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[1] Appointed, took office Feb. 6, 1952.

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[1] Became Presiding Judge Feb. 28, 1952.
[2] Died Feb. 15, 1952.
[3] Appointed, took office Feb. 28, 1952.

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Effective January 1, 1952.

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38 Cal.2d 34

PEOPLE v. NYE.

Cr. 5253.

Supreme Court of California, in Bank.

Nov. 13, 1951.

Rehearing Denied Dec. 10, 1951.

Frederick Leo Nye was convicted in the Superior Court of Los Angeles County, Edwin L. Jefferson, J., on two counts of assault with intent to commit rape, and he appealed from the judgment and from order denying motion for a new trial. The Supreme Court, Traynor, J., held that evidence sustained convictions.

Judgment and order affirmed.

Carter, J., dissented.

Prior opinion, 234 P.2d 172.

1. Rape ⚷16(1)

The crime of assault with intent to commit rape was committed, if defendant intended to have sexual intercourse with his victim and to use force to overcome her resistance.

2. Rape ⚷36

Where strange man entered bedroom of woman, covered her mouth with his hand, grasped her wrist while she screamed and kicked, released her when she bit his hand, and made no effort to take any property, it was reasonable to infer that he intended to commit rape, particularly when such intent was shown by his attempt to rape another woman under similar circumstances in the same month.

3. Criminal Law ⚷371(9)

In prosecution on two counts of assault with intent to commit rape on two different women, evidence of the attempt of defendant to rape one of the women was clearly admissible to show that defendant's acts against the other woman were committed with intent to commit rape.

4. Rape ⚷57(5)

In prosecution on two counts of assault with intent to commit rape on two different women, jury could reasonably reject contention of defendant that his admission that he intended to have sexual intercourse with one of the women went no further than to show that he intended peacefully to solicit sexual relations, where there was evidence that defendant used force and he had never seen that woman before.

5. Rape ⚷53(2)

Evidence sustained conviction for assault with intent to commit rape.

6. Criminal Law ⚷683(1)

In prosecution on two counts of assault with intent to commit rape on two women, wherein the prosecution introduced in its case in chief the testimony of police officer regarding defendant's admissions, and wherein two women testified regarding defendant's conduct, and wherein defendant testified in his own behalf and offered evidence of an alibi, claiming that he had never seen the two women before preliminary examination, prosecution was properly permitted to introduce on rebuttal testimony of another police officer regarding defendant's admissions, and a third woman was properly permitted to testify that defendant entered her bedroom on the dates of the two alleged assaults. Pen.Code, § 1093.

7. Criminal Law ⚷878(3)

An indictment or information may charge different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and a verdict of acquittal on one count is not an acquittal on any other count. Pen.Code, § 954.

8. Criminal Law ⚷200(7)

Where defendant was charged in count two of information with attempted rape and in count four with crime of assault with intent to commit rape on the same woman, dismissal of count two was not tantamount to an acquittal on count four, on ground that assault with intent to commit rape is simply an attempt to commit rape. Pen.Code, § 954.

9. Criminal Law ⚷824(14)

In prosecution for assault with intent to commit rape, even if a cautionary instruction to effect that since charges of sex offenses are easy to make and difficult to disprove, testimony of prosecuting witness should be examined with caution, is not requested by defendant, it is incumbent on the court to give such an instruction on its own motion, whether the alleged victim is a child or a mature person.

10. Rape ⚷54(1)

A conviction for assault with intent to commit rape is permitted on the uncorroborated testimony of prosecuting witness.

11. Criminal Law ⚷1173(2)

The circumstances of each prosecution for assault with intent to commit rape determine whether failure to give cautionary instruction to effect that since charges of sex offenses are easy to make and difficult to disprove, testimony of prosecuting witnesses should be examined with caution, was prejudicial.

12. Criminal Law ⚷1186(4)

Where in prosecutions on two counts of assault with intent to commit rape on two different women, admissions of defendant and testimony of third woman lent plausibility to testimony of the two women whom defendant was charged with assaulting, and to acquit defendant, jury would have had to reject the testimony of those two women in its entirety, or reject their identifications of defendant as the one who entered their bedrooms, or decide that defendant had not intended to have sexual intercourse with them by force, it was not reversible error for trial court to fail to give cautionary instruction to effect that since charges of sex offenses are easy to make and difficult to disprove, testimony of prosecuting witnesses should be examined with caution. Const. art. 6, § 4½.

Gladys Towles Root and Herbert Grossman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment entered on a jury verdict finding him guilty on two counts of assault with intent to commit rape and from the order denying his motion for a new trial. The sentences for the two offenses run concurrently.

The conviction on the first count is for an assault with intent to commit rape on Miss W. on May 7th, 1950, in Burbank. Defendant entered Miss W's house-trailer early in the morning. When she awakened and asked what he wanted, defendant tore off the bed covers and ripped her nightgown down to her knees. He grasped her throat and threatened to kill her if she screamed. He exposed his genital organs, got on the bed on top of Miss W. and attempted to accomplish sexual intercourse despite her resistance. In the course of the attack Miss W's alarm clock rang, and as defendant reached to turn it off he released his grasp of her throat. He then left, after threatening Miss W. with death if she reported the attack. Defendant does not contend that the evidence was insufficient to support his conviction on this count.

The conviction on the second count was for an assault with intent to commit rape on Mrs. P., on May 27th, 1950 in a motel in Burbank. Defendant entered Mrs. P's bedroom early in the morning. She awakened as he was closing the door. When she asked what he wanted, he came to her bed, placed his hand over her mouth and grasped her wrist. She screamed and kicked, and when she bit his hand he fled from the room. He did not expose himself or get on the bed with her and made no attempt to take any property.

Miss W. and Mrs. P. identified defendant as their assailant. Two police officers testified that defendant had admitted that he attacked the two women and that his purpose in entering the motel was to have sexual intercourse with Mrs. P. Miss F., a resident of the motel, testified that on May 27th, the day of the assault on Mrs. P., defendant opened the door to Miss F.'s room about seven-thirty in the morning, looked in, and closed the door. Miss F. also testified that on May 7th, the day of the assault on Miss W., defendant entered Miss F.'s room, stood by the bed, and left when he saw that she had awakened.

Defendant denied having seen either of the prosecuting witnesses before the trial and introduced evidence of an alibi. The jury rejected his defense and found him guilty on both counts.

Defendant contends that testimony regarding his admission that he intended to have sexual intercourse with Mrs. P. was improperly admitted, on the ground that the People did not first establish that the crime had been committed, and that, even with his admission, the evidence is insufficient to support the conviction on that count.

[1] The crime of assault with intent to commit rape was committed, if defendant intended to have sexual intercourse with his victim and to use force to overcome her resistance. People v. Lutes, 79 Cal.App.2d 233, 236, 179 P.2d 815; People v. Harshaw, 71 Cal.App.2d 146, 149, 161 P.2d 978. Defendant concedes that an assault on Mrs. P. was shown by the evidence, but contends that his conduct, standing alone, does not show the intent with which he made the assault.

[2, 3] When a strange man enters a woman's bedroom, covers her mouth with his hand, grasps her wrist while she screams and kicks, releases her when she bites his hand, and makes no effort to take any property, it is reasonable to infer that he intended to commit rape, particularly when such an intent is shown by his attempt to rape another woman under similar circumstances. The evidence of the attempt to rape Miss W. was clearly admissible to show that defendant's acts against Mrs. P. were committed with the intent to commit rape. "In such cases, former acts of the same kind are relevant to negative the intent as being of any other kind than to commit rape. Where the charge is of assault with intent, the propriety of such evidence cannot be doubted." 2 Wigmore, Evidence, 3rd ed. § 357; People v. Westek, 31 Cal.2d 469 480, 190 P.2d 9; People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161; see People v. Clapp, 67 Cal.App.2d 197, 153 P.2d 758; People v. Cosby, 137 Cal.App. 332, 31 P.2d 218; 1 Wharton, Evidence in Criminal Cases, § 252, 167 A.L.R. 565, 600.

[4, 5] Defendant contends that the admission that "he intended to have sexual intercourse" with Mrs. P. went no farther than to show that he intended peacefully to solicit sexual relations. In the light of the evidence of the force used and the fact that defendant had never seen Mrs. P. before, the jury could reasonably reject that interpretation of his admission. With the evidence of the admission properly before the jury, any doubts as to the sufficiency of the evidence to support the conviction for assault with intent to commit rape are resolved. See, People v. Meichtry, 37 Cal.2d 385, 231 P.2d 847; People v. Bradley, 71 Cal.App.2d 114, 162 P.2d 38; People v. Finkel, 70 Cal.App.2d 508, 161 P.2d 298; People v. Cosby, 137 Cal.App. 332, 31 P.2d 218.

The present case is clearly distinguishable from the principal case relied on by defendant, People v. Fleming, 94 Cal. 308, 29 P. 647. There, the prosecutrix was a servant girl employed by the defendant. He entered her bedroom late at night and, after promises, persuasions, and arguments, left her room. The court properly stated: "It can hardly be said that the defendant used force to any degree, and, from all the circumstances of the affair, it would appear that physical force was not an element in his mind in attempting to carry out his intentions. There was no duress upon the part of the prosecutrix, no fear of personal violence, for there were no threats of violence." 94 Cal. at page 312, 29 P. at page 648. Similarly, in People v. Mullen, 45 Cal.App.2d 297, 114 P.2d 11, the defendant ardently forced unwelcome attentions on the prosecutrix, but did not threaten violence and ceased his efforts and allowed the girl to walk away after she resisted him. In neither the Fleming nor the Mullen case did the prosecution offer evidence of other similar conduct that showed defendant's intent to commit rape.

Defendant next contends that the court improperly admitted rebuttal testimony over his objections. In the prosecution's case in chief, Officer Brennan testified regarding defendant's admissions. The two prosecuting witnesses testified regarding defendant's conduct in their bedrooms. Defendant then testified in his own behalf and offered evidence of an alibi, claiming that he had never seen the two women before the preliminary examination. He admitted that he had been arrested by Officers Brennan and Loranger, but denied making any admissions.

On rebuttal, Officer Loranger testified regarding defendant's admissions and Miss F. testified that the defendant had entered her bedroom on May 7th and May 27th, the dates of the two assaults.

[6] Defendant relies on People v. Rodriguez, 58 Cal.App.2d 415, 136 P.2d 626, where the People withheld the confession during the case in chief, and offered it for the first time in rebuttal without proof that it was voluntarily made. In the present case, the People did not withhold a material part of the case until rebuttal, but offered rebuttal testimony to support their case in chief after it had been controverted by the defendant. The evidence was properly admitted. Pen.Code § 1093; People v. Moore, 81 Cal.App.2d 799, 185 P.2d 32; People v. Gerbel, 71 Cal.App.2d 325, 162 P.2d 946; see People v. Avery, 35 Cal.2d 487, 491, 218 P.2d 527; 8 Cal.Jur. 236.

Defendant was charged in Count II of the information with the crime of attempted rape on Mrs. P. and in Count IV with the crime of assault with intent to commit rape on her. After evidence was introduced and defendant was in jeopardy, the court dismissed Count II on motion of the district attorney. Defendant was convicted on Count IV. He now contends that the dismissal of Count II was tantamount to an acquittal on Count IV, on the ground that an assault with intent to commit rape is simply an attempt to commit rape.

[7, 8] An indictment or information may charge "different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts" and a verdict of acquittal on one count is not an acquittal on any other count. (Penal Code, § 954.) Thus, whether or not Counts II and IV charged different statements of the same offense or two offenses of the same class of offenses, the dismissal of Count II was not tantamount to an acquittal on Count IV. People v. Codina, 30 Cal.2d 356, 360, 181 P.2d 881.

Defendant contends finally that the trial court erred in not giving a cautionary instruction to the effect that since charges of sex offenses are easy to make and difficult to disprove, the testimony of the prosecuting witnesses should be examined with caution.

[9, 10] Even if a cautionary instruction is not requested by the defendant, it is incumbent upon the court in cases such as this to give such an instruction on its own motion whether the alleged victim is a child or a mature person. People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367; People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485. Rape is "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though ever so innocent." Sir Matthew Hale, 1 Pleas of the Crown, 634. A conviction is permitted on the uncorroborated testimony of the prosecuting witness. Although protection of the public makes it necessary to allow convictions on such testimony, since the offense is usually committed in secret, the usual defense can only be a denial that the offense was committed by the defendant or in the case of forcible rape that the prosecuting witness voluntarily consented to the sexual act. Whether the prosecuting witness is a child or a mature person, the verdict will usually turn on whether the jury believes the defendant's or the victim's version of the occurrence, and there is the same danger of misinterpreting the defendant's acts as well as the danger of spite, blackmail, vindictiveness, private vengeance, neurotic fabrication or fanciful imagination.

[11] The circumstances of each case determine whether failure to give the instruction was prejudicial. In the cases in which judgments were reversed for failure to give the instruction, it was not improbable that the jury would have returned a different verdict had the cautionary instruction been given. In People v. Putnam, 20 Cal.2d 885, 129 P.2d 367, the evidence against the defendant consisted primarily of the testimony of a twelve year old boy. The boy's testimony was inconsistent, and the acts of defendant were circumscribed. In People v. Rankins, 66 Cal.App.2d 956, 153 P.2d 399, the defendant was convicted of statutory rape and incest on the uncorroborated testimony of his sixteen year old daughter. The girl's testimony was inconsistent, and other evidence indicated that motives of spite might have led to her accusation. In People v. Trumbo, 60 Cal.App.2d 681, 141 P.2d 225, a conviction for lewd conduct with a child was based on inconsistent testimony of two young girls. The parents of the girls corroborated their testimony, but the court held that under all the circumstances failure to give a cautionary instruction was reversible error. In People v. Williams, 55 Cal.App.2d 696, 131 P.2d 851, the prosecutrix was a mature woman, and the offense charged was forcible rape. Circumstantial evidence indicated that the prosecutrix had consented to the intercourse, and, again, refusal to give a cautionary instruction was held to be prejudicial.

Under the circumstances of several other cases, failure to give a cautionary instruction was not prejudicial. In People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485, this court held that the trial court should have given the instruction, but affirmed the judgment since the record clearly pointed to the defendant's guilt. The same result has been reached when there was evidence of corroborating facts and circumstances, and the unequivocal nature of the defendant's acts could leave no doubt as to his purpose. People v. Owsley, 76 Cal.App.2d 166, 172 P.2d 561; People v. Finkel, 70 Cal.App.2d 508, 161 P.2d 298; People v. Myers, 62 Cal.App.2d 24, 144 P.2d 60; People v. Fleming, 58 Cal.App.2d 37, 136 P.2d 88; People v. Mummert, 57 Cal.App.2d 849, 135 P.2d 665.

[12] In the present case, the evidence as to defendant's admissions and the testimony of Miss F. lend plausibility to the testimony of the two prosecuting witnesses. To acquit defendant, the jury would have had to reject the testimony of the women in its entirety, or reject their identifications of defendant as the man who entered their bedrooms, or decide that defendant had not intended to have sexual intercourse with them by force. A careful examination of the entire record in accord with Article VI, Section 4½ of the California Constitution leads us to the conclusion that it is improbable that the jury would have rejected the testimony of the prosecuting witnesses had a cautionary instruction been given and that there has therefore been no miscarriage of justice requiring reversal of the judgment.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I do not feel that the evidence in support of the second count (assault with intent to commit rape on Mrs. P.) was sufficient to uphold the judgment of conviction. The inference that he had entered the room with intent to commit larceny is as readily deducible from the evidence in support of this count, as is the inference that he intended peacefully to solicit sexual relations with her. If the evidence as to the assault on Miss W., twenty days prior to the act in question, had not been admitted in support of the second count, no one could doubt that the evidence would have been insufficient to uphold the judgment.

My views, with respect to the admission of evidence of crimes other than that which is charged against the defendant and for which he is being tried, have been expressed many times, see dissent People v. Dabb, 32 Cal.2d 491, 501, 197 P.2d 1; People v. Westek, 31 Cal.2d 469, 483, 190 P.2d 9; People v. Peete, 28 Cal.2d 306, 322, 169 P.2d 924; People v. Zatzke, 33 Cal.2d 480, 486, 202 P.2d 1009, and, so long as this court continues to sanction a procedure so manifestly unjust, will be expressed many more times.

Rehearing denied; CARTER, J., dissenting.

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38 Cal.2d 1

REITANO v. YANKWICH et al.

L. A. 21881.

Supreme Court of California, in Bank.

Nov. 2, 1951.

John J. Reitano sued Leon R. Yankwich and another for libel and slander. From judgments of the Superior Court, Los Angeles County, William B. McKesson, J., dismissing the action as to both defendants, plaintiff appealed. Named defendant moved to dismiss the appeal as to him. The Supreme Court, Carter, J., held that satisfaction of the judgment as to named defendant on plaintiff's payment of costs and attorney's fees did not foreclose plaintiff's right to appeal from such judgment.

Motion to dismiss appeal denied.

Prior opinion 229 P.2d 387.

1. Appeal and Error 🔑158(1)

Generally, voluntary satisfaction of judgment forecloses judgment debtor's right to review thereof on appeal.

2. Appeal and Error 🔑158(2)

A judgment debtor's compulsory payment of judgment, as under execution or other coercion, does not deprive him of right to appeal therefrom.

3. Appeal and Error 🔑158(1)

A judgment debtor's voluntary payment of judgment deprives him of right to appeal therefrom only when payment is by way of compromise or with agreement not to appeal.

4. Appeal and Error 🔑158(2), 781(7)

Payment of judgment must be regarded as compulsory, so as not to release errors nor deprive judgment debtor of his right to appeal from judgment, though execution has not issued, unless payment is by way of compromise and settlement, pursuant to agreement not to appeal, or under circumstances leaving only moot question for determination.

5. Appeal and Error 🔑158(1)

The statute providing that action is deemed pending until its final determination on appeal or expiration of time for appeal, unless judgment is sooner satisfied, does not foreclose judgment debtor's right to appeal from judgment after payment thereof, whether compulsory or voluntary. Code Civ.Proc. § 1049.

6. Appeal and Error 🔑159

Plaintiff's attorney's letter, enclosing amount of costs and attorney's fees, in reply to defendant's counsel's letter demanding payment thereof and stating that otherwise he would be forced to levy execution, did not foreclose plaintiff's right to appeal from judgment, in absence of any indication that such payment was by way of compromise or pursuant to agreement not to appeal.

Aaron Sapiro and Edwin M. Rosendahl, Los Angeles, for appellant.

David Mellinkoff, Beverly Hills, for respondents.

CARTER, Justice.

Plaintiff and appellant commenced an action for libel and slander against two defendants. A judgment of dismissal, that plaintiff take nothing and pay costs and counsel fees was rendered as to defendant Yankwich following the sustaining of demurrers. Thereafter, a similar judgment was rendered as to defendant Cheleden. After entry of the first judgment, Yankwich's counsel wrote to plaintiff's counsel demanding payment of the costs and attorney's fees or otherwise he would be "forced" to levy execution. Plaintiff's attorney replied by letter enclosing the amount of the costs and attorney's fees, and stating that he understood it would cover the costs. Yankwich's counsel received the payment and filed a satisfaction of judgment.

Plaintiff appeals from both judgments. Yankwich moves to dismiss the appeal as to him on the ground that a satisfied judgment will not be reviewed on appeal.

[1] It has been generally stated that the voluntary satisfaction of a judgment forecloses the right to have it reviewed on appeal. The problem has been discussed as involving a moot question, the lack of the existence of a controversy, inconsistency of position and that a satisfaction of judgment puts an end to the case. In many of the cases where the statement has been made the rule being applied is: "That the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. * * * [It] has no application where the benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put in jeopardy by the appeal." Schubert v. Reich, 36 Cal.2d 298, 299, 223 P.2d 242, 243. See Stein v. Simpson, 37 Cal.2d 79, 230 P.2d 816; In re Baby, 87 Cal. 200, 25 P. 405; People ex rel. Dunn v. Burns, 78 Cal. 645, 21 P. 540; In re Estate of Shaver, 131 Cal. 219, 63 P. 340; Patterson v. Keeney, 165 Cal. 465, 132 P. 1043; Warner Bros. Co. v. Freud, 131 Cal. 639, 63 P. 1017; Preluzsky v. Pacific Co-operative Cafeteria Co., 195 Cal. 290, 232 P. 970; Mt. Shasta Power Corp. v. Dennis, 66 Cal.App. 186, 225 P. 877; Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 P. 464; Graham v. Alchian, 51 Cal.App. 263, 197 P. 134; Morton v. Superior Court, 65 Cal. 496, 4 P. 489.

A distinction has been made, however, between an appellant receiving the fruits of a judgment and one paying a judgment. Hartke v. Abbott, 106 Cal.App. 388, 289 P. 206; Patterson v. Keeney, supra, 165 Cal. 465, 132 P. 1043; Union Lithograph Co. v. Bacon, supra, 179 Cal. 53, 175 P. 464; Warner Bros. Co. v. Freud, supra, 131 Cal. 639, 63 P. 1017.

[2] Thus when there has been a payment of the judgment by the appellant, he does not lose his right to appeal if it is compulsory, such as under execution or other coercion. Hallett v. Slaughter, 22 Cal.2d 552, 140 P.2d 3; Alamitos Land Co. v. Shell Oil Co., 217 Cal. 213, 17 P.2d 998; Buckeye Refining Co. v. Kelly, 163 Cal. 8, 124 P. 536; Kenney v. Parks, 120 Cal. 22, 52 P. 40; Knight v. Marks, 183 Cal. 354, 191 P. 531; Sunset Lumber Co. v. Bachelder, 167 Cal. 512, 140 P. 35; Patterson v. Keeney, supra, 165 Cal. 465, 132 P. 1043; Vermont Marble Co. v. Black, 123 Cal. 21, 55 P. 599; Yndart v. Den, 125 Cal. 85, 57 P. 761; Warner Bros. Co. v. Freud, supra, 131 Cal. 639, 63 P. 1017; Preluzsky v. Pacific Co-operative Cafeteria Co., supra, 195 Cal. 290, 232 P. 970; Hartke v. Abbott, supra, 106 Cal.App. 388, 289 P. 206; Burgess v. California Mut. Building & Loan Ass'n, 210 Cal. 180, 290 P. 1029; Levin v. Saroff, 54 Cal.App. 285, 201 P. 961; Everts v. Matteson, 46 Cal.App.2d 14, 115 P.2d 207.

[3, 4] Where the payment is voluntary this court has recently stated the rule: "It is established in this state that the general rule that the voluntary satisfaction of a judgment deprives a party of the right of appeal is subject to certain other well-settled principles of law. * * * In the case of voluntary satisfaction of a judgment, deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal." In re Estate of Merrill, 29 Cal. 2d 520, 524, 175 P.2d 819, 822. That rule has support in other cases. Metcalf v. Drew, 75 Cal.App.2d 711, 171 P.2d 488; Hartke v. Abbott, supra, 106 Cal.App. 388, 289 P. 206; Warner Bros. Co. v. Freud, supra, 131 Cal. 639, 63 P. 1017; Patterson v. Keeney, supra, 165 Cal. 465, 132 P. 1043. Moreover, it has been said: "* * * it is difficult to conceive how his [appellant's] payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. * * * The better view, we think, is, that though execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal, unless payment be by way of compromise and settlement or under an agreement not to appeal or under circumstances leaving only a moot question for determination." Freeman on Judgments, §

1165, p. 2410. That statement was quoted with approval in Warner Bros. Co. v. Freud, supra, 131 Cal. 639, 63 P. 1017. See also, 2 Am.Jur., Appeal & Error, § 221; 29 L.R.A.,N.S., 22; 4 C.J.S., Appeal and Error, § 214b.

There have been contrary statements. Hurt v. Bauer, 37 Cal.App. 109, 173 P. 601; Morneault v. National Surety Co., 37 Cal.App. 285, 174 P. 81; Churchill v. More, 7 Cal.App. 767, 96 P. 108, dictum; People's Home Savings Bank v. Sadler, 1 Cal.App. 189, 81 P. 1029, dictum; Everts v. Matteson, supra, 46 Cal.App.2d 14, 115 P.2d 207, dictum. The contrary statements in the last cited cases are out of harmony with the authorities cited above and must be considered as disapproved.

[5] In the foregoing authorities, section 1049 of the Code of Civil Procedure was invoked,[1] but it was held not to foreclose the right of appeal where the payment of the judgment by appellant was compulsory, Kenney v. Parks, supra, 120 Cal. 22, 52 P. 40; Preluzsky v. Pacific Co-operative Cafeteria Co., supra, 195 Cal. 290, 232 P. 970; Metcalf v. Drew, supra, 75 Cal.App.2d 711, 171 P.2d 488; Vermont Marble Co. v. Black, supra, 123 Cal. 21, 55 P. 599; Yndart v. Den, supra, 125 Cal. 85, 57 P. 761, and the same has been held where the payment was voluntary. Warner Bros. Co. v. Freud, supra, 131 Cal. 639, 63 P. 1017; Hartke v. Abbott, supra, 106 Cal.App. 388, 289 P. 206. It may be said that there has been no satisfaction under section 1049 in the sense that it was intended that the litigation was to be at an end—the right of appeal waived. Brochier v. Brochier, 17 Cal.2d 822, 112 P.2d 602, in saying that a satisfaction is the end of a proceeding adds nothing for it was not concerned with the right to appeal.

[6] In the instant case there is no indication that the payment of the judgment for costs was by way of compromise or pursuant to an agreement not to prosecute an appeal. The main portion of the judgment—the merits of the case—that plaintiff take nothing, is the part under attack on appeal.

The motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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107 Cal.App.2d 292

CHICK et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (two cases).

Civ. 8070.

District Court of Appeal, Third District, California.

Nov. 6, 1951.

As Amended Nov. 29, 1951.

Proceeding in certiorari by Nelson H. Chick and another, a co-partnership, doing business as Underground Construction Company, against the Industrial Accident Commission to review awards made by the Commission to Ira M. Rowell and Otto Schuck, granting additional compensation because Commission found that the employees were injured by reason of the serious and wilful misconduct of their employer. The District Court of Appeal, Van Dyke, J., held that the evidence supported finding of Commission that the employees were injured by reason of the serious and wilful misconduct of the employer.

Awards affirmed.

1. Workmen's Compensation 🔑1723

In proceeding to recover workmen's compensation, question of whether injury to employee was caused by the serious and wilful misconduct of employer is essentially one of fact.

2. Workmen's Compensation 🔑1723, 1939

Since question of whether injury to employee was caused by the serious and wilful misconduct of employer is essentially a question of fact, determination of Industrial Accident Commission will not be disturbed on review if it has any evidentiary support.

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[1] Code Civ.Proc., § 1049 provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

3. Workmen's Compensation ⚷941

Failure of an employer to comply with provisions of Labor Code relating to employees' safety, if knowingly and wilfully done, constitutes serious and wilful misconduct entitling employee injured because of such conduct to additional workmen's compensation. Labor Code, §§ 6400–6403.

4. Workmen's Compensation ⚷939

Under workmen's compensation act, "serious and wilful misconduct" is conduct which the employer knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees and employee injured because of conduct is entitled to additional compensation.

See publication Words and Phrases, for other judicial constructions and definitions of "Serious and Wilful Misconduct".

5. Workmen's Compensation ⚷1674

In proceeding in certiorari by employer against the Industrial Accident Commission to review awards of additional compensation to employees because Commission found that the employees were injured by reason of the serious and wilful misconduct of employer in failing to furnish a safe place of employment and in permitting employees to work in an unsafe place, evidence supported finding of Commission.

6. Workmen's Compensation ⚷1939

District Court of Appeal in reviewing award made to employee by Industrial Accident Commission will disregard the conflict in the evidence.

◆

Leonard, Hanna & Brophy, San Francisco, for petitioners.

P. H. McCarthy, Jr., H. S. Johnson, F. Nason O'Hara, and Alfred C. Skaife, San Francisco, for respondents Rowell and Schuck.

Edmond J. Thomas, Jr., T. Groezinger, Robert Ball, Deputy Attys. Gen., for respondent Commission.

VAN DYKE, Justice.

This is a proceeding in certiorari to review awards of the Industrial Accident Commission whereby there was granted to Ira M. Rowell and Otto Schuck additional compensation because they were found by the Commission to have been injured by reason of the serious and wilful misconduct of their employer. The employer was engaged in constructing a steel arch bridge with concrete deck over the Smith River in Del Norte County. The steel work had been completed and the employer was engaged in laying the deck. This was being done progressively a section at a time. The sections were called bays and when a bay was completed the forms used in constructing it were stripped off and the material used in constructing the next bay. In order to conduct this stripping operation the employer made use of a suspended platform underhanging the bridge at a distance of about four feet. Below the platform at the time these workmen were injured was a drop of about 60 feet to the bed of the river. At the time of the injury the platform failed and the men had been catapulted into the river, receiving injuries. There was at no time any dispute concerning their right to compensation, but the men applied to the Commission for an award of added compensation. Hearings were conducted at which a great deal of evidence was taken and the Commission's referee recommended that the application for added compensation be denied, as he found that the men had failed to prove the basis of their claims therefor. He absolved the employer from the charge made. His findings and recommendation for denial of further award went before a panel of the Commission which followed his recommendations and entered findings denying the added compensation applied for. The panel granted a petition for rehearing. Upon reconsideration findings were adopted upholding the contentions of the men that they were injured by reason of the serious and wilful misconduct of the employer in that the employer through its general superintendent knowingly and wilfully failed to furnish a safe place of employment, did knowingly and wilfully fail to use means and methods reasonably required to render the place of employment safe and did knowingly and wilfully permit the men to go and be in an unsafe place of employment. More specifically, the Commission found that at the time of injury the employer, through its general superintendent knew or should have known had it turned its mind to the fact that the combined weight of stripped materials and men engaged in stripping operations, plus the weight of the platform, exceeded the load, weight, and stress bearing capacity of the platform, thus making the prosecution of the work dangerous to life, limb and safety; that the employer knew or should have known had it turned its mind to the fact that the load, weight and stress bearing capacity of the platform was insufficient to sustain this combined weight; that the employer also knowingly and wilfully failed to exercise the degree of prudence and caution which it would have exercised had it turned its mind to the fact in that it required and directed its employees to work in stripping materials upon the platform furnished without first giving all necessary orders and instructions upon the process to be followed, the number of employees to be engaged therein and the load weight or stress capacity of the platform. Generally, the Commission found that at the time of the injury and immediately prior thereto the employer, through its general superintendent, wilfully failed to comply with the requirements of Sections 6400 to 6403 inclusive of the Labor Code and each of them. These sections provide that employers shall furnish a safe place of employment, shall use safety devices and safeguards and adopt practices and processes reasonably adequate to render employment and the place of employment safe and shall generally do anything reasonably necessary to protect the life and safety of employees, it being expressly forbidden to an employer to require or permit an employee to go or be in any employment or place of employment which is not safe.

In laying the concrete deck of the bridge the length of the proposed deck was divided into 12 to 14 bays and in turn each bay was divided into 5 or 6 panels across the width of the bridge. One bay was poured at a time, using wooden forms in place to contain the concrete until it set. Forms remained in place about seven days and were then stripped off to be re-used. This stripping operation was performed by the men being on the suspended platform, which consisted of three 4 x 4 timbers about 18 feet long, known as needle beams, spaced about 15 feet apart, with planking laid on to form the working platform. Each beam was suspended at three points—at the ends and in the center—the outside beams by means of three ropes. The center beam was suspended at one end and in the middle by ropes, but the other end rested upon a structural part of the bridge itself. The material for the platform was selected by the superintendent of construction and the general foreman. The superintendent designed the platform, adopting the needle beam type of platform after consultation with and the approval of the representative of the safety department of the Division of Industrial Relations of this State. There is some conflict as to the load capacity of the platform, it being given in one instance as 4,000 pounds and in another as approximately 5,000 pounds. When the injuries occurred five men were working on the platform. When nearly all of the panels of the bay had been taken down and laid on the platform the center beam failed at a point about 18 inches inside the point where it bore on the steel of the bridge. It was testified that at that time there was a total load on the platform of almost 5,000 pounds. There was testimony that, in stripping, timbers of considerable weight were sometimes dropped from the underside of the bridge onto the platform, a drop of four feet, and that the shock weight of such falling material would be about eight times the actual weight thereof.

[1–4] The scope of a review of an award of the Commission has been frequently stated and is not disputed here. It is not necessary to restate it. Adequate statements thereof will be found in such cases as Bethlehem Steel Co. v. Ind. Acc. Comm., 23 Cal.2d 659, 145 P.2d 583, and Parkhurst v. Ind. Acc. Comm., 20 Cal.2d 826, 129 P.2d 113. And these cases also hold that the question of whether an injury has occurred by the serious and wilful misconduct of an employer is essentially one of fact, so that the Commission's determination will not be disturbed on review if it has any evidentiary support; that the failure of an employer to comply with the quoted sections of the Labor Code, if knowingly and wilfully done, constitutes serious and wilful misconduct which has long been defined as "conduct which the employer * * * knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employes." E. Clemens Horst Co. v. Ind. Acc. Comm., 184 Cal. 180, 193 P. 105, 108, 16 A.L.R. 611.

[5, 6] That the question here presented is a close one is well evidenced by the contradictory decisions made while the proceedings were before the Commission, its panel and its referee, and certainly a finding by the Commission that the injuries were not suffered by reason of serious and wilful misconduct of the employer would have been amply supported. But when we have said this we think we have said all that can be said in favor of petitioner here, which is to say that the record presents an issue of fact and not of law and that the findings ultimately made by the Commission are substantially supported. Disregarding conflict, as we must, it appears from the evidence that on the morning of the accident the superintendent and the general foreman and six workmen, including the applicants before the Commission, gathered at the site of the work and that the foreman then, in the presence of the superintendent, ordered the men to go to work stripping forms. Previously some, if not all, of this same crew, had engaged in stripping forms and had followed a process or routine whereby from two to four men would go upon the platform and engage in stripping work, while one or two would be upon the deck and would there be engaged in receiving stripped material handed up from the platform by the men below. The result of this would be that there would not at any time be an accumulated load upon the platform which would closely approach its loading capacity. Nevertheless, it also appeared that although the superintendent and the general foreman who had selected the material for, and designed, the platform, and superintended its assembly were fairly chargeable with knowledge of the loading capacity, yet none of the workmen were ever told that this capacity was only four or five thousand pounds and that, therefore, stripping operations should be conducted within the safe limits of that capacity. It can be fairly inferred from the record that the failure of the platform was solely caused by overloading. The platform was estimated to have weighed about 1,650 pounds, each panel to be stripped weighed about 520 pounds, and the five men who were on the platform when it failed weighed about 850 pounds, a total of about 5,000 pounds. Having constructed the platform and knowing the load capacity, whether that be taken as 4,000 or 5,000 pounds, both the superintendent and the general foreman knew or should have known, had they turned their minds to the matter, that if the men did what they in fact did do—strip down the five panels before sending any of the material aloft—the accumulated load would either exceed or dangerously approach the load capacity of the platform. The record supports the inference that when the men went to work the superintendent and general foreman, had they looked, could have seen that only one man was on the deck, leaving five working on the platform and that the material was not going up, hence was accumulating. This situation obtained for about forty-five minutes before the platform failed, during which time at normal stripping speed all of the panels would have been lowered to the platform. In view of these factors and of the failure to give specific warning against doing what the workmen did, we think the Commission is supported in its findings hereinbefore set forth; that, all things considered, the men were sent to a place that was not safe and that this was knowingly and wilfully done within the meaning of those words as they have been defined by the courts in the cases referred to.

Petitioners argue that these were skilled workmen and must be considered as having known the proper and safe way of doing the work and the danger of overloading the platform but we think that this would require of them a technical knowledge of the breaking points of the various members of the platform which they did not have, but of which the superintendent at least was well informed.

The awards are affirmed.

ADAMS, P. J., and PEEK, J., concur.

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107 Cal.App.2d 382

PEOPLE v. CUNHA.

Cr. 2292.

District Court of Appeal,
Third District. California.
Nov. 7, 1951.

Kenneth Lewis Cunha, was convicted in the Superior Court, Sutter County, Arthur Coats, J., of robbery in the first degree and he appealed from the conviction and from order denying defendant's motion for a new trial. The District Court of Appeal, Peek, J., held, inter alia, that comments of trial judge at conclusion of case were free from contentiousness, partisanship or advocacy.

Judgment affirmed.

1. Criminal Law 🔑655(1)

In prosecution for robbery in the first degree, comments of trial judge at conclusion of case were free from contentiousness, partisanship or advocacy.

2. Criminal Law 🔑1169(1)

In prosecution for robbery in the first degree, admission of testimony of a witness who had identified defendant as the thief on first trial of defendant, but who expressed doubt as to identity of defendant at involved second trial of defendant, that following first trial defendant's mother had said to such witness "I hope you people are satisfied", which testimony was offered to show that witness had been intimidated and to explain his nervousness and hesitancy in identifying defendant at second trial, was not so prejudicial to defendant as to warrant reversal of conviction.

3. Criminal Law 🔑444

Question of sufficiency of preliminary proof offered to identify a photograph or to show that it is a fair and accurate representation of the objects which it purports to portray is a matter within sound discretion of trial court in criminal prosecution.

4. Criminal Law 🔑444

In prosecution for robbery in the first degree, wherein a clothing merchant in another city had identified defendant and alleged accomplice and another as having been in his store late in month in which robbery occurred and stated that two of the three bought clothing from him, and defendant denied having been in such city with defendant's alleged accomplice, trial court under evidence did not abuse discretion in refusing to admit in evidence a photograph of alleged accomplice taken before robbery which allegedly demonstrated he was wearing a suit similar to suit prosecution claimed he was wearing while in company of defendant at witness' clothing store.

5. Criminal Law 🔑1166½(12)

In prosecution for robbery in first degree, comment of trial judge that he would allow question defendant asked alleged accomplice of defendant in cross-examination concerning testimony given at prior trial of defendant, which comment was concluded by statement that it was practically covered and was not impeachment, was not so prejudicial as to warrant reversal of conviction in view of circumstantial evidence against defendant.

6. Criminal Law 🔑1168(2)

In robbery prosecution, permitting police officer to be recalled as a witness and to testify in rebuttal concerning his conversation with defendant immediately following defendant's apprehension, in which officer stated he disclosed to defendant the evidence against defendant and that officer advised defendant to admit the offense, and that defendant in his reply questioned such procedure because defendant was then under probation, was not error requiring reversal of conviction where defendant was recalled and permitted to explain his reference to his probation.

7. Criminal Law ⚿680(1), 684

In robbery prosecution, order of proof rests in sound discretion of trial court, but abuse of that discretion may result from allowing a district attorney, by way of rebuttal, to bring in evidence that should have been introduced in prosecution's case in chief. Pen.Code, §§ 1093, subd. 4, 1094.

8. Criminal Law ⚿1171(1)

In prosecution for first degree robbery, comment of district attorney that deputy sheriff of one county had no authority when retained as a private investigator in another county to investigate on behalf of defendant concerning an offense charged in latter county, was not such flagrant or prejudicial misconduct that neither a retraction nor an abandonment could destroy its influence.

9. Criminal Law ⚿706

In prosecution for robbery in the first degree, trial court did not err in allowing district attorney in his examination of witnesses concerning identification of defendant to ask if such witness could "positively" or "absolutely" identify defendant.

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Ray Manwell, Marysville, Clewe, Martin & Blade, Oroville, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy, Wallace Colthurst, Deputy, for respondent.

PEEK, Justice.

This is an appeal from a judgment of conviction of robbery in the first degree and from the order of the trial court denying defendant's motion for a new trial.

In view of the substantial evidence in support of the verdict of the jury the defendant, quite properly, does not question the sufficiency thereof. His attack upon the judgment, which is entirely without merit, is directed solely at certain alleged errors of the court in the conduct of the trial. Although, as stated, no question is raised as to the sufficiency of the evidence, it would appear that for a proper understanding of the case a brief summary of the pertinent facts is necessary.

Such facts, viewed in the light most favorable to the prosecution show that about the hour of 12:30 o'clock a. m. on October 28, 1950, defendant and one Janes entered a tavern in Yuba City. Defendant, armed with a gun, ordered those in the bar to put up their hands and the bartender to give him the money from the cash register. He then backed out of the door with his accomplice Janes, who had been keeping watch. All of the seven persons in the bar at that time (with exception of the witness Drew), the accomplice Janes, and one Vasco, who was waiting for them in the car, identified defendant and testified that he took the money. Drew was a next door neighbor to defendant who recognized him at the time of the holdup and so stated to the other persons in the bar, but when called as a witness at the second trial expressed doubt as to the identity of Cunha. Following the robbery Cunha, Janes and Vasco drove to San Francisco and returned to Oroville on Sunday. A Mr. Schachter, a San Francisco clothing merchant, identified Cunha, Vasco and Janes as having been in his store at an early hour on a Saturday morning in the latter part of October, 1950, at which time he sold clothing to two of them. The witness was positive in his identification, first, because he specifically recalled that the three men were in a hurry, and secondly, because during the course of the transaction he lost $5, a circumstance which apparently ordinarily did not occur in the usual course of his business. Although the defendant denied having been in the clothing store he admitted that he received a traffic ticket for the overtime parking of his automobile on Saturday morning, October 28, at a point approximately a block and a half from the clothing store.

The defendant's position and testimony was that he had no part in the robbery; that he did not know Janes, and that he was not with him or Vasco on the evening in question. He further testified that no one was with him when he left for San Francisco on the evening of the robbery, and that he did not return to Oroville until the following Sunday. In corroboration he produced witnesses who testified that Vasco and Janes were not with him as late as 10:00 o'clock on Friday evening, and that his car was seen near Marysville around 11:00 o'clock p. m. on Friday. A mechanic on duty at a Sacramento gas station testified that on the evening of October 28 the defendant came into his service station and tried to sell him the car he was driving. A waitress from a restaurant located on Highway 40 between Fairfield and Vallejo testified to talking to defendant on a Friday night but she could not recall the date.

It is defendant's first contention that the trial judge erred when, at the conclusion of the case, he commented on the evidence, for the reason that such comment did not include a fair statement of the facts or testimony.

[1] It is true, as defendant contends, a judge may so state a case that the jury could not help but be convinced that the court was of the opinion that the defendant should be convicted. Yet without something more specific than a declaration to that effect, see People v. Hooper, 92 Cal. App.2d 524, 207 P.2d 117, this court could not blindly agree with counsel and conclude that such were the circumstances in the present case. It does not appear necessary to quote in its entirety the rather lengthy document. Suffice it to say that we have read the entire charge and find no place therein where the court inferred, either directly or indirectly, how the testimony should be resolved. On the contrary the jury was specifically told that in the final analysis what evidence was to be believed and what was to be discarded was solely the obligation of the jury under the facts. Furthermore, it was told by the trial judge, *"I do not favor either the people or the defendant. If any remark of mine or act or conduct on my part has suggested to you that I favor either party, you will dismiss such suggestion entirely and disregard it entirely in arriving at your verdict."* Taken all together the attacked comments of the court appear to have been free from contentiousness, partisanship or advocacy. People v. Hooper, supra, 92 Cal.App.2d at page 530, 207 P.2d 117.

[2] Defendant next contends that the court erred in admitting evidence of a conversation occurring during his first trial. It appears from the record that the witness Drew, who was in the bar at the time of the alleged holdup, was a neighbor of the defendant and identified him at that time. He also identified him at the first trial. However, at the second trial, when he was again called by the prosecution, he expressed doubt as to the identity of the defendant and explained his changed testimony by stating that since the first trial a doubt had arisen in his mind. On further examination it was brought out that during the first trial the defendant's mother had threatened him and Turner. When Turner was called as a witness the objections by counsel for defendant to question asked of him concerning such conversation were without exception sustained by the court, but the objections were overruled as to any remark addressed to the witness Drew. The prosecution then asked, without objection by defendant, as to the specific words used by Mrs. Cunha, and the witness replied, "I don't know, she says, 'I hope you people are satisfied'." Defendant's argument in support of his contention is that such testimony was hearsay and should not have been admitted. It does not appear from the record that such testimony was offered to prove the truth of Mrs. Cunha's threatening statements but to show in fact that the witness Drew had been intimidated and to explain his obvious nervousness and hesitancy in identifying the defendant at the second trial. The lone statement so attacked by defendant, even if improper, does not appear to have been so prejudicial to him as to warrant a reversal.

The defendant next charges that the court erred in refusing to place in evidence a photograph alleged to be of the accomplice Vasco taken some time prior to the robbery. Defendant contends the picture demonstrated that Vasco was wearing a suit similar to the one the prosecution claimed was bought by him while in the company of the defendant at the witness Schachter's clothing store in San Francisco on the day following the robbery. When the photograph was shown to Vasco he was asked if it was his picture and he replied that it looked like him but he could not remember having it taken. He also testified that although the suit of clothes shown was similar to the suit he bought in San Francisco it was not the same suit. Janes testified substantially in the same fashion and added that the lapels of the coat were different. Mrs. Durant, a witness for the prosecution, in her testimony on cross-examination, stated that the picture looked like Vasco, whereupon defendant offered the photograph in evidence but the court sustained the prosecution's objection thereto.

[3, 4] It is the well established rule that the question of the sufficiency of the preliminary proofs offered to identify a photograph or to show that it is a fair and accurate representation of the objects which it purports to portray, is a matter within the sound discretion of the trial court. People v. Doggett, 83 Cal.App.2d 405, 409, 188 P.2d 792. Not only did the evidence in the present case fail to sufficiently show that the photograph correctly reproduced the suit being worn by Vasco but furthermore no evidence was introduced as to where, when or by whom the photograph was taken nor was any offer of such proof made following the court's sustaining of the prosecution's objection to the introduction thereof. Under such circumstances this court cannot say that the trial court abused its discretion in refusing to admit the photograph in question in evidence.

[5] Defendant's next contention that the court improperly limited the cross-examination of the accomplice Vasco, is also without merit. The record shows that defendant's original cross-examination of Vasco consumed approximately 37 pages of transcript; that subsequently he was recalled at the request of defendant for "one more question" and that such examination consumed 6 more pages of transcript. When the witness was first cross-examined he was fully questioned as to the alleged robbery, the details of the trip to Sacramento and San Francisco following the robbery, and his re-traveling of the same route in the custody of the police officers following his apprehension. During such cross-examination defendant sought to impeach the testimony the witness had given at the second trial by that given at the first. When Vasco was subsequently recalled as a witness at the request of defendant he was again asked concerning testimony given at the first trial. The prosecution objected upon the ground that it was not proper cross-examination in that it had already been asked and answered. The reply of the court, which is the basis of defendant's contention, was, "I will allow the question; it was practically covered; it is not impeachment anyway." No objection was made by defendant's counsel to this statement by the court and he continued with his questioning of the witness, at the conclusion of which he stated that he had no further questions to ask. Examination of the record shows that the question which brought forth the now attacked comments of the trial judge was the identical question asked in his original cross-examination. Furthermore there appears to be no contradiction between the answers given by the witness the first time the question was asked and the answers given when he was recalled. Under such circumstances this court cannot say that the defense was unduly restricted in its cross-examination particularly since the State's objection was overruled and the cross-examination allowed to continue. And secondly, since the answers given by the witness were practically identical the comment of the court that the same was not impeachment was correct. Even if it be assumed that the court's comment was incorrect, yet, in view of the circumstantial evidence against the defendant, one isolated

comment such as defendant herein attacks, could not be said to be so prejudicial as to warrant a reversal of the judgment.

[6] Appellant further contends that the trial court erred in allowing a police officer to be recalled as a witness and to testify in rebuttal concerning his conversation with the defendant immediately following his apprehension. His argument in support thereof was that such testimony related to vital matters which should have been covered by the prosecution's case in chief and that it was not a proper evidence in rebuttal. However, his only objection thereto was that the proper foundation for the conversation had not been laid. The officer, when recalled, testified that he disclosed to defendant the evidence against him, including the identification witness, and that he advised him to admit the offense; that defendant in his reply questioned such procedure because he was then under probation in Yuba county.

[7] On cross-examination the witness stated the reason he had neither mentioned the particular conversation with defendant or his reply thereto was that when the witness was first called he had been asked no question in that regard. The witness further stated that at no time during such conversation did the defendant confess to the commission of the crime. While the order of proof rests in the sound discretion of the trial court, Penal Code, §§ 1093 subd. 4, 1094, nevertheless as the court observed in People v. Avery, 35 Cal.2d 487, 491, 218 P.2d 527, 530, abuse of that discretion may well result from allowing a district attorney, by way of rebuttal, to bring in evidence that should have been introduced in the prosecution's case in chief. However, in the present case, Cunha was recalled and permitted, in answer to Meyers' testimony, to explain his reference to his probation in Yuba county. Hence we are confronted with a situation not wholly dissimilar to that presented in the Avery case, where the court, in answer to a question identical to that now raised by defendant herein, held that "Under these circumstances it cannot be said that the ruling put [defendant] to such disadvantage as to require a reversal."

[8] Defendant's next contention relates to comment by the district attorney that a deputy sheriff of one county had no authority when retained as a private investigator in another county to investigate on behalf of the defendant concerning an offense charged in the latter county. The record shows that when appellant objected to such statements by the district attorney the trial judge remarked that he believed the district attorney had a right to so argue and that also he believed it to be the law that the deputy sheriff under such circumstances was exceeding his duty. The court then stated: "* * * I will instruct * * * the Jury to disregard the statements in that regard", and following a statement by the district attorney that he said all he was going to say, the court concluded, "Very well. The Jury will disregard it." It is evident that the statement concerned a collateral point and did not bear upon appellant's guilt or innocence; that the trial judge stated he was not sure about the validity of counsel's statements and that he would, and in fact did, instruct the jury to disregard the statements. Again, it cannot be said that the alleged misconduct was either so flagrant or otherwise prejudicial that neither a retraction nor an abandonment could destroy its influence.

[9] Lastly it is defendant's contention that the trial court erred in allowing the district attorney in his examination of witnesses concerning the identification of appellant to ask if such witnesses could "positively" or "absolutely" identify the defendant. In support of such contention defendant quotes from and relies upon the statement appearing in Jones' Commentaries on Evidence, Vol. 2, page 873, where it is stated in part that "it is not necessary for [a witness] to speak positively as to the identification. His testimony according to his belief is all that can be called for * * *." The only reasonable interpretation which can be given to the quoted statement is that a witness cannot testify to any greater degree of positiveness than

as is his own best knowledge or belief. Obviously within such a rule there may be positive identification as well as identification of a lesser degree within which there may well be a degree of uncertainty. In other words, if he is not liable to positively identify the subject then "The uncertainty of his recollection or his lack of positiveness about the identity of the persons involved [goes] to the weight and not to the competency" of the evidence. People v. Avery, supra, 35 Cal.2d at page 492, 218 P.2d 530.

The judgment and order are affirmed.

VAN DYKE, J., and SCHOTTKY, Justice pro tem., concur.

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107 Cal.App.2d 461

In re ROSENAUR'S ESTATE.

Civ. 18557.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1951.

Rehearing Denied Nov. 20, 1951.

Hearing Denied Jan. 8, 1952.

In the matter of the estate of Leonard Rosenaur, deceased. From an order of the Superior Court of Los Angeles County, J. F. Moroney, J., denying a petition by the guardian of a minor son of decedent to set aside a probate homestead to such son, petitioner appealed. The District Court of Appeal, Wilson, J., held that decedent being survived by his wife, petitioner's ward, who was decedent's son by a former marriage, was not entitled to have a homestead set apart for his use.

Order affirmed.

1. Executors and Administrators 🔑173

The probate code provision that court must set apart homestead for use of decedent's surviving spouse and minor children or of his minor child or children, if there be no surviving spouse, imposes mandatory duty on court to set apart homestead when either of such conditions exists, but when neither condition is present, court has no authority to award homestead, as right thereto is purely statutory. Probate Code, § 661.

2. Executors and Administrators 🔑180

A homestead cannot be set apart for decedent's minor child alone when a spouse survives, so that minor son of decedent by former marriage to another than his surviving wife is not entitled to have homestead set apart for son's use, though decedent owed duty to support son. Probate Code, § 661.

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Morris E. Cohn, Melville B. Nimmer, Beverly Hills, Nathan Packler, Los Angeles, for appellant.

Jerome L. Ehrlich, James Wolf, Los Angeles, for respondent.

WILSON, Justice.

The question here is whether the court erred in refusing to award to a minor child a probate homestead from his father's estate in these circumstances: The child is the natural son of decedent and a former wife, having resided with and been in the custody of his mother at all times since her divorce from his father; decedent had remarried and left surviving him a widow and two minor children of the second marriage with whom he resided at the time of his decease; decedent left at least one parcel of tenantable real property consisting of a building containing six apartment units and commercial store rooms.

This appeal is from the order denying the petition of the minor's guardian for the setting aside of a probate homestead to him during his minority.

[1, 2] The authority of the court to set apart a homestead from property of a decedent is found in section 661 of the Probate Code, the applicable part of which reads: "If none has been selected, designated and recorded * * * the court, in the manner hereinafter provided, must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children,

or, if there be no surviving spouse, then for the use of the minor child or children * * *."

Pursuant to the code provision there are only two instances in which a homestead may be set apart, (1) "for the use of the surviving spouse and the minor children" or (2) if no spouse survives "then for the use of the minor child or children." When either of these conditions exists it is mandatory upon the court to set apart a homestead. In re Estate of Barkley, 91 Cal.App. 388, 391, 267 P. 148; In re Estate of Mason, 76 Cal.App. 315, 320, 244 P. 629. However, when as in the instant case neither condition is present there is no authority for the awarding of a homestead since the right to a homestead is purely statutory. In re Estate of Branam, 66 Cal.App.2d 309, 315, 152 P.2d 354. When a spouse survives a homestead cannot be set apart for a minor child alone but it must be for such spouse and the minor child or children. Hence since decedent left a spouse who still survives, the minor son of the former marriage is not entitled to have a homestead set apart for his use.

Appellant contends that the right of a survivor to a probate homestead depends upon the decedent's duty to support such survivor, hence decedent's minor son is entitled to a homestead. (Decedent provided for his son's support in the property settlement agreement at the time of the divorce.) The cases cited do not support such contention. In re Estate of Brooks, 28 Cal.2d 748, at page 750, 171 P.2d 724, the court said that section 680 of the Probate Code relating to a widow's right to a family allowance and section 661 providing for a probate homestead are parallel and a determination as to her right to a family allowance is decisive of her right to a probate homestead. The decision had reference to the rights of a surviving widow under express provisions of the statute. In re Estate of Wright, 98 Cal.App. 633, 277 P. 372, there was no surviving spouse. In re Estate of Still, 117 Cal. 509, at page 514, 49 P. 463, the applicant for the homestead was the sole minor child of the decedent and there was no surviving spouse since by his mother's remarriage she lost her right to a homestead. In re Estate of Pohlmann, 2 Cal.App. 360, 84 P. 354, the homestead was set apart to minor children who had no parent.

Since the right to a probate homestead is statutory and since the minor on whose behalf the petition was made is not a person to whom the Probate Code gives such right the court did not err in denying the petition.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

107 Cal.App.2d 466

MARSON v. RAND et al.

Civ. 18689.

District Court of Appeal, Second District.
Division 2, California.

Nov. 9, 1951.

Rehearing Denied Nov. 21, 1951.

Hearing Denied Jan. 8, 1952.

Action by Arnaldo M. Marson against Richard Rand and others, co-partners doing business under the name of Rand Construction Company, and others to rescind a contract of sale and recover purchase price paid for outstanding shares of corporate stock. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment for the defendants and the plaintiff appealed. The District Court of Appeal, McComb, J., held that substantial evidence sustained finding that the shares of stock purchased had been issued after the consideration therefor had been paid.

Affirmed.

1. Corporations 🔑121(5)

In action by buyer against seller to rescind contract of sale and recover purchase price paid for outstanding shares of corporate stock, substantial evidence sustained finding that corporation had received prior to issuance of shares of stock to buyer the consideration which the permit of the corporation commissioner required to be given prior to the issuance of the stock.

2. Corporations ⚷121(5)

In action by buyer against seller to rescind contract of sale and recover purchase price paid for outstanding shares of corporate stock, substantial evidence sustained finding that there were no false representations made in application to corporation commissioner for permit to issue stock, even though application stated that 7.12 acres of land of value of $37,000 would be conveyed to corporation when only 5.5 acres of land of value of $37,000 was conveyed to the corporation.

3. Courts ⚷104

It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is purely one of determining which side shall be believed because determination of trial court, which heard the witnesses, settled the controversy.

4. Corporations ⚷121(5)

In action by buyer against seller to rescind contract of sale and recover purchase price paid for outstanding shares of corporate stock, excluding evidence relative to transfer of funds by corporation prior to time buyer purchased his stock was not error, in view of fact that buyer's sole contention was that the stock was void because issued in violation of the terms of the permit of the corporation commission.

5. Corporations ⚷121(5)

In action by buyer against seller to rescind contract of sale and recover purchase price paid for outstanding shares of corporate stock, wherein contract of sale contained provision that balance sheet approved and signed by both parties contained all assets and liabilities of corporation, such clause constituted substantial evidence that buyer knew of transactions of corporation prior to time he purchased stock and was satisfied with what had occurred.

McLaughlin & Casey, Los Angeles, for appellant.

C. L. Gardner and Graham L. Sterling, Jr., Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff appeals from an adverse judgment in a rescission action whereby he sought to recover the purchase price which he had paid for outstanding shares of stock in Cienega Village, Inc. (hereinafter referred to as the corporation), which plaintiff purchased from defendant Richard Rand pursuant to a contract of sale dated February 10, 1951.

The action was predicated upon the theory that the stock which defendant Richard Rand sold and transferred to plaintiff was void for the reason that it had been issued in violation of the terms of the permit granted by the corporation commissioner, in that the consideration for the issuance of the stock was not received by the corporation *until a date* subsequent to the issuance of such stock.

The case was tried before the court sitting without a jury who found that the shares of stock which plaintiff purchased had been issued *after* the consideration therefor had been paid.

[1, 2] *Questions:* First: *Was there substantial evidence to sustain the trial court's findings, (a) that the stock which plaintiff purchased had been issued after the consideration therefor had been received by the corporation, and (b) that there were no fraudulent representations made in the application to the corporation commissioner for a permit to issue stock, even though it was conceded that the application stated that 7.12 acres of land of the value of $37,000 would be conveyed to the corporation when in truth and fact only 5.5 acres of land of the value of $37,000 was conveyed to the corporation?*

Yes. We have examined the record and are of the opinion there was substantial evidence to sustain the inferences that the trier of fact reasonably drew therefrom to sustain each and every material finding of fact upon which the judgment in favor of defendants was necessarily predicated.

(a) The records and testimony received in evidence disclosed that the corporation had received prior to the issuance of shares of stock the consideration which the permit of the corporation commissioner required to be given prior to the issuance of the stock.

(b) The testimony disclosed that the statement, in the petition for a permit to issue stock, that 7.12 acres of land would be conveyed to the corporation was made through inadvertence, and that the material fact relative to the transfer of land to the corporation was its value of $37,000 and not the quantity of the land. Since the land that was transferred was actually of the value of $37,000 it became immaterial as to the quantity thereof.

Further discussion of the evidence would serve no useful purpose, and we therefore refrain from further elaboration thereof. (See Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.)

[3] The applicable rule in the instant case often reiterated is stated by Mr. Justice Parker in Behler v. Kunde, 100 Cal. App. 731, 281 P. 76, 78, 736 thus: *"It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is one purely of determining which side shall be believed.* The trial court having determined this with the witnesses before it, the controversy is settled." (Italics added.)

[4] Second: *Did the trial court err in excluding evidence relative to the transfer of funds by the corporation prior to the time plaintiff purchased its stock?*

No. Such evidence was immaterial, plaintiff's sole contention at the time being that the stock was void because issued in violation of the terms of the permit of the corporation commission. Hence the financial transactions of the corporation prior to the time the purchaser became a stockholder were entirely immaterial to such issue.

[5] In addition the agreement between the parties contained this provision: "The parties agree that the only assets and liabilities of said corporation; to-wit, the Cienega Village, Inc., are such as are represented and shown on the balance sheet attached hereto and made a part hereof, which balance sheet has been approved and signed by both parties and includes certain improved real property located adjacent to the northeast corner of La Cienega Boulevard and 57th Street, in the County of Los Angeles, California, and which real property is improved with a number of apartment buildings containing a total of seventy-five (75) apartment units." Such clause constituted substantial evidence that plaintiff knew of the transactions of the corporation prior to the time he purchased its stock and was satisfied with what had occurred.

In view of the findings of the trial court and our conclusion that the evidence sustains them it is unnecessary to consider other questions argued by counsel.

Affirmed.

MOORE, P. J., concur.

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107 Cal.App.2d 372

In re RAMSEY'S ESTATE.

CARLTON v. WIENK et al.

Civ. 18421.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1951.

Rehearing Denied Dec. 5, 1951.

Proceeding in the matter of the estate of Olyn D. Ramsey, deceased, wherein Norman Carlton, assignee of interests of Jean Wienk and Margaret Phelps, legatees, filed petition for approval of assignments. The legatees filed affidavit opposing approval on ground that assignments were made under misrepresentations and mistake of fact as to value of their interests in the estate. The Superior Court of Los Angeles County, John Gee Clark, J., entered decree approving the assignment and ordering distribution to the assignee when distribution of the estate should be made, and the legatees appealed. The District Court of Appeal, Shinn, P. J., held that findings that allegations of petition were true and that allegations and denials of legatees inconsistent therewith were untrue, were insufficient and precluded the District Court of Appeal from arriving at any just determination.

Decree and order reversed with directions.

1. Appeal and Error ⚷1122(2)

In probate proceeding, wherein assignee of legatees' interests filed petition for approval of assignment and legatees objected on ground of misrepresentations and mistake of fact as to value of interests, findings that allegations of petition were true and that allegations and denials in the objections inconsistent therewith were untrue were insufficient as merely finding that assignments were made and for failure to determine issue of misrepresentations and whether consideration was fair and transaction just and equitable, precluding District Court of Appeal from arriving at any just determination, and decree of approval would be reversed. Probate Code, § 1020.1.

2. Trial ⚷388(1)

It is essential that findings be prepared on every material issue in the case.

3. Wills ⚷743

In a probate proceeding, court has discretion to conduct hearing on an assignee's petition for approval of legatee's assignment in advance as well as at time of hearing of petition for distribution. Probate Code, § 1020.1.

4. Wills ⚷743

In probate proceeding wherein assignee of legatees' interests petitioned for approval of assignments, court could have properly refused to hold hearing on the petition prior to filing of account by executor, where it was necessary for court to know value of interests of legatees in order to determine whether sums received for assignments were fair or grossly inadequate. Probate Code, § 1020.1.

5. Appeal and Error ⚷23

District Court of Appeal would not on its own motion raise question of appealability of order approving assignments by legatees of their interests in the estate, where the order would have to be reversed for insufficiency of findings. Probate Code, §§ 1020.1, 1240.

6. Wills ⚷743

In probate proceeding wherein assignee of legatees' interests files petition for approval of assignments, the court has discretion to at any time take evidence as to validity of disputed assignments. Probate Code, § 1020.1.

7. Executors and Administrators ⚷314(12), 315(1)

In probate proceeding wherein assignee of legatees' interests in the estate files petition for approval of assignments, and court makes decision as to validity of the assignments, the ruling should be incorporated in order for distribution and would be reviewable on appeal from decree of distribution. Probate Code, §§ 1020.1, 1240.

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Nicholas Ferrara, Los Angeles, for appellants.

Lee Schwartz, Beverly Hills, for respondent.

SHINN, Presiding Justice.

Jean Wienk and Margaret J. Phelps appeal from a decree rendered in probate approving assignments by appellants of their interests as residuary legatees of the estate of Olyn D. Ramsey, deceased, and ordering distribution to the assignee when partial, ratable or final distribution should be made.

Norman Carlton, the assignee, filed a petition alleging that each of said assignors was entitled under the will of decedent to receive one-sixth of the residue of the estate and that they had assigned their interests to him. He sought approval of the assignments pursuant to section 1020.1 of the Probate Code. In brief this section gives the court authority to inquire into the consideration paid for an assignment and to refuse distribution thereunder unless it is shown to have been executed voluntarily and upon just and equitable terms. Copies of the assignments were attached, as well as copies of earlier partial assignments that are not in question. Jean Wienk and Margaret J. Phelps separately filed affidavits in opposition to the petition of Carlton. The affidavit of Jean Wienk alleged that Carlton had represented to her that her entire interest or share in the estate would amount to from $1,600 to $1,660, and that his charge for any advances was twenty cents on the dollar; that she had borrowed from said Carlton $660, and has assigned interests in the estate to the amount of $825; that she sought to borrow further sums from Carlton; that he represented to her that the remainder which would come to her was from $775 to $835 and that, believing said representations, she assigned the remainder of her interest, receiving therefor $575. She alleged that Carlton well knew the condition of the estate and the value of her interest, the representations were knowingly false, were made with intent to deceive her, that she believed the same; that she was ill at the time, needed the money for hospitalization, so informed Carlton and eventually made the assignment in ignorance of the value of her interest. She alleged facts to show that Carlton, instead of making a profit of from $200 to $260 from the balance of her interest so assigned, which he represented he would receive, actually would profit to the extent of $1,419.56. She alleged also that the representations made by Carlton were made positively, and if not actually known to him to be untrue, were made without reason to believe they were true, and she also alleged that she made the assignments under a mistake of fact as to the value of her interest in the estate.

The affidavit of Margaret Phelps contained similar allegations as to the value of her interest, Carlton's knowledge, and her lack of knowledge thereof. She alleged that Carlton represented to her that he would gain only to the extent of $115 to $175, whereas he stood to profit from the final assignment to the extent of $1,334.56.

As security for the earlier loans each appellant had assigned amounts equal to the loans, plus twenty-five per cent thereof. Each gave notice of rescission of her final assignment but in her objections expressed her willingness to have her assignment of her entire interest approved for the amount she had received therefor upon the same terms upon which she had made the earlier assignment. (They compute the profits of Carlton at twenty per cent of the money advanced, whereas it was twenty-five per cent.) The court approved the assignments unconditionally.

The parties assume that the proceedings under section 1020.1 constituted a trial in the true sense and that the order made was a final judgment. We shall discuss this matter later.

The matter was duly heard and the objectors testified to the facts alleged in their affidavits. There was also corroborative evidence consisting of statements made by Carlton. The court made findings as follows: (1) "That each and all of the allegations of the petitioner, Norman Carlton, are true"; (2) "That each and all of the allegations and denials set forth in the objections to the petition for approval of the assignments by the objectors Jean Wienk and Margaret J. Phelps, inconsistent with the Finding of Fact hereinabove are untrue." The first finding is merely that the assignments were made, since nothing more was alleged in the petition. The affidavits of appellants which constituted their objections stated facts which, if true, would have required the court to withhold approval of the assignments and refuse distribution thereunder for any more than the amounts received plus twenty-five per cent thereof, which appellants were willing to pay. Another necessary issue was whether the consideration was fair and the transaction just and equitable. These issues were not determined by the findings.

[1] In the absence of sufficient findings, we cannot arrive at any just determination as to the merits of the appeal. Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 P. 1125; Estate of Pendell, 216 Cal. 384, 14 P.2d 506; James v. Haley, 212 Cal. 142, 297 P. 920; see also Bridge v. Kedon, 163 Cal. 493, 498, 126 P. 149, 43 L.R.A.,N.S., 404.

[2] We have frequently had occasion to comment upon the increasing tendency on the part of some attorneys to regard the

preparation of findings as a casual and unimportant incident of a completed trial. It is just the reverse. Great care should be taken to have findings on all the material issues. This much is essential. More than this is confusing and unnecessary. Although the trial judge has the primary duty in the matter of findings, he soon becomes engrossed in the trial of other cases and should be able to rely upon the prevailing party to prepare findings according to his directions. We realize that slight benefit is to be expected from our calling attention to the necessity for scrupulous care in the drafting of findings, for, as we have previously stated, while such admonitions come to the attention of those who read law, they do not reach the practitioners who are the cause of our concern.

[3, 4] Certain other points argued by appellants will be considered briefly. It is contended that the court may pass upon the validity of assignments such as these only upon the hearing of a petition for distribution, and that the judgment under consideration is for that reason void. Section 1020.1 gives the court authority on motion of any person interested in the estate, or its own motion, to inquire fully into the transaction and to refuse distribution thereunder for reasons which invalidate contracts generally, and to grant it only upon terms it deems just and equitable. Notice of the hearing must be given to the assignor and the assignee. Clearly it is within the discretion of the court to conduct such hearings in advance as well as at the time of the hearing of a petition for distribution. However, in the present case, the hearing was had prior to the filing of any account by the executor, although it was necessary for the court to know the value of the interests of appellants in the residuary estate in order to determine whether the sum they had received for their assignments was fair or grossly inadequate. We think that where interests have been assigned outright the court might properly refuse to conduct a hearing under section 1020.1 in advance of a hearing upon an account of the executor or administrator.

[5] No question is raised as to the appealability of the order in question. Section 1240 of the Probate Code provides for an appeal from a decree of distribution. It does not, in terms, provide an appeal from any order made in a proceeding under section 1020.1. For practical reasons we deem it inadvisable to raise the question of jurisdiction on our own motion, inasmuch as we are required to reverse the order.

[6, 7] Section 1020.1 does not require the court to make any findings or any order as to the effectiveness of an assignment otherwise than by an order for distribution. The section outlines a procedure to be employed for the convenience of the court preliminary to distribution but not for the trial of issues for which procedure for distribution is provided. It is clearly within the discretion of the court to at any time take evidence under section 1020.1 as to the validity of the disputed assignments. Its ruling thereon will be incorporated in an order for distribution. The code does not provide for a final decision of the issues at any other time or in any other manner. The decision as to the validity of the assignments would be reviewable on an appeal from the decree of distribution. Prob.Code, sec. 1240.

For reasons which will be apparent, we are indicating what we believe will be a proper course for the proceeding to take upon its being remanded to the trial court. In view of the conclusions we have stated and the directions which follow, it is unnecessary to consider other points urged by appellant.

The decree and order are reversed for a rehearing; provided, that if within twenty days after notice to respondent that our remittitur has been filed, he files his written consent to accept under the assignments in question the amounts he paid appellants therefor, plus twenty-five per cent of said amounts, they shall be deemed valid for such amounts when distribution is had, and provided, further, that if said consent is not filed further proceedings shall be had in accordance with the views herein expressed.

WOOD and VALLÉE, JJ., concur.

107 Cal.App.2d 402

ANDERSON v. ANDERSON.

Civ. 18331.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1951.

Action by Oscar E. Anderson against Harold Anderson involving validity of a deed by which father of the parties one week before death had conveyed realty to defendant without consideration. The Superior Court of Los Angeles County, Arthur Crum, J., entered judgment cancelling the deed and ordering defendant to reconvey the realty and account for rents collected and defendant appealed. The District Court of Appeal, Doran, J., held that the evidence sustained judgment cancelling deed on ground of mental incompetence and undue influence.

Judgment affirmed.

1. Appeal and Error ⚷1010(1)

Where record discloses any substantial evidence in support of judgments, it should not be disturbed on appeal.

2. Deeds ⚷211(1, 4)

Evidence sustained judgment cancelling on ground of mental incompetence and undue influence, a deed by which grantor at age of 83, one week before death and after sustaining two strokes of apoplexy had conveyed realty to one of his two children without consideration.

3. Appeal and Error ⚷1011(1)

Findings of trial court supported by substantial evidence are conclusive on appeal, notwithstanding conflicting evidence.

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Michael Motta, Los Angeles, for appellant.

Anna Zacsek, Jerome Schwimmer, Los Angeles, for respondent.

DORAN, Justice.

The parties hereto are the only children of Charles E. Anderson, deceased, who died intestate on November 20, 1947. The plaintiff, Oscar E. Anderson, was appointed administrator of the estate. On November 13, 1947, the decedent had executed a quitclaim deed covering certain real estate to defendant-appellant Harold Anderson, the validity of which is here in question. The trial court cancelled the deed on the grounds of mental incompetence of the decedent and undue influence on the part of the appellant grantee. Appellant was ordered to reconvey the same and to account for rents collected in the sum of $2,938.21 and for certain personal property. The present appeal is from that judgment.

[1] The sole contention on this appeal is that the evidence of incompetency and undue influence is not sufficient to sustain the findings and judgment in favor of respondent. The respondent relies upon the well established rule that if the record discloses any substantial evidence in support of the judgment, no appellate interference therewith is warranted. It is not claimed that the trial court committed any prejudicial errors in the trial of the case.

As commented on by the trial judge, "The witnesses in the case are partisan. Everyone of them who has testified, including the parties themselves, is a partisan witness". The trial court was therefore confronted with a serious conflict of evidence involving the credibility of the witnesses, and said: "In the main I am not going to believe Harold Anderson because of the many, many discrepancies in his testimony". After pointing out the various discrepancies, the court said: "Now the evidence shows activity on the part of Harold Anderson in respect to this deed. It shows plenty of opportunity for activity and it shows actual activity. It shows that he profited by that activity, or thought he did". The trial court therefore found that in reference to the deed there was a "lack of intent growing out of the mental incompetence of the deceased", and that "the deed was the product of undue influence of his son Harold".

There was evidence that the decedent, born in Sweden, had considerable difficulty with the English language; that in April, 1945, decedent suffered a first stroke of apoplexy, after which decedent's conduct became increasingly irrational. The decedent completely disregarded O. P. A. regulations, wrecked the plumbing for the purpose of hastening the eviction of certain tenants, refused to procure a doctor for Mrs. Charles Anderson who was in great pain and dying. Contrary to previous habits, decedent refused to comply with various laws, disregarded the care and maintenance of the property, displayed animosity towards various persons, became suspicious of almost everyone, refused to bathe, and in various ways evidenced confusion and disintegration.

Some six weeks before death, decedent failed to recognize Oscar Anderson, mistook Oscar for Harold, was confused and disoriented, complained of dizziness and pain, and was unable to remember various things. On November 10, three days prior to the execution of the deed, decedent suffered a second stroke, and experienced difficulty in speaking and in other respects. This condition grew progressively worse so that it became necessary to call a physician on the evening of the 13th, and on the morning of the 14th decedent was taken to the hospital where death occurred on the 20th of November. Decedent was then 83 years of age.

In regard to execution of the deed it appears that the appellant called an attorney on November 12th; the attorney notarized the deed and recorded it, and received $10 from appellant for so doing. There was evidence that during the week of executing the deed, appellant spent four days with the decedent in addition to nightly visits; that appellant did not advise the other son, Oscar, of the making of the deed, of the father's hospitalization, or of the father's death. Appellant is later reputed to have said "that Oscar couldn't pin anything on him because he had two lawyers witness the signing of the deed".

On the other hand there was testimony by the attorney-notary who acknowledged the deed, that the decedent appeared to be mentally competent and directed the execution of the deed. A Doctor Robbins, however, expressed an opinion, in response to hypothetical questions, that the decedent was of unsound mind at the time the deed was executed. There was evidence that the decedent received no consideration for the execution of the deed, and had no independent advice regarding the transaction.

[2, 3] Appellant's brief calls attention to various items of evidence tending to negative the findings of mental incompetence and undue influence. As hereinbefore mentioned, it is true that the record discloses a conflict of evidence on these questions. The trial court, however, has resolved these conflicts in favor of the respondent and against the validity of the deed in question. That there is substantial evidence in the record supporting these findings cannot be denied. Therefore under the well established rules of appellate review, such findings can only be sustained.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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107 Cal.App.2d 447

ROYAT et al. v. ROBERTS et al.

Civ. 8032.

District Court of Appeal, Third District, California.

Nov. 8, 1951.

Leonard W. Royat and Sol S. Willey, individually and as partners doing business under the firm name and style of Dobbins Logging Company, brought action against George Roberts, also known as George W. Roberts, Lawrence Roberts, also known as L. W. Roberts, and the Bank of America National Trust and Savings Association to recover possession of tractor and damages for its alleged unlawful detention. The trial court entered an order adverse to the plaintiffs, and they appealed. The District Court of Appeal, Van Dyke, J., held that appeal by plaintiffs was not barred because of the fact that plaintiff had repossessed the tractor in accordance with terms of judgment.

Motion to dismiss appeal denied.

1. Appeal and Error ⚷161

Generally, acceptance of the benefits of a judgment is a bar to prosecution of an appeal therefrom, but the general rule is subject to exceptions.

2. Appeal and Error ⚷162(2)

Where reversal of a judgment cannot affect the right of an appellant to benefit which he has received, he is not precluded from an appeal, even though he has voluntarily accepted amount awarded him.

3. Appeal and Error ⚷161

Where appellant seeks relief in addition to that given by the judgment in his favor, there is no bar to the appeal because of acceptance by appellant of benefits under the judgment.

4. Appeal and Error ⚷162(2)

Where only question on appeal is whether recovery should be greater than allowed by trial court, acceptance of amount adjudged due is not inconsistent with claim that judgment is not large enough, and appeal may be maintained.

5. Appeal and Error ⚷161

Where main assignments of error in action to recover possession of tractor and for damages for alleged unlawful detention were that trial court erred in failing to find that defendant bank unlawfully asserted an interest in the tractor and in failing to render a judgment against defendant bank like that rendered against individual defendant and that trial court's finding as to unpaid balance on purchase price was unsupported by evidence and that evidence without contradiction showed a lesser amount than that found by the trial court, the taking of possession of tractor by plaintiff in accordance with judgment, did not bar prosecution of appeal by plaintiff, since contentions of plaintiff in assignments of error were for greater relief and not inconsistent with repossession of the tractor.

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Morris M. Grupp, San Francisco, for appellant.

Dorman & Stokes, Arcata, Samuel B. Stewart, Jr., and Christopher M. Jenks, San Francisco, for respondent.

VAN DYKE, Justice.

This is a motion to dismiss the appeal upon the ground that appellants have accepted the benefits of the judgment entered in their favor. This requires an analysis of the pleadings, findings and judgment.

The appellants brought this action to recover possession of a tractor, and for damages resulting from the unlawful detention of said tractor by the defendants. Defendant Bank of America by its answer denied that appellants were entitled to the possession of the tractor; denied that it had taken possession of the property; and alleged that the tractor was "subject to a chattel mortgage dated July 22, 1946, by which all of said property was mortgaged to this defendant to secure a promissory note, also dated July 22, 1946, and all sums that might be thereafter advanced by this defendant to the mortgagor [defendant Roberts], all indebtednesses and obligations that might be thereafter incurred by the mortgagor to this defendant, * * *; and that the amount now due, owing and unpaid to this defendant and secured by said chattel mortgage is Three Thousand Five Hundred and Seventeen and 54/100 Dollars ($3,517.54), plus interest, costs, charges, and attorneys' fees." The answers of defendants Lawrence W. and George W. Roberts denied generally the allegations of the complaint.

The trial court found that defendants Roberts orally agreed to sell the tractor to the appellants on or about May 9, 1947; that said agreement provided for a total consideration of $9,500; that appellants paid the sum of $1,000 down, and took possession of the tractor; that the agreement provided for retention of title in the sellers until the entire purchase price was paid, and the right to retake possession upon default; that the defendant Bank of America at that time held a chattel mortgage on the tractor in the sum of $5,207.48; that appellants agreed to pay the balance of the purchase price by payments of all sums due the Bank of America under the chattel mortgage, and the remaining balance of the purchase price to defendants Roberts on or before the due date of the final payment under the chattel mortgage; that time was not of the essence under the agreement of sale; that defendants Roberts repossessed the tractor on December 13, 1948; that on the date of repossession the sum due the bank on the chattel mortgage was $327.08, and the unpaid balance on the purchase price, including the final installments owing to the bank, was $3,619.60; that prior to said date defendant Bank of America, with the consent of defendants Roberts, had accepted delinquent payments due under the loan secured by the chattel mortgage, and thereby defendants waived the right to retake possession of the tractor since no notice restoring a reasonable time in which to make payments had been given; that the damage for the detention of the tractor by the defendants Roberts is $3,000; that the defendant Bank of America did not take possession of the tractor; that the defendants Roberts did not act as the agent of defendant Bank of America.

Judgment was entered for the appellants in accordance with the findings. On November 14, 1950, the appellants filed a notice of appeal from the judgment. The notice specified that the appeal was from the judgment and "from the whole of said judgment." The appellants regained possession of the tractor in December, 1950, by causing the issuance and levy of execution under the judgment entered in their favor.

Respondents contend that the repossession of the tractor by appellants constituted an acceptance of the benefits of the judgment, and serves as a bar to the prosecution of the appeal. We hold that repossession by the appellants does not bar the prosecution of the appeal.

[1–4] As a general rule the acceptance of the benefits of a judgment is a bar to the prosecution of an appeal therefrom. The reason for this rule is that the two courses of action are legally inconsistent. Klebora v. Klebora, 118 Cal.App. 613, 5 P.2d 965; Copeland v. Rabing, 104 Cal.App.2d 98, 230 P.2d 649; Schubert v. Reich, 36 Cal.2d 298, 223 P.2d 242. However, the general rule is subject to several exceptions. Where reversal of a judgment cannot affect the right of an appellant to the benefit which he has received, he is not precluded from an appeal even though he has voluntarily accepted the amount awarded him. Browning v. Browning, 208 Cal. 518, 524, 282 P. 503; Harrold v. Harrold, 100 Cal.App.2d 601, 604, 224 P.2d 66. Where the appellant seeks relief in addition to that given by the judgment in his favor there is no bar to the appeal. In Maxwell Hardware Co. v. Foster, 207 Cal. 167, at page 170, 277 P. 327, at page 329 the court stated: "A plaintiff may appeal from a judgment in his favor, when the amount of said judgment is less than the amount demanded and to which the plaintiff considered himself entitled. But in such a case the appeal is not from that part of the judgment in plaintiff's favor, but is from the provisions of the judgment denying him the full relief demanded." See, also, In re Estate of Hughes, 80 Cal.App.2d 550, 554, 182 P.2d 253; Browning v. Browning, supra. "The law is settled that, where the only question on appeal is whether the recovery should be greater than that allowed by the trial court, the acceptance of the amount adjudged due is not inconsistent with the claim that the judgment is not large enough and the appeal may be maintained." Clarke v. Angelus Memorial Ass'n, 14 Cal.App.2d 750, 752, 58 P.2d 974, 975.

[5] Applying the above principles to the present case, the right to maintain the appeal is beyond question. The main assignments of error are that: (1) The trial court erred in failing to find that defendant Bank of America "unlawfully asserted an interest in" the tractor, and also erred in failing to render a judgment against the bank identical to that rendered against the Roberts, and, (2) The trial court's finding as to the unpaid balance on the purchase price is unsupported by the evidence, and that the evidence without contradiction shows a lesser amount than that found by the trial court. These contentions are for greater relief and are not inconsistent with the repossession of the tractor. And indeed the contentions rest upon the court's findings that appellants were unlawfully deprived of possession of the tractor. Should appellants prevail on appeal, the additional relief granted them would in no way affect that part of the judgment restoring possession of the tractor to them.

We are not unmindful of the fact that the notice of appeal states that the appeal is from the whole of the judgment. It would have been better procedure to specify that the appeal was from those parts of the judgment which did not give the relief to which appellants considered they were entitled. However, it is clear that the appeal is for additional relief and "it will not be considered as an appeal from the judgment in so far as it is in his [appellant's] favor." Estate of Hughes, supra [80 Cal. App.2d 550, 182 P.2d 257].

The motion is denied.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

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107 Cal.App.2d 298

PIERSON v. HOLLY SUGAR CORP. et al.

Civ. 4181.

District Court of Appeal
Fourth District, California
Nov. 6, 1951.

Rehearing Denied Nov. 26, 1951.

Hearing Denied Jan. 3, 1952.

Action by Leron D. Pierson against Holly Sugar Corporation, and others, for personal injuries sustained when a freight elevator in named defendant's building on which plaintiff was riding dropped from third to ground floor. The Superior Court of Orange County, Raymond Thompson, J., gave judgment for the plaintiff and the named defendant appealed. The District Court of Appeal, Mussell, J., held that where the plaintiff entered defendant's premises as a business invitee, when he went to a portion of the premises for the common interest or mutual advantage of himself and the owner of the premises, he remained an invitee.

Judgment affirmed.

1. Master and Servant 🔑6

In action by business invitee against corporation for personal injuries sustained when a freight elevator in corporation's building on which invitee was riding dropped from third to ground floor, jury was entitled to infer that man on stairs of corporation's building, dressed in blue denim clothing, who showed invitee location and manner of operation of elevator, was an employee of corporation.

2. Master and Servant 🔑6

Where one is performing work and labor for another, prima facie evidence of employment is shown, and such person is presumed to be a servant in absence of evidence to the contrary.

3. Carriers 🔑318(3, 4)

In action by business invitee against corporation for personal injuries sustained when a freight elevator in corporation's building on which invitee was riding dropped from third to ground floor, evidence was sufficient to establish that elevator was dangerous, defective, and negligently maintained and operated.

4. Appeal and Error 🔑1053(6)
Evidence 🔑244(10)

In action by business invitee against corporation for personal injuries sustained when a freight elevator in corporation's building on which invitee was riding dropped from third to ground floor, admission in evidence of testimony of man invitee met on first visit to premises who was dressed in blue denim clothing and who showed invitee location and manner of operation of elevator was not prejudicial error, in view of fact that court stated conversation was admitted not for purpose of showing negligence on part of corporation but only for limited purpose of showing how invitee got there.

5. Appeal and Error 🔑1053(6)
Evidence 🔑244(10)

In action by business invitee against corporation for personal injuries sustained when a freight elevator in corporation's building on which invitee was riding dropped from third to ground floor, admission in evidence of statement made by corporation's employee to invitee, that invitee could use elevator, was not prejudicial error, in view of fact that court stated conversation was admitted not for purpose of showing negligence on part of corporation but only for limited purpose of showing how invitee got there.

6. Master and Servant ⚷117
Negligence ⚷45

Safety orders and sections of Labor Code, providing generally for installation and maintenance of proper safety factors to be used in construction and operation of elevators, and relating to inspection of elevators and issuance of permits for operation thereof, are intended not only to protect employees of companies, but also as safeguards for public generally against injury or loss of life. Labor Code, §§ 6312, 6500, 7300, 7304.

7. Carriers ⚷321(23)

In action by business invitee against corporation for personal injuries sustained when freight elevator in corporation's building on which invitee was riding dropped from third to ground floor, where evidence was introduced to show elevator was not equipped and operated as required by statutes, instruction that violation of orders, rules and regulations issued in conformity with statutes providing for installation and maintenance constituted negligence per se, and instruction regarding issuance of permits for operation of elevators with proper safety devices and factors, were proper. Labor Code, §§ 6312, 6500, 7300, 7304.

8. Negligence ⚷32(2.8)

Where road salesman entered corporation's premises as business invitee with merchandise to be delivered to corporation's cafeteria, corporation's invitation extended to such portions of premises where under circumstances and conditions of his invitation salesman would naturally be likely to go.

9. Negligence ⚷32(2.8)

Where road salesman entered corporation's premises as business invitee with merchandise to be delivered to corporation's cafeteria, and the building housed an elevator to carry freight to upper floors which had been previously pointed out to salesman with instructions as to its use, when salesman used elevator for common interest or mutual advantage of himself and owner of premises, salesman remained an invitee.

10. Carriers ⚷320(2)

Where road salesman entered corporation's premises as business invitee with merchandise to be delivered to corporation's cafeteria, and building housed an elevator to carry freight to upper floors which had been previously pointed out to salesman with instruction as to its use, question as to whether invitation, express or implied, included elevator, was one of fact for jury, in action by salesman against corporation for personal injuries sustained when elevator dropped from third to ground floor.

11. Carriers ⚷320(2)

In action by business invitee against corporation for personal injuries sustained when elevator in corporation's building on which invitee was riding dropped from third to ground floor, whether elevator was for passengers or freight, or both, was question of fact for jury.

12. Carriers ⚷347(1)

In action by business invitee against corporation for damages for personal injuries sustained when elevator in corporation's building on which invitee was riding dropped from third to ground floor, whether business invitee was guilty of contributory negligence in disregarding "freight only, no passengers allowed" sign on elevator cage was question for jury.

◆

Friis & Schutz, Leo J. Friis and Warren L. Schutz, all of Anaheim, for appellant.

Clarence E. Sprague, Santa Ana, and James D. Garibaldi, Los Angeles, for respondent.

MUSSELL, Justice.

Action for damages for personal injuries.

Defendant Holly Sugar Corporation appeals from a judgment entered pursuant to a jury verdict in favor of plaintiff in an action brought to recover damages for injuries which he sustained when a freight elevator on which he was riding dropped from the third to the ground floor in defendant's Santa Ana sugar plant building.

There is no dispute as to the nature and extent of plaintiff's injuries.

Appellant asserts as grounds for reversal of the judgment that the trial court erred in permitting the introduction of certain testimony and in the giving of instructions.

The circumstances under which plaintiff's injuries were received are as follows: On May 28, 1949, the day of the accident, plaintiff, who was employed as a road salesman by Bowie Pie Company, entered defendant's building, carrying an order of ten pies for delivery to a cafeteria situated and operated on the third floor. In order to deliver his merchandise, it was necessary that plaintiff climb stairs to the third floor, use a "manlift", or a freight elevator or hoist. The stairway leading from the first to the second floor was located inside the building immediately west of the south entrance and the freight hoist and manhoist were immediately to the west of the stairway. The freight hoist had a platform without sides and was approximately five feet square. This platform was raised and lowered by means of a three-eighths inch wire cable which wound around a drum attached to and operated by an electric motor. In raising the platform of the hoist, the cable wound around the drum as the drum revolved. When the drum turned in the other direction, the cable unwound and lowered the platform. The hoist was operated by means of two ropes which extended from the first floor to the switch on the motor. By pulling the "up rope", the switch made contact, causing the cable to wind onto the drum. Conversely, by pulling the "down rope", the switch made contact, causing the cable to unwind. Around the square opening where the platform rested on the first floor was a fence, with gates constructed of pipe, and on one of the gates was a sign reading "Freight only. No Passengers Allowed."

The "manlift", which was situated immediately west of the hoist, had a sign upon it reading "Employees Only." The lift consisted of an endless belt extending vertically from the first to the fourth floor. The belt rolled counterclockwise around two rollers, one being fastened at the first floor and the other at the fourth. At spaced intervals on this belt were small platforms upon which to stand and "hand-holds" which the rider could grasp while riding the lift.

Upon entering the building, plaintiff first placed a box containing seven pies on the manlift, carrying three others on his left arm. He stepped on the platform on which the pies were placed and prepared to ascend. However, someone on an upper floor started the manlift in motion, the pies were spilled on the floor and plaintiff returned to his truck for more pies. Upon reentering the building, he placed his merchandise upon the elevator, intending to use it as he had done on previous occasions. Plaintiff testified that a Mr. Hants, an employee of defendant, was at the time working near the elevator and manlift and when he asked Mr. Hants if it were allright to use the elevator, Hants replied "Sure. Go ahead." Plaintiff then started the elevator by pulling on the "up rope" and when the hoist had reached the third floor level, it stopped, the wire cable parted and the platform dropped to the first floor with plaintiff, resulting in serious injuries to him.

[1–3] Plaintiff testified that previous to the accident he had ridden on the freight hoist on two different occasions and that before using it, he had used the manlift two or three times in "going up." He further testified that on his first visit to the premises, he met a man on the stairs, dressed in blue denim clothing, who showed him the location and manner of operation of the manlift and freight hoist. Defendant's first contention is that the court erred in admitting this testimony and argues that plaintiff failed to sustain the burden of proof that the man on the stairs was an employee of defendant corporation and acting within the scope of his employment. Under the circumstances shown by the record, the jury was entitled to infer that the man on the stairs was an employee of defendant and where one is performing work and labor for another, prima facie evidence of employment is shown and such person is presumed to be a servant in the absence of evidence to the contrary. Robinson v. George, 16 Cal.2d 238, 242, 105 P.2d 914. While it is true that there was no proof that the man on the stairs had authority to bind the defendant by his acts and conduct, the plaintiff does not contend that liability on the part of defendant was created thereby. His contention is that the defendant corporation was liable for the negligent acts of its agents and employees in the construction, maintenance and operation of the elevator. Pfingst v. Mayer, 93 Cal.App.2d 265, 272, 208 P.2d 1002. That the elevator was dangerous, defective and negligently maintained and operated is well established by the evidence. Furthermore, the questioned evidence was admitted by the court for a limited purpose and the jury was instructed that the conversation with the man on the stairs was admitted not for the purpose of showing negligence on the part of the defendant corporation but only for the purpose of showing "how the plaintiff got there" and also with respect to any inference which the jury might or might not draw as to the use of the hoist or elevator.

[4, 5] It is next contended that the court erred in admitting in evidence the statement of Mr. Hants, an employee of defendant, made to plaintiff as he was about to use the elevator immediately prior to the accident. At that time plaintiff asked Mr. Hants if he could use the elevator and Hants replied "Sure. Go Ahead." Objection was made to this testimony on the same grounds as urged in defendant's first contention and the court stated that the conversation with Hants was admitted for the limited purpose previously stated and that the instructions given by Hants did not show that they were pursuant to any authority of the defendant. In this connection, the jury was instructed that the defendant was not liable for the act of any person in granting permission to ride the freight hoist unless it was shown that the act of giving permission, if permission were given, was within the scope of such person's agency or employment. Under the circumstances shown, no prejudicial error was committed in the admission of either of the conversations in question.

Defendant argues that the court erred in giving as instructions to the jury certain orders of the Division of Industrial Safety and instructing the jury that the violation of any of such orders constituted negligence per se. The orders referred to were orders, rules and regulations issued in conformity with the provisions of sections 6312 and 6500 of the Labor Code. These orders and regulations provide generally for the installation and maintenance of proper bumpers, guardrails, hoist way gates, final limit stopping devices, slack cable devices, the proper rope cables, correct and counterweight safety devices, sheaves and safety factors to be used in the construction and operation of elevators. In this connection, the court also instructed the jury as to the provisions of sections 7300 and 7304 of the Labor Code relative to the inspection of elevators and the issuance of permits for the operation thereof.

[6, 7] Evidence was introduced to show that the elevator in question was not equipped and operated as required by these rules and regulations. Defendant's objections to these instructions are that the benefit of the safety orders and Labor Code provisions is restricted to a situation where an employer-employee relationship exists; that in the instant case the plaintiff is not entitled to the benefits of the safety provisions because at the time of the accident he was an employee of the Bowie Pie Company and not an employee of defendant. We conclude that the safety orders and the provisions of the Labor Code referred to were intended not only to protect employees of defendant corporation but also as safeguards for the public generally against injury or loss of life and that it was proper to instruct the jury as to such rules and regulations and provisions in the instant case. McKeon v. Lissner, 193 Cal. 297, 303, 223 P. 965; Bateman v. Doughnut Corp. of America, 63 Cal.App.2d 711, 715, 147 P.2d 404.

[8–12] Finally, defendant contends that plaintiff was a trespasser and argues that since there was no wilful or wanton misconduct on the part of the defendant, he is not entitled to recover. Defendant concedes that plaintiff was an invitee when he entered the premises for the purpose of delivering his merchandise to the third floor cafeteria but argues that he became a trespasser when he left the stairs and went to the elevator. The point is not well taken. Admittedly, the plaintiff entered defendant's premises on the day of the accident as a business invitee with merchandise to be delivered to the company's cafeteria therein. The building housed an elevator to carry freight to the upper floors. The elevator had been previously pointed out to the plaintiff with instructions as to its use. Plaintiff's invitation extended to those portions of the premises where under the circumstances and conditions of his invitation he would naturally be likely to go. Gastine v. Ewing, 65 Cal.App.2d 131, 141, 150 P.2d 266; Stewart v. Lido Cafe, 13 Cal.App.2d 46, 50, 56 P.2d 553. When the plaintiff went to a portion of the premises for the common interest or mutual advantage of himself and the owner of the premises, he remained an invitee. Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 98, 16 P.2d 807. The question as to whether the invitation, express or implied, included that part of the premises where the injury occurred was one of fact for the determination of the jury. Gastine v. Ewing, supra, 65 Cal.App.2d 131, 150 P.2d 266; Biondini v. Amship Corp., 81 Cal.App.2d 751, 185 P.2d 94. The jury was fully instructed on the question as to whether plaintiff was an invitee or trespasser and determined this question of fact in favor of the plaintiff. A freight elevator, as defined in the instructions of the court and by the Division of Industrial Safety is as follows: "3004–6 Freight Elevator—A freight elevator is one used solely for carrying freight and such persons as are necessary for the handling of freight and the operation of the elevator." Whether the elevator was a passenger or a freight elevator, or both, was a question of fact addressed to the jury. It cannot be said as a matter of law that plaintiff was guilty of contributory negligence in disregarding the sign on the elevator cage. This was likewise a question for the jury. Jenson v. Will & Finck Co., 150 Cal. 398, 411, 412, 89 P. 113.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

107 Cal.App.2d 260

SAKS & CO. v. CITY OF BEVERLY HILLS et al.

Civ. 18037, 18038.

District Court of Appeal, Second District, Division 2, California.

Nov. 5, 1951.

Rehearing Denied Nov. 21, 1951.

Hearing Denied Jan. 3, 1952.

Action by Saks & Company, a corporation, against City of Beverly Hills and others to enjoin enforcement of ordinance revoking temporary zoning variances and for a declaration respecting plaintiff's rights thereto and action in certiorari and mandamus between the same parties to review action of city council in revoking zoning variances. The cases were consolidated for trial before the court without a jury. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgments in favor of plaintiff and named defendant appealed. The District Court of Appeal, McComb, J., held that ordinances adopted by city council revoking zoning variances were invalid because adopted without a public hearing, as provided in ordinances granting the variances, and that similar ordinance adopted by electors at special election was void because no hearings had been held pursuant to statutory requirements that notice be given and hearings held as to possible effect of proposed zoning law upon property rights.

Judgments affirmed.

1. Certiorari 🔑**65**

Mandamus 🔑**173**

In certiorari or mandamus proceeding to review action of a local board, superior court will afford petitioner a trial de novo upon pleading and proof that the board has acted arbitrarily, capriciously or fraudulently.

2. Municipal Corporations ⇨97

Where city council consisted of five members, favorable vote of a majority of the quorum, consisting of three members, was necessary to adopt an ordinance or resolution. Gen.Laws, Act 5233, § 859.

3. Mandamus ⇨173
Municipal Corporations ⇨621.63, 621.64

Where three of five members of city council were disqualified to vote on ordinance and resolution revoking temporary zoning variances because they were biased and prejudiced and had determined in advance of hearings and presentation of evidence to vote for revocation or because they had not heard the evidence presented to council and one of two remaining members voted against ordinance and resolution, such ordinance and resolution were adopted arbitrarily and capriciously without affording grantee of variances a fair and impartial judgment upon the evidence presented and hence grantee was entitled to a trial denovo in certiorari and mandamus proceedings to review such action of city council. Gen.Laws, Act 5233, § 859.

4. Certiorari ⇨68
Mandamus ⇨174

Where examination of proceedings before a local board discloses that board exercised its judgment fairly and impartially and in absence of fraud, malice or arbitrary conduct, superior court in certiorari or mandamus proceeding to review such action will confine itself to an examination of whether the evidence presented to board was substantial in support of its findings.

5. Administrative Law and Procedure ⇨473

A "public hearing" contemplates a fair and impartial hearing at which competent evidence may be presented before a fair and impartial tribunal.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Hearing".

6. Municipal Corporations ⇨621.63

Where three of five members of city council were disqualified to vote on resolution and ordinance revoking temporary zoning variances either because they were biased and prejudiced and had determined in advance of hearings and presentation of evidence to vote for revocation or had not heard the evidence presented to council, resolution and ordinance were adopted without a "public hearing", as provided in ordinances granting the variances and reserving right to revoke them after regular public hearings, and hence such resolution and ordinance revoking zoning variances were properly held invalid. Gen.Laws, Act 5233, § 859.

7. Administrative Law and Procedure ⇨683

Where trial court grants a hearing de novo and its findings are questioned on appeal, appellate court's duty begins and ends with a determination that there is substantial evidence to sustain findings of fact of trial court.

8. Mandamus ⇨168(4)
Municipal Corporations ⇨621.64

In certiorari and mandamus proceeding to review action of city council in revoking temporary zoning variances permitting use of lots in residential zone for parking automobiles in connection with adjacent commercial property, evidence sustained trial court's findings that permitting such use of the lots in question was indispensable to the public welfare and that prohibiting such use could not promote the public peace, health, safety or general welfare.

9. Mandamus ⇨168(4)
Municipal Corporations ⇨621.64

In certiorari and mandamus proceeding to review action of city council in revoking temporary zoning variances permitting use of lots in residential zone for parking automobiles in connection with adjacent commercial property, view of the area by trial judge constituted independent evidence which could be considered by the trier of facts in arriving at his conclusion and constituted substantial evidence in support of his findings consonant therewith.

10. Municipal Corporations ⇨621.63

An ordinance adopted by electors of sixth class city at special election revoking all zoning variances and prohibiting the granting of future variances was void in absence of hearings pursuant to requirements of zoning law that notice be given and hearings held as to possible effect of proposed ordinance upon property rights. Gen. Laws, Act 994.

11. Municipal Corporations ⚿121

Where grantee of zoning variances advised city before submission to electors of proposed ordinance revoking all variances that it would contest the legality of such action on ground that variances could not be revoked by such procedure and city failed to show that any of the acts alleged in its affirmative defense of estoppel were performed by city in reliance upon any conduct or representation of grantee, grantee was not estopped from attacking the validity of ordinance in action to enjoin its enforcement.

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Richard C. Waltz, City Atty., Richard L. Sieg, Jr., Assistant City Atty., Beverly Hills, Bodkin, Breslin & Luddy, Peter E. Giannini and S. V. O. Prichard, all of Los Angeles, for appellant.

Wright, Wright, Green & Wright, S. Earl Wright; O'Melveny & Myers, Rodney K. Potter and Jackson W. Chance, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by defendant (City of Beverly Hills) from two judgments in favor of plaintiff. The first action filed contains two counts, one for an injunction and one for declaratory relief.

The first count seeks to restrain the enforcement of the revocation of certain temporary variances in zoning ordinances, and the second count seeks a declaration respecting plaintiff's rights thereto. The second action, in certiorari and mandamus, is to review certain revocation orders of the zoning variances theretofore granted to plaintiff which had been adopted by defendants. The cases were consolidated for trial before the court without a jury. Separate judgments were entered and separate appeals taken which, since both actions involved the same issues, have been consolidated on appeal and will be disposed of together.

Facts: In 1936 defendant city had in effect Zoning Ordinance No. 443 which established the land use permissible for each parcel of land within the city. The greater portion of the city was zoned for single-family residential use. Commercial use was confined largely to the area enclosed by Santa Monica Boulevard on the northwest, the alley south of Wilshire Boulevard on the south, and Canon Drive on the northeast, and to so-called strip development along the major boulevards traversing the city. Apartment and multiple-dwelling use was in general confined to the area adjoining such commercial areas.

In 1939 the basic zoning ordinance was modified by the enactment of an ordinance changing the restrictions governing Zone R–4 to provide expressly that such properties might be used for parking in connection with adjacent commercial C–3 property when a variance had been granted in respect thereto.

In the fall of 1937 plaintiff entered into a lease with the owner of Lots 69, 72 and 73, located on the southwest corner of Wilshire Boulevard and Peck Drive. This lease required a three-story building to be constructed for plaintiff on the lot fronting on Wilshire Boulevard, with the two adjoining lots to be used for parking cars of customers of the new store. The lessor applied to the City Council for a zone variance to park cars of customers of the store about to be built. On May 10, 1938, defendant City Council, after notice and public hearings, adopted a resolution respective to Lots 72 and 73 reading as follows:

"It is for the best interests of the City of Beverly Hills, and the property owners and inhabitants thereof, and in furtherance of the public peace, health, safety, and general welfare, to grant a temporary variance from the zoning ordinance of said city as the same affects said lots for the purpose of permitting the parking of automobiles thereon."

Said resolution, after setting forth the conditions upon which the variance was granted, provided that nothing contained in the variance "shall prevent the City Council, in its discretion, from revoking or modifying this resolution, or the variance herein provided for after regular public hearings in regard thereto." Subsequently plaintiff went into possession of its new store under the lease and expended large sums of money in improvements upon the property. Thereafter plaintiff paved four lots, 65 to 68, on the east side of Peck Drive and used them for parking cars, these lots having been granted a zone variance by the resolution above set forth, which variance was continued in effect by subsequent Resolution No. 1162. Numerous other, similar zone variances were granted to other applicants in the same area.

In 1947 a group of citizens asked the City Council to call a special election for the purpose of enabling the voters of the city to vote on the matter of prohibiting future zoning variances and enforcing the existing zoning regulations. Plaintiff objected to the submission of this question to the electorate and gave notice that it would contest the legality of any such action so taken.

Subsequently Ordinance No. 698 was submitted to the electorate at a special election and adopted which provided for the revocation of all the variances theretofore granted and amended the zoning ordinance so as to prohibit the granting of any such variances in the future. At the time of the adoption of this ordinance plaintiff was using 9½ lots in Zone R–4 for parking the cars of its customers.

Plaintiff immediately filed the first action mentioned above to enjoin the enforcement of Ordinance 698 on the ground that it was not properly adopted, was arbitrary, unreasonable, and deprived plaintiff of its property without due process of law. After the first case was at issue and enforcement of the ordinance had been temporarily enjoined a group of citizens sought to have the City Council take steps to remove the contention that Ordinance 698 had not been properly enacted by revoking the variances granted to plaintiff.

When the City Council declined to take such action this group, in the election campaign in the spring of 1948, opposed the re-election of the councilmen who were running for re-election and proposed their own candidates, and during the campaign the major issue against the incumbent councilmen running for election was that they had failed to take action to revoke the zoning variances. This group was known as the "United Home Owners." Three of the persons active in it, Councilmen Gerth, Olson and Cotterell, were elected to the City Council. Two of these candidates, prior to the election, publicly stated that if they were elected they would proceed to take necessary steps to have all parking variances revoked. Upon their election these councilmen filled two vacancies by selecting Councilmen McConnell and Fisher.

In July, 1949, the City Council adopted Ordinance 720, which is essentially identical with the provisions of Ordinance 698, and Resolution 1350, which purported to revoke the variances in zoning ordinances previously granted permitting parking on lots as above described. After an extended trial the court held that plaintiff was entitled to the relief it sought in both proceedings and gave judgment accordingly.

[1] *Questions:* First: *Did the trial court err in granting plaintiff a trial de novo?*

No. Where there is pleading and proof that a local board has acted arbitrarily, capriciously, or fraudulently the superior court will, upon either mandamus or certiorari, afford petitioner a trial de novo. (Dierssen v. Civil Service Comm., 43 Cal.App.2d 53, 59, 110 P.2d 513; Vaughn v. Board of Police Comm'rs, 59 Cal.App.2d 771, 781, 140 P.2d 130; cf. Bank of America Nat. Trust & Savings Ass'n v. Mundo, 37 Cal.2d 1, 229 P.2d 345.)

In the present case the trial court found supported by substantial evidence (a) that three of the councilmen were biased and prejudiced and had determined in advance of hearings and presentation of evidence to vote for a resolution revoking the zoning ordinance variances in favor of plaintiff, and (b) that one councilman who voted in favor of the adoption of Ordinance 720 and Resolution 1350 had not heard the evidence presented to the council at two of the hearings nor had he seen or read transcripts of the oral proceedings taken at such hearings.

[2, 3] The City Council consisted of five members and it was necessary for the adoption of an ordinance or resolution that a majority of the quorum, consisting of three in this case, vote in favor of the resolution. (Deering's Gen.Laws, Act 5233, sec. 859.) Since one of the members was disqualified because he had not heard the evidence; two of the members were disqualified because of bias and prejudice and having prejudged the case; and one of the two remaining members voted against the ordinance and resolution, it is evident that Ordinance 720 and Resolution 1350 were passed arbitrarily and capriciously without affording plaintiff a fair and impartial judgment upon the evidence presented to the council.

[4] Therefore the rule set forth in Eastern-Columbia, Inc., v. County of Los Angeles, 70 Cal.App.2d 497, 161 P.2d 407, and Bank of America v. Mundo, supra, that where an examination of the proceedings before a local board discloses the board exercised its judgment fairly and impartially and in the absence of fraud, malice or arbitrary conduct the superior court upon review will confine itself to an examination of whether the evidence presented to the local body was substantial in support of its findings, is not here applicable and the trial judge properly granted a trial de novo.

[5] The various ordinances granting plaintiff a zoning variance provide that nothing contained in the variance "shall prevent the City Council, in its discretion, from revoking or modifying this resolution, or the variance herein provided for, after regular public hearings in regard thereto." It is to be noted that there was a requirement that there be a regular public hearing before the variances could be revoked. A public hearing contemplates a fair and impartial hearing at which competent evidence may be presented before a fair and impartial tribunal. (Albert Albek, Inc., v. Brock, 75 Cal.App.2d 173, 176[2], 170 P.2d 508; Grant v. Michaels, 94 Mont. 452, 23 P.2d 266, 270; Heath v. Mayor and City Council of Baltimore, Md., 49 A.2d 799, 803 et seq.; Inland Steel Co. v. N. L. R. B., 7 Cir., 109 F.2d 9, 20.)

[6] It is obvious under the trial court's finding of the disqualifications of the three city councilmen that plaintiff did not have a public hearing as provided in the ordinance permitting the zone variances. Therefore, on this ground also the trial court properly held Ordinance 720 and Resolution 1350 invalid.

[7] Second: *Was there substantial evidence to sustain the trial court's findings?*

Yes. It is unnecessary to cite authority in support of the proposition that where a trial court grants a hearing de novo and its findings are questioned on appeal, the appellate court's duty begins and ends with a determination that there is substantial evidence to sustain the findings of fact of the trial court.

[8] In the present case there is an abundance of evidence to support the findings of fact questioned by defendant city. The trial court found that as a result of the business development along Wilshire Boulevard it is indispensable to the public welfare to provide and maintain off-street parking, to take care of cars of customers who patronize business establishments in the city; that it was impossible to provide parking spaces for these automobiles in the established commercial-zoned areas since all the lots not already built upon are presently in use for such parking; that the existence of this shortage required the use of over 1,200 curb-parking spaces in the residential zones, and that the result of prohibiting parking upon the lots to which variances had heretofore been granted would be proportionately to increase such use of curb-parking space in the residential area; that there is no noise, dust or fumes arising from the use of the parking lots which are offensive to persons of ordinary sensitivity and that the use of said lots would not in any respect depreciate the value of surrounding residential property; that during the Christmas shopping season and on sale days considerable traffic congestion occurs

in the vicinity of the parking lots in question, but the effect of prohibiting the use of such lots would be to increase rather than decrease such congestion, and the prohibiting of parking upon plaintiff's parking lots does not, did not and cannot in any respect promote the public peace, health, safety or general welfare.

[9] These findings were supported by the evidence of three city planning experts and evidence of other witnesses including the findings of the City Council of defendant city over a period of many years that the parking lots in question, by relieving traffic congestion and taking cars off the streets, were beneficial to the public welfare. In addition, the trial judge inspected the area in question. This "view" of the area was independent evidence which could be considered by the trier of facts in arriving at his conclusion and is substantial evidence in support of his findings consonant therewith. (Sindell v. Smutz, 100 Cal.App.2d 10, 15[1], 222 P.2d 903; Rowland v. City of Pomona, 82 Cal.App.2d 622, 624 [1], 186 P.2d 447.)

[10] Third: *Was Ordinance 698 invalid and ineffective to terminate plaintiff's rights?*

Yes. In 1947 the City Council called a special election for the purpose of enabling the voters of defendant city to vote on the matter of prohibiting future zoning variances and enforcing existing zoning regulations. Two opposing factions had urged the council to submit two contrary proposals. The Zoning Committee of defendant Council recommended that public hearings be held to determine the final wording of those proposals and that they then be submitted to the electorate. This was done and Ordinance 698 was adopted. However, no hearings were held pursuant to the requirements of the Zoning Law of 1917 (Stats.1917, p. 1419, Gen.Laws, Act 994) that notice be given and hearings held as to the possible effect of the proposed zoning law upon property rights.

In the absence of compliance with such provisions of the Zoning Act of 1917, an ordinance adopted by the electors of Beverly Hills, a city of the sixth class, is void. (Hurst v. City of Burlingame, 207 Cal. 134, 138 et seq. [3], 277 P. 308.)

Defendant's contention that Hurst v. City of Burlingame, supra, is not controlling for the reason that the court did not consider the effect of Article IV, section 1 of the California State Constitution is devoid of merit because an examination of the briefs in such case discloses that prior to the decision Article IV, section 1 of the Constitution was called specifically to the attention of the Supreme Court and an argument similar to the one now presented to this court by defendant was urged. This decision is binding upon us.

Dwyer v. City Council of the City of Berkeley, 200 Cal. 505, 253 P. 932, also relied upon by defendant, is clearly not in point, for the Supreme Court in the Hurst case (207 Cal. at page 142, 277 P. at page 312) says of the Dwyer case: "It also appeared that the city council had taken all of the requisite preliminary steps in order that the measure might become a valid city ordinance and had actually adopted the same."

[11] Fourth: *Is plaintiff estopped to attack the validity of Ordinance No. 698?*

No. The trial court found, supported by substantial evidence, that none of the acts set forth in defendant city's affirmative defense of estoppel were performed by the city in reliance upon any conduct or representation of plaintiff. The court likewise found that plaintiff had advised the city of its position that the parking variances could not be revoked by means of the proposed initiative election and that plaintiff would contest the procedure through appropriate litigation. In the light of this finding which was supported by evidence no estoppel arose.

In view of our conclusions no useful purpose would be served by discussing other propositions urged by counsel for defendant city since, should we agree with them, it would not result in a reversal of either judgment.

The judgments are and each is affirmed.

MOORE, P. J., concurs.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

107 Cal.App.2d 351

EDDLEMAN v. DEAVEL et al.

Civ. 18262.

District Court of Appeal, Second District,
Division 3, California.
Nov. 7, 1951.

Carolyn Eddleman brought an action against Harold R. Deavel and Dorothy Rhodes Deavel to terminate the right of defendants in and to residential property, and to quiet title to such property. The Superior Court of Los Angeles County, Clarence E. Johns, Judge pro tem, rendered a judgment adverse to the defendants and the defendants appealed. The District Court of Appeal, Shinn, P. J., held that where plaintiff who agreed to sell realty to defendants under contract calling for payment of purchase price in installments, temporarily waived strict performance in making payments as they fell due, and contract did not give plaintiff right upon defendants' default to declare immediately due the unpaid balance of purchase price, and defendants tendered payment of arrearages after receipt of notice demanding payment of arrearages, plaintiff had duty to accept tendered amount and plaintiff was not entitled to demand unpaid balance of purchase price.

Judgment modified.

1. Vendor and Purchaser ⚷187

Where agreement for purchase of realty by installment payments provides that in case of purchaser's default in any payment when due, or failure to comply with conditions, covenants and agreements stated, amounts already paid may be retained by vendor as consideration to vendor for making agreement, and that vendor will be released from further obligations under agreement, where strict performance has been waived by vendor, purchaser is entitled to notice reinstating requirement for strict performance and allowing a reasonable time for compliance before he will be considered in default.

2. Vendor and Purchaser ⚷187

Where plaintiff who agreed to sell realty to defendants under contract calling for payment of purchase price in installments, temporarily waived strict performance in making payments as they fell due, and contract did not give plaintiff right upon defendants' default to declare immediately due the unpaid balance of purchase price, and defendants tendered payment of arrearages after receipt of notice demanding payment of arrearages, plaintiff had duty to accept tendered amount and plaintiff was not entitled to demand unpaid balance of purchase price. Civ. Code, § 1515.

3. Quieting Title ⚷49

Where plaintiff who agreed to sell realty to defendants under contract calling for payment of purchase price in installments, temporarily waived strict performance in making payments as they fell due, and plaintiff improperly refused to accept tender of payment of arrearages which defendants made after receipt of notice demanding payment of arrearages, and improperly demanded payment of unpaid balance of purchase price, although contract did not give plaintiff right upon defendants' default to declare immediately due the unpaid balance of purchase price, and defendants, after receipt of subsequent notice of default, again offered to pay all delinquent payments, decree in plaintiff's quiet title action should have allowed defendants time within which to bring payments up to date, with plaintiff's title being quieted if defendants failed to pay sum due.

L. U. Everhart, Pasadena, and Edward P. Hart, Los Angeles, for appellants.

Frank L. Stearns, Los Angeles, for respondent.

SHINN, Presiding Justice

This is an action brought by plaintiff vendor to terminate the rights of defendants Deavel in and to a residential property in South Pasadena, and to quiet title to the same. The theory of the action is that defendants defaulted under their contract to purchase the property. The sequence of events alleged in the complaint is the following: On March 1, 1947, defendants agreed to buy the property for $7,500, payable $60 down and $60 per month commencing April 1, 1947, which payments would include interest at the rate of five per cent per annum, payable monthly; on November 30, 1948, defendants were in default and were given notice demanding payment of the arrearage within five days; on July 6, 1949, defendants were notified that because of their default their rights under the contract were terminated; that $60 per month is the reasonable rental value of the premises; that defendants have remained in possession to plaintiff's damage in the sum of $500. Defendants answered, alleging that plaintiff had waived strict performance by accepting payments after their due dates, that on December 6, 1948, defendants tendered the total amount of the accrued payments on the contract, the tender was refused, they later repeatedly offered to make all delinquent payments on account of the unpaid balance, which offers were refused and defendants, with the knowledge and consent of plaintiff, had paid taxes for the years 1948, 1949 and 1950. Defendants made no tender of any sum at the time they answered, nor later. They sought no affirmative relief but prayed only that plaintiff be awarded none. Plaintiff was given judgment terminating the contract and quieting her title. Defendants appeal.

The ground of appeal as stated in the brief of defendants is the following: "The decree rendered, upon the undisputed facts, is contrary to the law of this jurisdiction." The evidence disclosed that for two years defendants had been occupying the premises as plaintiff's tenants at a rental of $55 per month. There was undisputed evidence that the rental value was $60 per month. On March 1, 1947, defendants agreed to purchase the property on the terms above stated. They made the 15 payments that fell due between May 1, 1947 and July 1, 1948, inclusive. The April and May, 1948, payments were not made until May 13th and 25th; the June and July payments were not made until July 12th. In only four instances were payments made on or before the first day of the month. Plaintiff did not object to these delinquencies. Early in October Mr. Deavel wrote plaintiff, who was in the hospital, that they would get caught up in their payments in a short time. On November 30, 1948, plaintiff's attorney wrote defendants that it appeared they did not intend to carry out their contract and that he was authorized to take legal action "unless definite arrangements made within five (5) days from date hereof." On December 4th plaintiff's attorney told Mr. Deavel that all his client wanted was to have the payments brought up to date; that he would talk with her and call back. He did not call. On December 6th Mr. Deavel mailed a cashier's check for $300 to plaintiff's attorney. Shortly thereafter the latter wrote defendants stating that their offer was not acceptable and demanding "payment in full plus costs and attorney's fees on or before December 11, 1948." The $300 cashier's check was returned to defendants. Defendants deposited $300 for the opening of an escrow and on December 14th their attorney wrote plaintiff's counsel stating that an escrow had been opened with the bank, and $300 had been deposited with instructions that upon receiving a grant deed for the property from plaintiff, with policy of title insurance, the remaining unpaid purchase price "shall be deposited in said escrow to the credit of Carolyn E. Eddleman." Receiving no reply, defendants withdrew the $300 from the escrow. On July 5, 1949, defendants were served with a written notice of default and demand for possession and $1,740 claimed as rent for the property. This was answered by letter of defendants' attorney which stated, in part: "Although you have heretofore refused to accept the tender of the delinquent payments we are again offering to reinstate the contract and to pay all of the delinquent payments which may now be due under the contract. If you choose to refuse our offered payment, at this time, we shall be compelled to litigate the matter." The present action was filed November 2, 1949.

[1] The agreement provided that in case of buyer's default in any payment when due, or failure to comply with the conditions, covenants and agreements stated, the amounts already paid might be retained by the seller as consideration to

the seller for making the agreement, and the seller would be released from all further obligation under the agreement. Defendants say that under such an agreement where strict performance as to time has been waived by the vendor, the vendee is entitled to notice reinstating the requirement for strict performance and allowing a reasonable time for compliance, before he will be considered in default. Retsloff v. Smith, 79 Cal.App. 443, 249 P. 886. This is a familiar and well established rule with respect to such contracts. Plaintiff does not question it. She says only that she was not required to accept the $300 tendered in December of 1948, and that defendants have been in default ever since that time.

As previously mentioned, the answer of defendants was not accompanied by a tender of the sums then due, nor did they seek specific performance of the agreement. They did not make a tender at the trial, but relied on tenders previously made. They did, however, insist that they had a right to make the delinquent payments and they asked the court to extend them that right rather than to declare their interest in the property forfeited; but they did not offer evidence as to their ability to pay what was due.

[2] In view of the temporary waiver by plaintiff of strict performance in making the payments as they fell due, and the letter of her attorney under date of November 30, 1948, it was unquestionably the duty of plaintiff to accept the sum of $300 which was the amount of delinquencies at that time. Her response to the tender was a demand for payment in full, which presumably was a demand for the unpaid balance of the purchase price. The agreement did not contain any provision giving the vendor the right upon the vendees' default to declare immediately due the unpaid balance of the purchase price. The demand for payment in full was an additional refusal by plaintiff to comply with the terms of the agreement. Plaintiff's notice of default, dated July 5, 1949, evidenced plaintiff's continued unwillingness to accept any further payments on account of the purchase price. Defendants' reply of July 8, 1949, was a sufficient tender of the amounts due up to that date. They were not required to make further tenders. (Civ.Code, sec. 1515.)

[3] Upon the undisputed facts and under applicable principles of law, the decree should have allowed defendants a time to be fixed by the court within which to bring their payments to date. In the event of their failure to pay the sum due, plaintiff's title should be quieted. In view of the large amount owing by defendants, they should be required to deposit in court the sum of $120 and should thereupon be granted 60 days within which to pay the balance of the sum found due.

It is to be noted that plaintiff not only sued for possession, but also for the value of the use and occupation of the premises and damages for their retention, and that the court refused to allow her a judgment for money, although there was a trial of that issue. The rental value of the property was shown to be $60 per month, equal to the accrued payments which, including October, 1951, amount to $2,340. In view of the failure of defendants to deposit any money in court, and the absence of evidence of their ability to pay, plaintiff should not be deprived of a judgment for the value of the use and occupation of the premises in the event defendants are unable or unwilling to pay the amount due as hereinafter stated. Their offers to pay, unless made good, do not justify their depriving plaintiff of possession for more than three years without compensation.

The judgment is modified to read as follows: The agreement described in the complaint will be in full force and effect and binding upon the parties, provided, within five days after notice of the filing of this judgment, defendants pay into court for plaintiff $120, and within 60 days thereafter the sum of $2,340; if defendants fail to pay either of said sums within the times specified, a further decree will be entered declaring terminated the rights of defendants under the agreement and quieting plaintiff's title to the property; provided, further, that instead of presently accepting a decree quieting her title plaintiff may, if she so elects, have the action set for trial and prosecute her demand for damages and the value of the use and occupation of the premises since August 1, 1948, as well as her demand that her title be quieted.

WOOD and VALLÉE, JJ., concur.

BURTIS v. UNIVERSAL PICTURES CO., Inc., et al.*

Civ. 18270.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1951.

Hearing Granted Jan. 3, 1952.

Action by Thomson Burtis against Universal Pictures Company, Inc., Warren Wilson, Oscar Brodney, Joseph Gershenson, and others, for infringement of a literary property. The Superior Court of Los Angeles County, Henry M. Willis, J., rendered judgment for plaintiff, and the named defendants appealed. The District Court of Appeal, Per Curiam, held that the evidence was sufficient to show similarity and plaintiff's protectible property in the story alleged to have been pirated by the defendants.

Judgment affirmed.

1. Literary Property 🔑9

In action for infringement by moving picture of common-law copyright in unpublished manuscript, evidence was sufficient to sustain finding of similarity.

2. Appeal and Error 🔑1001(1)

Where the evidence substantially supports the jury's conclusion, the appellate tribunal cannot disturb the judgment.

3. Literary Property 🔑9

In action for infringement of common-law copyright of literary property, liability for damages must rest upon substantial evidence of similarity between plaintiff's literary property and the moving picture produced by the defendants.

4. Literary Property 🔑9

In action for infringement of common-law copyright of literary property, plaintiff must establish ownership of a protectible property interest, unauthorized copying by the defendant and damage resulting therefrom.

5. Literary Property 🔑9

In action for infringement by moving picture of common-law copyright in unpublished manuscript, evidence established plaintiff's protectible property in the manuscript.

Loeb & Loeb, Harry L. Gershon, Los Angeles, Herman F. Selvin, Los Angeles, of counsel, for appellants.

Harold A. Fendler, Los Angeles, Jacques Leslie, Beverly Hills, for respondent.

PER CURIAM.

This is an appeal from the judgment following a jury verdict for plaintiff in an action for damages.

Appellants' "Introductory statement" recites that the action is for "plagiarism" in which "plaintiff contends that defendants infringed upon his common law copyright in an unpublished story manuscript of 59 pages written by him in 1938 and entitled 'Manhattan Masquerade'. The claimed infringement is alleged to have resulted from defendants' production and distribution in 1946 of the motion picture 'She Wrote the Book', starring Joan Davis and Jack Oakie. It is not claimed that there has been piracy of specific scenes or sequences, gags or dialogue. Plaintiff's claim of piracy rests upon his contention that defendants appropriated and used the 'central dramatic situation', Goulding v. R. K. O. Pictures, Inc., 35 Cal.2d 690, 221 P.2d 95, of his story in the production of their motion picture.

"The evidence upon which plaintiff relies in support of his contention is that of similarity between the story and the picture with respect to the broad story outline of each; the idea of a woman impersonating the author of a supposedly autobiographical best-selling book depicting the amorous conduct of a beautiful young lady of easy virtue. The pseudo-authoress is feted in the manner befitting her assumed character and attempts by her conduct to justify the reputation she has supposedly earned, almost losing thereby the love of a young man of high moral character. It is defendants' contention that such similarities cannot support a verdict of plagiarism in that they arise only from the common use of a broad theme or idea that, as a matter of law, is not protectible by common law copyright. This appeal presents the question whether under the well-recognized principles of the recently announced decision of the Supreme Court in Golding v. R. K. O. Pictures, Inc., 35 Cal.2d 690, 221 P.2d 95, the judgment is supported by substantial evidence of similarity between plaintiff's story and defendant's motion picture with respect to protectible material contained in the former. Defendants contend that the judgment is not so supported. Defendants also contend that the judgment must be reversed for the reasons that the trial court erroneously instructed the jury as to the applicable law, the damages awarded are manifestly excessive, and plaintiff's counsel was guilty of prejudicial misconduct".

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* Subsequent opinion 256 P.2d 933.

It is contended by appellant that the evidence was insufficient to sustain the judgment; that the court erroneously instructed the jury, "That plaintiff could recover if the jury found that defendants copied a substantial portion of his story without reference to the question whether the portion copied was protectible"; that the court erred in instructing the jury on the subject of ownership; that the court erred in the instruction on damages and that the damages were excessive and that plaintiff's counsel "committed prejudicial misconduct".

On the other hand, respondent contends that,

"1. Appellants err in stating that plaintiff does not claim 'piracy of specific scenes or sequences' but relies wholly upon similarities in 'the common use of a broad theme or idea'. As we shall hereafter show plaintiff contends (and the jury impliedly found) that a substantial portion of plaintiff's story including major characters, characterizations, motivation and a substantial number of scenes and incidents, appearing in the same sequence and order, were all pirated from plaintiff's work. Constant use and repetition throughout their brief by appellants of such words as 'ideas' or 'themes' is a basic misconception of plaintiff's theory, testimony, and of the evidence supplied by plaintiff's script and defendants' motion picture.

"2. Appellants blind themselves to the impeachment of their principal witnesses and to the inferences of bad faith which must necessarily have been drawn by the jury from the constant evasion, contradiction and inconsistent statements of appellants' witnesses Gershenson, Wilson, etc. Appellants err in attempting to whitewash this testimony as 'uncontradicted and unimpeached'.

"3. Appellants' attack upon the jury instructions is completely unwarranted because the primary error complained of by appellants was incorporated in the instructions which appellants themselves requested. In any event, any error contained in these instructions was wholly cured by additional instructions requested by respondent, given by the trial court, and which are completely ignored by appellants. It is only by a complete distortion of one instruction and the misconstruction of others that appellants can imply interpretations which are contrary to the express instructions actually given by the trial court.

"4. The alleged misconduct of respondent's counsel was considered of such little importance by appellants at the trial that their counsel stated to the court that an admonition to the jury was 'perhaps unnecessary'. Nevertheless the trial court immediately gave such admonition and in denying a motion for new trial expressly ruled that no misconduct had occurred or in any event that appellants had not been prejudiced thereby.

"5. Appellants err in contending that a motion picture made, owned and copyrighted by a third party (Columbia Pictures Corporation) must be deemed by this court as conclusive evidence 'refuting plaintiff's claim of originality' or 'establishing that much of the material of plaintiff's story is in public domain'. Originality is a question of fact (impliedly found by the jury) and material which is copyrighted by a third party is certainly *not* 'in public domain'. Appellants cannot exonerate their piracy from respondent by asserting that they '*could have* obtained the story from another source'. Golding v. R.K.O. Radio Pictures, Inc., 35 Cal.2d 690, 697, 221 P.2d 95. Italics by Supreme Court.

"6. Appellants completely overlook the basic rule that questions of originality, similarity and copying are questions of fact for the jury and an appellate court should not be asked to substitute its own impressions for the findings of fact made by the trial court or jury.

"7. Appellants err in constantly referring to certain 'differences' and 'dissimilarities' between respondent's story and appellants' picture. None of these relate to the basic counterpart in story, characterization, motivation and sequence of incident and event; but even if they did so relate and 'such differences are shown to exist, the question remains for the trier of fact to decide the issue' ".

The record reveals that plaintiff had been a professional writer for thirty years. And, as plaintiff's brief recites, "Some time during the year 1938 plaintiff originated, created and wrote a literary work subsequently titled 'Manhattan Masquerade'. This literary work was in the form of a thirteen-page outline synopsis designed for development into a motion picture script; and which was submitted to the defendant on September 1, 1938. This original submission was made to Mr. Joseph Pasternak, then a producer employed by the defendant Universal Pictures Company. Based upon this thirteen-page synopsis, a written agreement was entered into between the plaintiff and the defendant Universal Pictures Company which provided that in consideration of the payment of $250.00 by the defendant Universal Pictures Company, to plaintiff, plaintiff would write and complete an original story of not less than 10,000 words suitable for a motion picture. By this agreement plaintiff granted to defendant an option to purchase this story for the sum of $3,250.00, and the agreement further provided in paragraph 2 thereof 'in the event that we (Universal) do not exercise said option, we shall have no right, title or interest whatsoever in or to said story'. Subsequently the plaintiff wrote an original story of fifty-nine pages and consisting of some 20,000 words which was delivered to Universal Pictures on November 14, 1938.

"It was admitted by stipulation that the defendant Universal Pictures retained both the thireteen-page synopsis and the fifty-nine-page screen treatment in their files continuously from the date of first submission through the date of the filing of the action. It was furthermore admitted that a synopsis and review of the plaintiff's literary work was prepared by one Maurice Tombragel, an employee of Universal, and that his review and synopsis were retained in the Universal files at all times after September 14, 1938.

"Universal did not exercise its option and consequently all rights of ownership remained in plaintiff.

"During the year 1946 defendants produced and released the motion picture entitled 'She Wrote the Book'. The jury found that the defendants' picture 'She Wrote the Book' substantially copies the plaintiff's work 'Manhattan Masquerade,' thereby rendering it valueless.

"It is an admitted fact in the case that a synopsis of plaintiff's story was mimeographed and placed in a bound volume together with synopses of other story properties which had been submitted to Universal and had either been purchased, produced or rejected. This volume was one of a set of volumes of which there were available on the Universal Picture Company's lot approximately thirty complete sets; one of which was in the office of defendants' executive producer, Joseph Gershenson, who produced the motion picture alleged to have pirated plaintiff's story. There were also one or two sets of these volumes in the Universal Story Department available to all producers and writers on the lot, including the defendants Oscar Brodney and Warren Wilson, who claim they originated defendants' motion picture 'She Wrote the Book.'"

[1] It would serve no useful purpose to detail the stories. They were read to the jury and the motion picture was exhibited. This court has likewise read the stories and seen the moving pictures which were exhibited to the jury and is satisfied that the evidence is sufficient to sustain the implied finding of similarity. Golding v. R.K.O. Pictures, Inc., supra, 35 Cal.2d at page 698, 221 P.2d 95.

[2] During the trial which started on Monday and was concluded the following Tuesday, evidence as to the facts above recited was introduced. That the evidence substantially supports the jury's conclusion there can be no question and the absence of authority of an appellate tribunal to disturb the judgment in such circumstances is well settled.

[3] The attempt by appellant to inject a question of law in the within appeal is unavailing. The same question was presented in Golding v. R.K.O. Pictures, Inc., 35 Cal.2d 690, 221 P.2d 95, 100, which is cited by both parties in the within action. There the opinion recites:

"The parties are directly at variance as to whether this issue of similarity presents a question of law or of fact. The only direct statements in the cases appear to confirm the playwrights' position that it is a question of fact for the jury. Universal Pictures Co. v. Harold Lloyd Corp., 9 Cir., 162 F.2d 354, 360; Dam v. Kirke La Shelle Co., C.C.[N.Y.] 166 F. 589. However, they extend this point too far when they contend that the determination by the jury of this issue 'is conclusive' upon appeal. No finding of fact is binding upon an appellate court if it is not supported by substantial evidence. The function of this court, when the contention of insufficiency is made, is to examine the record to ascertain whether there is evidence to support the verdict of the jury.

"The situation presented by the issue of similarity is a peculiar one. There is always *some* evidence in the record. That is to say, if plagiarism is claimed there will always be a play by the plaintiff and one assertedly copied from it by the defendant. Yet the mere existence of two dramatic works in evidence does not, *per se,* constitute sufficient evidence of similarity. It is necessary to read or view the two works to see if they present any substantial similarity insofar as the plaintiff's property in his work is concerned. This is not to say that the appellate court will substitute itself for the jury to decide what it thinks of the issue of similarity, it is merely a question of determining if there is any substantial evidence of similarity to support the jury's finding."

[4, 5] And with regard to the "protectibility" issue argued by appellant the court in the Golding case, supra, noted that, "If it is established that the plaintiff has a protectible property in his literary work, and there was copying, the elements of liability for infringement or piracy are established and all that remains is the determination of damages. On this latter issue, the rules are the same with regard to literary property as apply to any other form of personal property." Cases cited. In the within action there is substantial evidence establishing plaintiff's "protectible property" in the story alleged to have been pirated by defendant.

An examination of the instructions complained of by appellant reveals no prejudicial error. The instructions as requested by both parties and given by the trial court were proper and fair.

In the light of the decisions in such cases the damages in the within action do not appear to be excessive and with regard to the alleged misconduct on the part of plaintiff, the argument relied on by appellant is not sustained by the record.

The judgment is affirmed.

107 Cal.App.2d 469

COYNE v. NELSON et al.

Civ. 18318.

District Court of Appeal, Second District, Division 3, California.

Nov. 9, 1951.

Rehearing Denied Dec. 5, 1951.

Hearing Denied Jan. 8, 1952.

A. B. Coyne brought an action against Dan Nelson and others, and J. E. Ebbert, for damages for false imprisonment. The Superior Court of Los Angeles County, J. F. Moroney, J., rendered a judgment adverse to the defendant J. E. Ebbert and denied such defendant's motion for a new trial, and such defendant appealed from the judgment and order denying the motion for a new trial. The District Court of Appeal, Vickers, J. pro tem., held, inter alia, that evidence justified finding that plaintiff, a real estate broker, was falsely accused by the appealing defendant, and of stealing property, and was falsely arrested and imprisoned by the appealing defendant against plaintiff's will, and that in so doing the appealing defendant did not believe plaintiff had committed any crime and did not have reasonable grounds or probable cause for so believing, and that the appealing defendant acted maliciously and to plaintiff's damage.

Judgment affirmed and appealed from order dismissed.

1. Appeal and Error 🔑1010(1)

Where there was substantial evidence together with inferences that could be reasonably and legitimately drawn therefrom to support all findings of charge made in action for damages for false imprisonment, District Court of Appeal could not draw contrary conclusions.

2. False Imprisonment 🔑31

In action for damages for false imprisonment, evidence justified finding that plaintiff, a real estate broker, was falsely accused by defendant of stealing property and was falsely arrested and imprisoned by defendant against plaintiff's will, and that in so doing defendant did not believe plaintiff had committed any crime and did not have reasonable grounds or probable cause for so believing, and that defendant acted maliciously and to plaintiff's damage.

3. False Imprisonment 🔑39

In action for damages for false imprisonment the trial court as the trier of fact could completely reject defendant's testimony if it felt impelled so to do. Code Civ.Proc. § 1847.

4. False Imprisonment 🔑41

In action for damages for false imprisonment, finding that when action was commenced, and prior thereto, plaintiff was duly licensed real estate broker and was entrusted with money and property belonging to his clients and maintained a reputation for fidelity and integrity, was not irreconcilable with finding that defendant falsely imprisoned plaintiff and that such false imprisonment injured plaintiff in his business as real estate broker and caused plaintiff to be greatly hampered in following his chosen business and profession.

5. False Imprisonment 🔑36

Where plaintiff real estate broker was falsely accused by defendant of stealing property, and was falsely arrested and imprisoned against plaintiff's will by defendant who did not believe plaintiff had committed any crime and who had no reasonable grounds or probable cause for so believing, and defendant acted maliciously and to plaintiff's damage, arrest of plaintiff, plaintiff's detention, accusations of theft and consequent embarrassment, humiliation and fear to plaintiff and plaintiff's wife, precluded award of $750 compensatory damages, and award of $500 punitive damages, from being so grossly disproportionate to sum reasonably warranted by facts as to shock sense of justice and raise presumption that it was result of passion and prejudice. Civ.Code, § 3294.

6. False Imprisonment 🔑22

In action for damages for false imprisonment brought against a defendant who arrested plaintiff without a warrant, defendant had burden to prove a proper justification for arrest.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Roland Wilson, Deputy City Atty., John F. Feldmeier, Deputy City Atty., Robert Burns, Deputy City Atty., all of Los Angeles, for appellant.

Jerrell Babb, Los Angeles, for respondent.

VICKERS, Justice pro tem.

Action for damages for false imprisonment. Judgment for plaintiff.

Plaintiff-Respondent filed suit against the appellant Ebbert, a police officer, and several other defendants for damages for false imprisonment. After trial before the court without a jury, the plaintiff having dismissed as to the defendants Dan Nelson and L. M. Nevarez, the court gave judgment against the appellant and the defendants Michael Krempels and James Snyder for $750, as compensatory damages, and against the appellant and the defendant Michael Krempels for $500, as punitive damages. Thereafter the appellant and these defendants moved for a new trial. The court denied such motions. From the judgment and the order denying a new trial Ebbert alone appeals. The appellant attacks the judgment on the ground that the evidence does not support some of the findings and that the findings as to compensatory damages are irreconcilable.

The court found in part as follows: That the respondent, a real estate broker, was falsely accused by appellant (and other defendants) of stealing property and was falsely arrested and imprisoned by appellant against respondent's will; that in so doing appellant did not believe respondent had committed any crime or have reasonable grounds or probable cause for so believing; that appellant acted maliciously and to plaintiff's damage.

A reading of the reporter's transcript discloses the following evidentiary facts which the court was entitled to believe: That for several years prior to May 14, 1948, respondent had been a successful real estate broker; that just prior to and on May 14, 1948, the defendants Krempels and Dan Nelson and the respondent were engaged in a complicated real estate transaction involving a motel in Atwater, California; that respondent was to receive a $3,000 commission from Krempels; that during the course thereof Krempels, through the respondent, exchanged certain diamonds for a house trailer (referred to generally by the witnesses as "the bus"), owned by one Lyton; that Lyton, at Krempels' suggestion, delivered "the bus" to the respondent together with the pink slip therefor assigned in blank; that respondent thereupon executed and delivered his promissory note, dated May 3, 1948, in the sum of $4,500, to and in favor of Krempels and assigned to Krempels his $3,000 commission; that there was an understanding between Krempels and respondent that respondent would sell "the bus" and deliver the proceeds of the sale to Krempels; that shortly thereafter respondent brought "the bus" to Los Angeles and to San Fernando to find a buyer. It further appears that during the course of the transaction the respondent on April 11, 1948, executed and delivered his check in the sum of $10,000 to and in favor of Nelson and that at the time of the delivery thereof the respondent did not have sufficient funds in the bank, upon which the check was drawn, to meet the check but that he so informed Nelson and Krempels at the time of issuance and further informed them that he would obtain the necessary funds from another real estate transaction and would deposit them to cover the check; that shortly before May 14, 1948, the date of the claimed false imprisonment, the defendant Snyder was brought into the transaction with the intent of all parties that he would be substituted for and take the place of the respondent. It further appears that during the day time of May 14, 1948, Krempels caused a police officer of the City of San Fernando to investigate the respondent, who was then living with his wife and children in "the bus" in that city, upon a charge that the respondent had stolen "the bus", but that after a discussion with the respondent, during which he exhibited to that police officer the pink slip and his policy of insurance covering "the bus", the officer informed Krempels that there was no ground for an arrest of the respondent; that on the evening of the same day Krempels, Nelson and Snyder went to the office of Attorney Joseph Forno in Los Angeles and discussed some phases of the matter with him and at that time Krempels, Nelson or Attorney Forno, or all of them, telephoned the appellant, a police officer of the City of Los Angeles, who was off duty, at his residence in Hollywood; that that night the defendants Nelson, Snyder and Krempels drove to appellant's residence in Hollywood; that after some discussion Nelson loaned Krempels $100 in currency and Krempels handed some currency to the appellant; that thereupon Nelson, Snyder, Krempels and appellant and a friend of appellant, named Boyd, drove to the place where the respondent was living in "the bus" arriving about 9 p. m.; that appellant knocked on the door of "the bus" and when the respondent and his wife came to the door announced that he was a police officer and intended to take the respondent "in"; that upon being asked for his authority he produced a pair of handcuffs and stated that they were all the authority he needed; that respondent, who had retired, was instructed by the appellant to dress and thereupon, over his protest, appellant forcibly took him to the automobile and forced him to enter the same; that appellant told respondent and his wife that he was going to take him to jail or to room 21 in the City Hall of Los Angeles (police headquarters) and permitted respondent's wife to telephone his attorney, Thomas Connell; that respondent demanded to be taken to a judge or that he be released and permitted to leave the automobile, and attempted to get out, whereupon appellant handcuffed his arms behind him; that respondent and appellant, Krempels, Nelson and Boyd were then driven by Snyder to the rooms of Krempels and Nelson in the Rosslyn Hotel. It further appears that during the trip respondent was seated in the rear of the car between appellant and Boyd, who he thought was a police officer, and at Nelson's suggestion the handcuffs were removed; that Krempels accused respondent of stealing "the bus" and stated he wanted the $4,500 or the pink slip and "the bus"; that respondent refused to comply and demanded that he be taken to jail or before a judge; that appellant asked respondent if he had the pink slip; that nothing was said about the $10,000 check; that upon arrival at the rooms of Krempels and Nelson the respondent demanded that he be allowed to call his lawyer but the appellant refused to let him do so and ordered him to sit in a certain chair and to remain there; that between 30 minutes and an hour thereafter appellant permitted respondent to call his lawyer Connell, which he did; that Mr. Connell arrived about 30 minutes thereafter; that respondent was detained in the rooms until about 4 A. M. the next morning when appellant told him he could go home; that during the time that respondent was detained in the rooms Krempels kept insisting that the respondent pay him the $4,500 or surrender the pink slip and "the bus", which the respondent refused to do and stated that Krempels would have to pay him the $3,000 commission due him from the real estate transaction; that no mention was made of the $10,000 check; that respondent was not taken to jail or before a magistrate and was returned to "the bus" in San Fernando by defendant Snyder about daylight. It further appears that appellant made no written report of the affair until May 20, 1948, when he signed two memorandum reports, in one of which he made no reference to the $10,000 check matter and in both of which he originally said Krempels was on the trip to San Fernando (this later changed to Snyder); that on May 19th defendant Nelson swore to a criminal complaint charging the respondent with having issued the $10,000 check without sufficient funds and a warrant was issued; that on May 24th the respondent surrendered under the warrant and thereafter was discharged at the preliminary hearing. It further appears that as a result of the acts complained of respondent and his wife were greatly humiliated, embarrassed and fearful of what was going to be done with him; that it became common gossip in the neighborhood where respondent lived that he had been arrested for stealing "the bus"; that respondent was required to move from his place of business and lost one or more business associates who discontinued their practice of referring real estate business to him; that he gave up the real estate business.

[1-3] It is apparent from the above recital that there was substantial evidence together with the inferences that could be reasonably and legitimately drawn therefrom, to support each and all of the findings attacked by appellant. This being so an appellate court can not draw contrary conclusions. Hughes v. Oreb, 36 Cal.2d 854, 856, 228 P.2d 550. It is true that evidence was received which directly contradicted much of that recited above but it is apparent that the court did not believe it. This was particularly true as to the testimony given by appellant to support his contentions that he had reasonable cause to believe that respondent had committed a crime, arrested him for issuing the $10,000 check without sufficient funds to cover it, and acted in good faith and without malice. In addition to the testimony given by other witnesses contradicting appellant he gave much testimony that was equivocal and sometimes contradicted his earlier testimony. His attempts to explain his delay in making a report of the arrest, the fact that one report spoke only of "the bus" transaction and that both of them originally listed Krempels as having been present on the trip to San Fernando are examples of this. The court (the trier of fact) had the right to completely reject appellant's testimony if it felt impelled so to do. Code Civ.Proc. sec. 1847; Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. The court may well have believed that the appellant was solely actuated by a desire to assist Krempels in forcing respondent to pay the $4,500 or deliver "the bus" and the pink slip to Krempels and that the consideration for such assistance was a considerable sum of money given to appellant by Krempels.

Appellant urges that there is an irreconcilable conflict between findings II and VI which requires a reversal of the judgment, because finding II declares that at the time of the commencement of the action (November 12, 1948), respondent's reputation and business was good, while finding VI declares the false imprisonment greatly hampered respondent in his business. These findings read as follows:

"II

"It is true that at the time of the commencement of this action and prior thereto, and particularly on or about the 14th day of May, 1948, the plantiff A. B. Coyne was a duly and regularly licensed real estate broker, doing business in the State of California, having his principal place of business in the City of Los Angeles, County of Los Angeles, State of California, and as a real estate broker was entrusted with sums of money and other property belonging to his clients, and did maintain a reputation for fidelity and integrity, and that in the ordinary course of said business and profession, plaintiff's clients did repose confidence in plaintiff's good faith and honesty. * * *

"VI

"It is true that defendants falsely imprisoned plaintiff and that said false imprisonment injured plaintiff in his business as a real estate broker and caused plaintiff to be greatly hampered in following his chosen business and profession."

[4] While there may be some uncertainty in these findings they and the findings as a whole are not irreconcilable. As said in Richter v. Walker, 36 Cal.2d 634, 639, 226 P.2d 593, 596: "'* * * Any uncertainty in the findings will be construed so as to support the judgment rather than to defeat it.' * * * Even where findings are to some extent inconsistent a judgment may not be set aside unless the conflict is clear and material and the findings incapable of being harmoniously construed."

[5] The arrest of respondent, his detention from 9 p. m. until 4 o'clock the next morning, the repeated accusations of theft and the consequent embarrassment, humiliation and fear to him and his wife on the night in question and thereafter in themselves are sufficient to support the award of $750 compensatory damages. At least a reviewing court should not interfere unless "* * * the allowance is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice." Kircher v. Atchison T. & S. F. Ry. Co.,

32 Cal.2d 176, 187, 195 P.2d 427, 434. The same rule applies to the award of $500 punitive damages.

[6] While appellant's opening brief states that the findings do not support the judgment he does not argue the point. It is sufficient to say that it is clear from the findings (supported by the evidence) that appellant, by the exercise of force, or by express or implied threat of force, deprived respondent of his liberty and compelled him to remain where he did not wish to remain, refused to take him before a magistrate and therefore committed false imprisonment, Moffatt v. Buffums' Inc., 21 Cal.App.2d 371, 374, 69 P.2d 424; Kaufman v. Brown, 93 Cal.App.2d 508, 209 P.2d 156; that having arrested the respondent without a warrant the burden was cast upon appellant to prove a proper justification, Hughes v. Oreb, 36 Cal.2d 854, 858, 228 P.2d 550, and that he failed to carry that burden; that appellant did not believe respondent had committed a crime or have probable cause so to believe and without good faith imprisoned respondent for the purpose of aiding in the extortion of money from him and therefore was guilty of oppression, fraud and malice and became liable in exemplary damages. Civ.Code, sec. 3294.

The judgment is affirmed. The order denying the motion for new trial not being an appealable order the purported appeal therefrom is dismissed.

SHINN, P. J., and WOOD, J., concur.

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107 Cal.App.2d 405

JIRSCHIK v. FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES et al.

Civ. 18361.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1951.

Hearing Denied Jan. 3, 1952.

Anna Jirschik filed claim against Farmers & Merchants National Bank of Los Angeles, a banking corporation, and another, as executors of the estate of Louis J. Friedman, also known as L. J. Friedman, deceased, based on an oral contract of deceased to bequeath money to Anna Jirschik. The Superior Court of the State of California, in and for the County of Los Angeles, William B. McKesson, J., rendered judgment for the defendants, and the plaintiff appealed. The District Court of Appeal, Drapeau, J., held that complaint alleging that housekeeper continued in decedent's employment and did not take days off or vacations and did not go into defense work in which housekeeper would have earned more money and would have had social security and unemployment benefits, in reliance on decedent's oral promise to will $15,000 to housekeeper, was insufficient to show such unconscionable injury to housekeeper or unjust enrichment of decedent as would estop executors from interposing bar of statute of frauds to housekeeper's claim against estate.

Judgment affirmed.

1. Frauds, Statute of 🔑144

Executors' estoppel to assert statute of frauds declaring that oral agreement to will property is unenforceable depends upon the facts in every case, and basically there must be evident some unusual circumstances where no other remedy is available, and there must be unconscionable injury and unjust enrichment of the party sought to be estopped. Civ.Code, § 1624; Code Civ. Proc. § 1973.

2. Frauds, Statute of 🔑149

A complaint alleging that housekeeper continued in decedent's employment and did not take days off or vacations and did not go into defense work in which housekeeper would have earned more money and would have had social security and unemployment benefits, in reliance on decedent's oral promise to will $15,000 to housekeeper, was insufficient to show such unconscionable injury to housekeeper or unjust enrichment of decedent as would estop executors from interposing bar of statute of frauds to housekeeper's claim against estate. Civ. Code, § 1624; Code Civ.Proc. § 1973.

3. Frauds, Statute of 🔑144

Where wages paid to housekeeper filing claim against estate on oral contract of decedent to bequeath money to housekeeper are less than housekeeper's services are reasonably worth, an action in quantum meruit for the difference would prevent any unjust enrichment of decedent or of his estate as ground for estoppel against pleading statute of frauds. Civ.Code, § 1624; Code Civ. Proc. § 1973.

◆

Bertram R. Ross, Los Angeles, for appellant.

Pacht, Tannenbaum & Ross, Rudolph Pacht and Maxwell E. Greenberg, all of Los Angeles, for respondent Bank.

Roy C. Kaiser, Los Angeles, for respondent Friedman.

DRAPEAU, Justice.

Louis J. Friedman died December 25, 1949. Defendants are executors of his estate. Plaintiff filed her claim against the estate, which was rejected.

The claim was for "extra services and long periods of nursing rendered to deceased, for which deceased originally named creditor in his will to sum of $15,000, and then was persuaded * * * to change said will * * * and eliminate the $15,000 bequest to claimant."

Demurrer to plaintiff's first amended complaint was sustained without leave to amend, upon the ground that her cause of action was barred by our statute of frauds. Plaintiff appeals from the judgment which followed.

Said amended complaint alleged that decedent employed plaintiff as his housekeeper from 1931 to the date of his death; that in 1942 plaintiff informed decedent she was leaving his employment to enter defense work; that, to induce her to remain in his employ, decedent orally promised plaintiff he would will her $15,000, she to forego vacations and days off; that plaintiff believed such representations, continued in decedent's employ and did not take days off or vacations; that in May of 1947 decedent told her he had kept his promise and had left her $15,000 in his will; that had plaintiff taken other employment she would have earned more money, and would have been protected by social security and unemployment benefits which she now needs and does not have at past seventy years of age.

Our statute law declares that an oral agreement to will property is unenforceable. Civil Code, Section 1624; Code of Civil Procedure, Section 1973. Appellant asserts that the conduct of decedent estops his executors from pleading the statute as a bar to her action. Appellant relies upon the recent case of Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737.

[1] But estoppel depends upon the facts in every case. Basically, in such cases as this there must be evident some unusual set of circumstances where no other remedy is available. There must be unconscionable injury and unjust enrichment of the party sought to be estopped. Monarco v. Lo Greco, supra; Ruinello v. Murray, 36 Cal. 2d 687, 227 P.2d 251.

[2] In this case the most that can be drawn from plaintiff's complaint is that while she was employed and paid by decedent she could have secured work at a higher rate of pay, with certain social security and unemployment benefits; and that, relying upon decedent's promise to leave her $15,000 in his will—which promise he did not keep—she stayed with him, did not earn additional money in defense work, and did not secure the social benefits mentioned.

This does not show unconscionable injury sufficient to estop defendants from interposing the bar of the statute of frauds. Nor does it show unjust enrichment of decedent.

[3] The complaint does not allege that plaintiff was paid less than the reasonable value of her services. And if the wages paid plaintiff had been less than they were reasonably worth, an action in *quantum meruit* for the difference would prevent any unjust enrichment of decedent, or of his estate. Monarco v. Lo Greco, supra; Ruinello v. Murray, supra.

The demurrer was properly sustained without leave to amend.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

JEFFERS v. SCREEN EXTRAS GUILD, Inc., et al.

Civ. 18352.

District Court of Appeal, Second District, Division 1, California.

Nov. 5, 1951.

Rehearing Denied Nov. 23, 1951.

Hearing Denied Jan. 3, 1952.

Action by Michael D. Jeffers against the Screen Extras Guild, Inc., and others for libel for statements allegedly in defendants' "News Letter to Members" which attacked plaintiff's character as a union leader and accused him of being a dictator and a demagogue, of having been associated with a communist influenced union and of using a scandal sheet and a "blacklist" to destroy defendant union. From an order of the Superior Court of Los Angeles County, William B. McKesson, J., dismissing his action, plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the alleged statements, if made, were libelous.

Order dismissing the action reversed with directions.

1. Appeal and Error 🔑102

An order sustaining or overruling a demurrer, without further action by the court, is not appealable.

2. Appeal and Error 🔑113(4)

An order denying motion to vacate and set aside an order of dismissal is appealable. Code Civ.Proc. § 473.

3. Appeal and Error 🔑843(1)

Where appeal from order of dismissal of libel complaint was sustained, it was not necessary to review order denying plaintiff's motion to vacate and set aside order of dismissal. Code Civ.Proc. §§ 473, 581, subd. 3.

4. Appeal and Error 🔑78(4)

An order of dismissal entered on the minutes of the court is a final judgment from which an appeal may be taken. Code Civ.Proc. § 581, subd. 3.

5. Pleading 🔑225(1)

Where a demurrer to a complaint was sustained with leave to amend and plaintiff failed to amend, he, in effect, refused to amend. Code Civ.Proc. § 473.

6. Libel and Slander 🔑6(1), 9(1)

Almost any language which upon its face has a natural tendency to injure a person's reputation, either generally or with respect to his occupation, falls within the definition of libel. Civ.Code, § 45.

7. Libel and Slander 🔑10(5)

Statements alleged in complaint to have been made in a union's newsletter to members accusing a labor leader of being a demagogue and would-be dictator who looked after his own ambitions at the expense of union members, of permitting an open shop, of association with a Communist influenced union and, by use of the "slimiest, dirtiest, most despised scandal sheet" and a blacklist, of attempting to destroy another union, if made, were libelous, and complaint, read as a whole, stated a cause of action against the union. Civ.Code, § 45.

◆

Perry Bertram, Los Angeles, for appellant.

Gilbert, Nissen & Irvin, Robert W. Gilbert, Los Angeles, for respondents.

DRAPEAU, Justice.

Demurrer was sustained to plaintiff's second amended complaint for libel, with leave to amend. Failing to file another amended complaint in time, upon motion of defendants, an order was made dismissing the action under the provisions of Subdivision 3 of Section 581 of the Code of Civil Procedure.

Plaintiff appeals from the order dismissing the action; from the order sustaining the demurrer; and from an order subsequently made, denying his motion under Code of Civil Procedure, section 473 to vacate and set aside the order of dismissal.

[1–3] Some considerable portion of the briefs has been devoted to the two grounds of appeal last stated. These may be summarily disposed of by stating: First, that an order sustaining or overruling a demurrer, without further action by the court, is not appealable. Harmon v. De Turk, 176 Cal. 758, 169 P. 680; Wood, Curtis & Co. v. Missouri Pac. Ry. Co., 152 Cal. 344, 92 P. 868. Secondly, while the order denying relief under Code of Civil Procedure, Section 473 is appealable, Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951, it is not necessary to pass upon it because the appeal from the order of dismissal must be sustained.

[4, 5] This Court is required to determine whether, as a matter of law, the complaint states a cause of action. The order of dismissal entered on the minutes of the court was a final judgment from which an appeal could be taken. Colby v. Pierce, 15 Cal.App.2d 723, 59 P.2d 1046. And, failing to amend the complaint, plaintiff in effect refused to amend. Saddlemire v. Stockton Savings & Loan Soc., 144 Cal. 650, 79 P. 381; Huffaker v. Decker, 77 Cal.App.2d 383, 175 P.2d 254; Litch v. Kerns, 8 Cal. App. 747, 97 P. 897; 21 Cal.Jur. 125.

The complaint alleges that plaintiff was libeled by statements in a publication of defendants' called "News Letters to Members."

Asserted libelous statements in the article are as follows:

"Mike Jeffers, demogogue and would-be dictator, was forced out into the open last week as the leader of the small clique that seeks to destroy Screen Extras Guild. Jeffers personally solicited signatures on an anti-Guild petition and he personally handed out an unsigned, mimeographed, lying attack on the officers and directors of the Guild. The Screen Extras Guild accepts Jeffers' challenge and will continue to expose him for what he is—a would-be dictator who seeks to further his own selfish ambitions at the expense of the extra players; a discredited leader of a discredited union which permitted open shop for extra players and started to flood the extras' ranks with non-union newcomers. That is Jeffers.

"Jeffers yells his head off each time one of his underhanded schemes is exposed as a plot by leaders of the defunct SPU to destroy our American Federation of Labor Guild of extra players. Of course he doesn't like it. He would prefer that the extras would forget all about the terrible things he did to the extras. Jeffers would like the extra players to forget that he was part of the Commie-influenced Conference of Studio Unions which pulled two disastrous jurisdictional strikes in 1945 and 1946. Jeffers would like you to forget that he never did one thing for the good of the extra players, that all he did was to bring about open shop. But the extra players are not going to forget it—now or ever.

* * * * * *

"Jeffers has sunk to a new low in his scheme to destroy the Screen Extras Guild. He now has as his ally the slimiest, dirtiest, most despised scandal sheet in the entire history of Hollywood. 'Birds of a feather flock together' and this disreputable, lying, blackguard, yellow rag is now supporting Jeffers in his attempt to split and destroy the Guild. The Screen Extras Guild, its officers and directors are proud to be on the 'blacklist' of this filthy publication. The Screen Extras Guild refuses to be blackjacked into paying tribute under any guise whatsoever to any publication. Jeffers is welcome to his latest rotten associate. SEG dares them to sue us for libel."

Many California libel cases repeat the definition of libel set forth in Section 45 of the Civil Code: "a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Pridonoff v. Balokovich, 36 Cal.2d 788, 228 P. 2d 6.

[6] This definition is very broad. It includes almost any language which upon its face has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation. Dethlefsen v. Stull, 86 Cal.App.2d 499, 195 P.2d 56.

[7] Applying the rule to the words appearing in the complaint, the conclusion is manifest that they are libelous.

Read as a whole, the complaint states a cause of action. Oberkotter v. Woolman, 187 Cal. 500, 202 P. 669; and see 30 West's California Digest, Libel and Slander, 🔑80; McKinney's California Digest, same title; 12 So.Cal. Law Review 225.

The order dismissing the action is reversed, with directions to the trial court to overrule the demurrer, and allow defendants a reasonable time within which to answer the complaint herein.

WHITE, P. J., and DORAN, J., concur.

CHAN et al. v. TITLE INSURANCE & TRUST CO. et al.*

Civ. 18483.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1951.

Rehearing Denied Nov. 30, 1951.

Hearing Granted Jan. 11, 1952.

Action by Paul C. Chan, as special administrator of the estate of Chin Ott Wong, deceased, and another, against the Title Insurance and Trust Company, and Melvin E. Vaughan, Sr., and others, for forfeiture of money deposited by defendant Vaughan with defendant Title Insurance and Trust Company, pursuant to an agreement with plaintiffs for purchase and sale of realty. The Superior Court of Los Angeles County, Arthur Coats, J., entered judgment for defendant Vaughan, and plaintiffs appealed. The District Court of Appeal, Wilson, J., held that evidence was insufficient to sustain findings of court that buyer had not been informed, after extension of time for performance of conditions of escrow agreement, that performance as of subsequent certain fixed date would be strictly enforced.

Judgment reversed.

1. Evidence 🔑594

It is general rule that trier of fact cannot arbitrarily disregard uncontradicted, entirely probable testimony of an unimpeached witness, but that testimony which is not inherently improbable and is not impeached or contradicted by other evidence must be accepted as true.

2. Vendor and Purchaser 🔑104

In action by vendor of realty for forfeiture of money deposited in escrow by buyer pursuant to escrow agreement in which time was of essence, wherein uncontradicted, not improbable testimony of vendor's attorney was that buyer had been informed after extension of time beyond agreed date that performance would thereafter be insisted upon as of definite date, evidence was insufficient to support finding that vendor had not given buyer definite notice as to date on which strict performance of contract would be insisted upon.

3. Vendor and Purchaser 🔑104

In action by vendor of realty for forfeiture of money deposited in escrow by buyer pursuant to escrow agreement in which time was of essence, wherein it appeared that time in which buyer might perform had been extended, but that subsequent specific date on which strict performance would be enforced had been specified by vendor, evidence was insufficient to sustain finding that failure of buyer to comply with extended specified date had not been willful, fraudulent, or grossly negligent, but warranted finding that refusal of buyer to pay balance of purchase price had been willful with purpose of obtaining modification of agreement from vendor.

4. Vendor and Purchaser 🔑104

The word "willful" as used in civil cases merely means that when person does or fails to do an act he does so intentionally.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful".

◆

Harry M. Irwin, V. P. Lucas, Los Angeles, for appellants Wong.

Lawrence L. Otis, Gilbert E. Harris, James F. Healy, Jr., Harold Arman, Los Angeles, for appellant Title Insurance & Trust Co.

J. Q. Gilchrist, Los Angeles, for respondents.

WILSON, Justice.

From a judgment in favor of defendants Vaughan in an action for money had and received, plaintiffs appeal.

Plaintiffs are seeking a forfeiture of monies deposited in escrow with defendant Title Insurance & Trust Company by the other defendants pursuant to an agreement between Chin Ott Wong and Quan Shee Wong, as sellers, and defendants Melvin E. Vaughan, Sr. and Rozelle Rainey Vaughan as buyers, for the purchase and sale of real property. Chin Ott Wong died after suit was filed and Paul C. Chan as special administrator of his estate was substituted as party plaintiff in his stead.

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* Subsequent opinion 246 P.2d 632.

The escrow was opened at the Title Insurance and Trust Company on April 29, 1946, and the terms of the agreement between the parties are contained in escrow instructions of the same date, and "Agreement Re Purchase and Sale of Real Property" dated May 10, 1946, and filed in the escrow, and instructions dated May 14, 1946, supplementing and amending the original escrow instructions.

The total purchase price was $176,254.15, which was to be paid into escrow by May 29, 1946. Defendants deposited $1,500 in the escrow on April 29, $3,500 on May 1, and agreed to deposit an additional $30,000 and execute a trust deed and note in the amount of $141,254.15. Prior to May 29, defendants paid $77.45 into the escrow in payment of taxes and deposited the trust deed and note, duly executed. Also prior to May 29, plaintiffs deposited in the escrow their grant deed conveying to defendants the property involved.

The escrow instructions of April 29, 1946, contain the following provision: "Time is of the essence of these instructions. If this escrow is not in condition to close by May 29, 1946, any party who then shall have fully complied wtih his instructions may, in writing, demand the return of his money and/or property; but if none have complied, no demand for return thereof shall be recognized until five days after the escrow holder shall have mailed copies of such demand to all other parties at their respective addresses shown in the escrow instructions. If no such demand is made, close this escrow as soon as possible."

The escrow was not in a condition to be closed by May 29, but on June 18 the Title Company notified defendants that it was ready and able, on receipt of the balance of $30,000 payable by them, to issue its policy of title insurance. On July 1 defendants paid $5,000 into the escrow. On July 15 they executed and delivered to the Title Company, with appellants' approval, amended instructions directing that company to endorse interest paid on the note to June 18, 1946, in lieu of the previous instruction to endorse interest paid thereon to date of the close of escrow.

The instant action was filed on August 27, 1946, and the trial thereof resulted in judgment for plaintiffs. Upon appeal the judgment was reversed, Chin Ott Wong v. Title Ins. & Trust Co., 89 Cal.App.2d 183, 200 P.2d 541, 544, the court stating that "plaintiff's complaint affirmatively shows that the transaction was still pending with plaintiff's approval on July 15th which is long after May 29th the date originally agreed upon by the parties within which the agreement was to have been performed. The complaint contains no allegation that a later and different date was agreed upon by the parties to which the 'Time is of the essence' condition was to apply. * * * Where time is made of the essence of the contract for the payment of money and this covenant has been waived by the acceptance of money after the same is due, with knowledge of the facts, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture as could only be restored by giving a definite and specific notice of intention to enforce it."

Thereafter plaintiffs amended one paragraph of their complaint to allege that on August 1, 1946, August 5, 1946, and August 9, 1946, plaintiffs demanded of defendant Melvin E. Vaughan, Sr. payment of the total sum due in the escrow and on August 9, 1946, plaintiffs notified Melvin E. Vaughan, Sr. that "thereafter they intended to and would require strict compliance by said Melvin E. Vaughan, Sr. with the conditions of his agreement in said escrow instructions and that in the event that he, Melvin E. Vaughan, Sr., failed to pay said total sum of $35,077.45 on or prior to August 26, 1946, plaintiffs intended to and would thereupon strictly enforce their rights under said escrow instructions and would thereupon file an action in court for the enforcement thereof." Defendants filed an answer to the amended complaint and a cross-complaint for money had and received. The case was tried and submitted. Thereafter the court, upon its own motion, made an order setting aside the submission and fixing a date for "taking further evidence upon the issue of the damage suffered by plaintiff and the price for which the property was sold, and to consider the amending of the pleadings to conform to the proof." When the matter came on for hearing plaintiffs objected upon the ground that the court had no jurisdiction to reopen the cause after submission and objected to the introduction of any further evidence upon the ground that the matter of damages was beyond the issues as framed by the pleadings. The objection was overruled. Plaintiffs declined to submit evidence or to amend their pleadings. Judgment was rendered against them on their complaint and in favor of defendants on their cross-complaint, from which judgment this appeal is taken.

It is plaintiffs' contention that the evidence does not support the findings and that the judgment is contrary to law.

In the negotiations between the parties Harry M. Irwin acted as the agent of plaintiffs. The court found that "from time to time after May 29, 1946, and prior to August 28, 1946, said agent Irwin and Vaughan, Sr. had various telephone conversations in which the proposed modifications of the escrow instructions and the performance and the completion of the Escrow by Vaughan, Sr., and the payment by him into said Escrow of the sum of $30,000, or such portion thereof as remained unpaid, were discussed, and said Irwin insisted upon the completion of said Escrow but no definite date was ever fixed when the balance of said sum should be paid; that at no time did the Wongs, or their agent Irwin, inform Vaughan, Sr. that they would insist upon a strict performance of the provision in the Escrow Instructions making time the essence thereof; that at no time did they give to Vaughan, Sr. a definite notice whereby another date for the performance of the contract was fixed, or that they would thereafter insist upon the performance of the contract and the payment of said sum of $30,000, and all thereof, into the escrow at any particular time so fixed."

Plaintiffs' agent, Harry M. Irwin, testified Vaughan telephoned him on July 8th stating that he was completing arrangements for financing a building on the property and would be able to pay the balance due in the escrow in a few days; on July 30th Vaughan telephoned him and said he would call Irwin the following Thursday and give him a definite statement as to when the escrow would be closed; on August 2d, Vaughan telephoned Irwin that he was at home, ill, and would call him the following Monday; August 5th Vaughan telephoned Irwin and asked him to make an appointment with Mr. Wong to meet him (Vaughan) at Irwin's office on the following Thursday and said he had a proposition to make to Mr. Wong which he felt would be satisfactory or acceptable; Vaughan failed to keep the appointment but telephoned Irwin the following day, August 9th; at that time Irwin told Vaughan, "I am giving you notice now for Mr. Wong that Mr. Wong will not wait any longer for you to perform. He has now waited for you about two months and if you do not pay the balance of this purchase price in escrow within fifteen days, Mr. Wong will proceed to enforce whatever right he has under the contract"; looking at his calendar he noted that the fifteenth day would fall on Saturday and he then told Vaughan, "since the fifteen days expire on Saturday, for Mr. Wong I will give you two days longer, to and including Monday, August 26th. * * * If you have not paid the balance in full in escrow by Monday, August 26th, Mr. Wong will file suit on you immediately thereafter to enforce whatever rights he may have under the purchase contract. In view of your insulting attitude, we will demand strict compliance."

Vaughan testified that prior to the filing of the action he had never talked personally or by telephone to Harry M. Irwin or to plaintiffs.

Irwin's testimony as to the fact that on certain dates he had telephone conversations with Vaughan is contradicted only by

Vaughan's testimony that he had never talked to Irwin either personally or over the telephone. Since the court found that from time to time between May 29, 1946, and August 28, 1946, Irwin and Vaughan had various telephone conversations it is obvious that the court believed Irwin's testimony and disbelieved that of Vaughan. It follows, therefore, that Irwin's testimony as to the substance of those conversations stands uncontradicted.

[1, 2] It is the general rule that the trier of fact cannot arbitrarily disregard uncontradicted, entirely probable testimony of an unimpeached witness. Mantonya v. Bratlie, 33 Cal.2d 120, 127, 199 P.2d 677; Fidelity & Casualty Co. of New York v. Abraham, 70 Cal.App.2d 776, 782, 161 P.2d 689. Testimony which is not inherently improbable and is not impeached or contradicted by other evidence must be accepted as true by the trier of fact. Dobson v. Dobson, 86 Cal.App.2d 13, 14, 193 P.2d 794. The trial court's finding that in the conversations between Irwin and Vaughan the performance and completion of the escrow by Vaughan and the payment into escrow of the unpaid balance were discussed and that Irwin insisted upon the completion of the escrow is supported by Irwin's testimony and solely by his testimony. There is no rational ground upon which the court can disregard Irwin's evidence, which is uncontradicted and not inherently improbable, that he told Vaughan on behalf of plaintiffs that he would give him until August 26th to pay into the escrow the balance of the purchase price and that if the balance was not paid by that date plaintiffs would bring suit to enforce their rights under the contract. Since the court found that Irwin and Vaughan had various telephone conversations between the dates specified, there is no evidence in the record to support the finding that plaintiffs did not at any time give Vaughan a definite notice whereby another date for the performance of the contract was fixed or that they would insist on a strict performance of the contract or that no definite date was fixed when the balance of the purchase price should be paid into escrow.

The court further found that "any failure of Vaughan, Sr. to comply with the terms of the Escrow Instructions was not wilful and/or fraudulent and/or grossly negligent; that shortly after entering into the Escrow Instructions he learned that without some change in the provisions thereof, he would be financialy unable to construct the building contemplated on said real property and that he would be financially unable to pay the purchase price of said property or the amount of said deed of trust; that he therefore endeavored to secure in good faith a modification *if* said contract so that he could secure the property and proceed with his plans for the construction of said building; that he believed at all times, and had reasonable grounds for such belief, that the provision for strict performance of the contract was not being invoked by the Wongs up to and including said August 28, 1946" when plaintiffs terminated the escrow by demanding the return of their deed from the Title Company. The court found also that "Vaughan, Sr. was at all times reluctant and adverse to completing the escrow as constituted and endeavored to the best of his ability to secure a modification thereof."

[3] Such finding is contrary to the evidence. Vaughan testified that he had sufficient money and ample credit with which to pay the balance of the purchase price. When asked by the court why he did not pay it if he had such money and credit Vaughan stated: "That's a matter there of getting something done that was to be done. If I had paid the $35,000 when Mr. Wong wanted it, I still couldn't have borrowed enough money to put up the building that I had bought from Mr. Bailey and paid him $21,000 for, and he was after me to get it moved, and I had taken it up with the Security Bank, I had taken it up with the Union Bank and they all told me, 'Whenever you get that piece of property so that you can get a clear title to one acre or 1⁸⁄₁₀th acres of it, we will loan you the money. You can erect your building and we will take a first trust deed on the acre and the building and then you can give Mr. Wong the second trust deed on the balance

of it.'" Vaughan further testified that when he learned that in order to borrow the money to erect the building it would be necessary for him to have clear title to at least an acre, he entered into negotiations outside the escrow for the sale of a part of the property to other parties; that he could not complete the escrow and declined to pay the balance of the purchase price unless he also completed these other negotiations.

[4] The word "wilful" as used in civil cases merely means that when a person does or fails to do an act he does so intentionally. Wilson v. Security-First Nat'l Bank, 84 Cal. App.2d 427, 431, 190 P.2d 975; May v. New York Motion Picture Corp., 45 Cal.App. 396, 404, 187 P. 785. Since Vaughan testified that although he had ample money and credit to complete the escrow he did not intend to do so unless plaintiffs would agree to a modification of their agreement or he could complete other negotiations whereby he would receive a clear title to a part of the property, his failure to pay the balance of the purchase price cannot be regarded as anything but intentional and deliberate and therefore wilful.

Inasmuch as the evidence does not support the findings the judgment must be reversed and it is therefore unnecessary to decide other points raised by counsel.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concur.

107 Cal.App.2d 457

Adoption of LINGOL.

Civ. 18547.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1951.

As Modified on Denial of Rehearing Dec. 4, 1951.

Hearing Denied Jan. 8, 1952.

Proceedings in the matter of the adoption of Jane Doe Lingol in which the petition of Robert David White and Flora May White for adoption was resisted by the State Department of Social Welfare. The Superior Court of Los Angeles County, Georgia P. Bullock, J., entered order denying petition, and petitioners appealed. The District Court of Appeals, Wilson, J., held that when only persons resisting petition were agents of department of public welfare, and when their objections were solely on ground of alleged instability of adoptive mother because of events occurring over 11 years prior to petition, refusal to grant petition, when evidence established that petitioners were fit persons into whose custody the child should be placed for her own best interests, was abuse of discretion.

Order reversed with directions.

1. Adoption 🔑13, 15

The granting or denial of petition for adoption rests within sound discretion of trial court, and appellate court is without power to reverse its order in the premises unless evidence shows that discretion has been abused.

2. Adoption 🔑13

In determining whether petition for adoption should be granted, the best interests of child are to be considered.

3. Adoption 🔑13

In adoption proceedings in which no person other than agents of department of public welfare opposed adoption by petitioners of illegitimate child who had been in their custody for several years, and opposition by such agents was directed only at instability of adoptive mother on basis of occurrences over eleven years prior to petition, evidence established that petitioners were fit and proper persons into whose custody child should be placed for her own interest and that child court had abused its discretion in denying petition for adoption.

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Sidney J. Unickel, Sidney Sampson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Ariel C. Hilton, Deputy Atty. Gen., for respondent.

WILSON, Justice.

This is an appeal from an order denying a petition for the adoption of a minor who is an illegitimate child born November 12, 1943, in California. She was given into the custody of petitioners Robert David White and Flora May White, husband and wife, by her natural mother nine days after her birth and ever since has been in their custody and has been reared as their own daughter.

The court did not make any findings of fact nor did it state any reasons for denying the petition but entered the order of denial without comment. There is therefore nothing in the record to indicate whether the court considered the evidence insufficient to warrant the granting of the petition or was influenced solely by the recommendation of the agents of the Department of Social Welfare.

The petition for adoption was uncontested except for the report of the Department of Social Welfare recommending that the petition be denied on the ground that there was "doubt" as to the stability of petitioner Flora. Such doubt was based on events prior to 1938. Nothing has occurred since that date to cause any apprehension that she is now unstable. No evidence was offered in anywise detrimental to petitioner Robert. His good character and steady employment are affirmatively established by the report and by the evidence.

The report shows and petitioner Flora admits that she had been married six times during the 17-year period from November 1922 to October 1939, each marriage having been dissolved by divorce or annulment. The first marriage was contracted at the instance of her stepfather when she was a child of 16 years. During 1933 and 1934 she served 11 months in the Missouri State Prison on a charge of accomplice to murder. She was subsequently granted a full pardon by the governor of Missouri and was restored to citizenship. Petitioners are aged 39 and 44 years respectively. They were married in June, 1940, and have lived together as husband and wife ever since that date.

Two representatives of the Department of Social Welfare testified that they opposed the adoption because of the record of the instability of the petitioner Flora prior to 1939, and for no other reason; they had checked the home of petitioners, found they were good people and were taking proper care of the child; they found nothing whatsoever that would injure petitioners' interest in the child; "it is just our feeling that with the past record of the woman petitioner there can be doubt cast on her stability" but nothing has happened in the last ten years that would indicate instability; there has been a normal parent-child relationship between petitioners and the minor; the child's general health, physical condition and mental development are excellent and she is scholastically well adjusted; she has been given all needed medical care.

Three witnesses, one of them a sister-in-law of the natural mother of the child, testified they had visited petitioners' home and found the child was well cared for, well nourished and well clothed. The principal of the school which the minor attends reported that her adjustment in school is good, she is doing well scholastically and her best interests would be served by the adoption. A minister acquainted with the family wrote a letter reciting his knowledge of petitioners and of the child and recommended that the petition be granted.

Petitioners have provided extra-curricular dancing lessons, take the child to Sunday School and have established a savings account in a bank for her. They reside in a two bedroom house and the child has her own room. Petitioners have adequate insurance. Petitioner Robert is steadily employed and Flora earns about $150 a year selling cosmetics at times when she is able to leave the home—presumably when the child is in school. They have purchased their home, paying for it in monthly installments.

[1,2] We are mindful of the rule that the granting or denial of a petition for adoption rests within the sound discretion of the court and that an appellate court is without power to reverse such an order unless the evidence shows that discretion has been abused. The best interests of the child are to be considered. The whereabouts of her father is unknown. Her mother has twice signed her consent to her adoption by petitioners, the last consent

having been given with the knowledge that the Department of Social Welfare intended to recommend the denial of the petition. At the same time she wrote a letter to petitioners hoping that the papers came and that "everything turned out all right." No person other than department agents has opposed the granting of the petition.

The cases cited by respondents are not applicable. In such cases either there was active opposition to the adoption by one of the parents of the child or by some other blood relative, or there were contests between relatives as to who should be permitted to adopt the child or be given letters of guardianship. See Matter of Bewley, 167 Cal. 8, 138 P. 689; Matter of Fahlman, 84 Cal.App. 248, 257 P. 893; In re Hickson's Adoption, 40 Cal.App.2d 89, 104 P.2d 411; Adoption of Martin, 76 Cal.App.2d 133, 172 P.2d 552.

The opposition of the Department of Social Welfare, as has been stated, is based entirely upon the "doubt" expressed by agents of the department as to petitioner Flora's stability by reason of acts that occurred more than 12 years ago. Her stability since her marriage to her present husband in 1940 is admitted and is shown by unquestioned and uncontradicted evidence. The department concedes that since her birth the child has had excellent care in favorable surroundings. "We have uncovered nothing in the last ten years" that would not be for the best interests of the child. Nevertheless the department counts all such facts as naught and rests its opposition on occurrences in petitioner Flora's earlier years beginning with her first marriage contracted when she was a child of only 16 years. Many persons who have committed indiscretions in early life have reformed and even criminals have been rehabilitated and have become useful and honored citizens. For 11 years petitioner Flora has been a good wife and has made a good home for her husband. She has been a good mother during the entire life of the child. "He that is without sin among you, let him cast a stone at her." We find nothing whatsoever in the record that redounds against the granting of the petition.

[3] In view of the overwhelming and uncontradicted evidence that throughout her life the child has had from petitioners the same parental care and devotion as if she were their natural offspring and that they are fit and proper persons into whose custody she should be placed for her own best interests, a gross injustice would result to the minor, whose interests are paramount, and to the petitioners as well if the adoption should be refused. In consideration of the entire record and of the facts and circumstances shown thereby we are constrained to hold that the denial of the petition was an abuse of discretion and should therefore be reversed.

The order appealed from is reversed with directions to grant the petition for adoption.

MOORE, P. J., and McCOMB, J., concur.

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107 Cal.App.2d 391

SAGER v. O'CONNELL.

No. 14918.

District Court of Appeal, First District,
Division 1, California.
Nov. 8, 1951.

E. N. Sager, Sager Enterprise and Construction Company, a corporation, brought an action against Daniel R. O'Connell, wherein judgment was rendered in favor of defendant providing that the land of defendant was entitled to receive lateral support from plaintiff's land, and a second so-called judgment was answered against plaintiffs requiring plaintiffs to pay a specified amount of money to defendant because of plaintiff's failure and refusal to construct such support. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., denied plaintiff's motion to compel the execution of entry of a satisfaction of judgment and denied plaintiff's motion to strike the second judgment from the files, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that

the second so-called judgment was an order after judgment finding noncompliance with prior judgment and was not void as being a second final judgment where only one final judgment could be entered.

Orders affirmed.

1. Judgment ⚷203

Where judgment required plaintiffs, within specified time, to build a support for benefit of defendants who were found to be entitled to receive lateral support from plaintiffs' land, and provided that defendant should recover specified sum of money if plaintiffs failed to restore support within specified time, and a so-called "judgment" was subsequently entered against plaintiffs in specified amount on defendant's application and affidavit that plaintiffs had failed and refused to construct support, such second so-called "judgment" was an order after judgment finding noncompliance with a prior judgment and was not void as being a second final judgment where only one final judgment could be entered.

2. Motions ⚷46

The effect an order has determines its character and not the name given order.

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Marvin E. Lewis, San Francisco, for appellant.

Simeon E. Sheffey, Eric A. Falconer, San Francisco, for respondent.

BRAY, Justice.

Plaintiffs appeal from (1) an order denying their motion to compel the execution and entry of a satisfaction of judgment, and (2) an order denying their motion to strike from the files a certain judgment.

Questions Presented.

1. What is the effect of the second judgment? 2. Should the judgment be satisfied?

Record.

November 12, 1948, judgment[1] was rendered in favor of defendant and against plaintiffs providing that the land of defendant is entitled to receive lateral support from plaintiffs' land, requiring plaintiffs to restore such support within 90 days, and in the event of their failure to do so within that time defendant shall have and recover from plaintiffs the sum of $3,000. More than 90 days later, on June 16, 1949, the parties entered into an agreement providing the type of support to be erected including a fence on top of it, said support to be a specified type of concrete bulkhead to be erected on a 2 foot strip of land which defendant was to sell to plaintiffs for $300, and containing other provisions including one to the effect that defendant "agrees to suspend the enforcement of the judgment during the time that said bulkhead is being built, provided said period of time does not extend over and beyond the 15th day of Sept., 1949, save and except if the completion of said bulkhead on or before said date, is prevented by strikes, acts of God, or by any other matter or thing outside of the control of the Second Parties, said time to be extended to its completion."

On March 22, 1950, on application of defendant and an affidavit to the effect that plaintiffs had failed and refused to construct said support, judgment[2] in favor of defendant and against plaintiffs in the sum of $3,000 was rendered. October 20, plaintiffs moved the court for an order directing defendant to enter a satisfaction of judgment. The motion was based on the affidavit of plaintiff Sager, setting forth the before mentioned agreement of extension of time to September 15, 1949, and stating that he had notified defendant's attorneys he was unable to construct said support within that time due to the fact that he would not have the money to pay for its construction until certain property was sold. He was having difficulties clearing the title to this property, which he would sell as soon as the title was cleared. Defendant's attorneys told him that while they were anxious to have the support completed as soon as possible, they understood his difficulties and for him to complete said support as soon as possible. Relying upon the willingness of defendant and the attorneys to extend said time, plaintiffs did expend considerable sums of money in constructing said support and did comply with all the terms of the agreement. It was never the intention of the court that defendant should have a bulkhead and a fence on top of it and the other work and labor performed which had been agreed upon in said agreement and also to have a sum of money besides. Plaintiffs had requested a satisfaction of judgment from defendant and his attorneys, and they had refused to give it. The circumstances described which delayed the construction of the support were beyond the power of plaintiffs to prevent. No counter affidavit was filed.

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[1] Herein referred to as "first judgment."

[2] Herein referred to as "second judgment."

On December 14, plaintiffs moved for an order striking from the files the second judgment on the ground that it is void on its face. This motion was also based on the before-mentioned affidavit. Both motions were denied.

The Judgments.

[1, 2] Plaintiffs contend that the first judgment was a final one, that there can be only one judgment in an action, and hence the second judgment is void. The discussion of whether the first judgment is interlocutory or final is actually unimportant here, for the reason that regarded either way the second judgment is proper. Plaintiffs concede that if the first judgment is only interlocutory, then the second one was proper. The first judgment provided an alternative—either the plaintiffs within 90 days should build the support, or defendant would be entitled to recover $3,000. Assuming it to be a final judgment, as contended by plaintiffs, the judgment was not self-executing in the sense that merely by filing an affidavit that the support had not been completed, an execution would issue. It required a judicial determination of the fact of non-compliance. Although the order making that determination is denominated a judgment it is an order after judgment finding non-compliance with a prior judgment. It is not the name given an order which determines its character, but the effect such order has. Therefore, the second judgment was not void and the trial court properly refused to set it aside on that ground. (No motion was made to set it aside on any other ground, such as the grounds provided by section 473 of the Code of Civil Procedure.) Neither judgment was appealed from, so the question of whether both are appealable does not arise.

Satisfaction of Judgment.

On the hearing of the motion to order defendant to satisfy the judgment, there was no formal denial of the statements in plaintiff Sager's affidavit. It states, in effect, that defendant's attorneys advised plaintiff that they understood his difficulties and told them to complete the bulkhead as soon as possible. The affidavit does not state when this took place, whether before or after the execution of the agreement extending the time of performance to September 15. At the hearing defendant took the position that on the date of the second judgment there had been no compliance with the judgment for construction of the support (in fact, the construction had not then been started), and that plaintiff's financial difficulties were not "any other matter or thing outside of the control of the Second Parties." In answer to plaintiffs' contention that defendant was in a position where he was getting the bulkhead and fence and $3,000 besides, when it was undoubtedly the intention of the court originally that he should have only one *or* the other, defendant contended that he had been greatly damaged by the delay, and that if the court ordered the judgment satisfied plaintiffs would be relieved from reimbursing defendant for such damage. He contended that plaintiffs should bring an action in equity where the equities between the parties could be balanced.

Section 675 of the Code of Civil Procedure provides: *"Whenever a judgment is satisfied in fact* * * * the party or attorney must give such acknowledgment * * * and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it." (Emphasis added.) Strictly speaking, the judgment is not satisfied in fact. It provided that the support was to be constructed in 90 days. It was not, nor in the extension thereof provided by the written agreement. Hence, section 675 of the Code of Civil Procedure does not apply. In a suit in equity, the court can determine whether there was such oral extension, whether the circumstances justify a relief from what appears on its face to be a double burden on plaintiffs, whether defendant was damaged by the delay, and if so, what would be a fair balancing of the equities.

The orders are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

WEST KEY NUMBER SYSTEM

107 Cal.App.2d 463

In re LUNDELL'S ESTATE.

BENNETT v. LUNDELL et al.

Civ. 18600.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1951.

Hearing Denied Jan. 8, 1952.

Proceeding in the matter of the estate of Wendell Phillip Lundell, also known as W. P. Lundell, deceased, wherein Alberta G. Bennett, as guardian of Allen Vincent Lundell, a minor, filed a petition for costs expended in contesting award, of extraordinary fees to attorneys for executors and an allowance for attorney's fees. The petition was contested by Sadie McCormac Lundell and another. The Superior Court of Los Angeles County, John Gee Clark, J., entered an order allowing petitioner the amount requested and contestants appealed. The District Court of Appeal, McComb, J., held that award payable out of estate was properly made to guardian of chief beneficiary as compensation for her attorneys for successfully contesting allowance of extraordinary fees to attorneys for executors.

Order affirmed.

1. Executors and Administrators 🔑511(2)

Probate court may make an allowance of attorney's fees for services rendered to a party who successfully objects to charges against an estate in an executor's account.

2. Executors and Administrators 🔑511(2)

An award payable out of estate was properly made to guardian, whose minor ward was chief beneficiary of estate, as compensation for guardian's attorneys for successfully contesting an allowance of extraordinary fees to attorneys for executors.

3. Attorney and Client 🔑155

Fees for legal services rendered in preserving a common fund for the benefit of all heirs or persons interested in an estate are proper charges against such fund, since each beneficiary should pay his proportionate share of expenses of litigation as the result of which he derives a benefit.

4. Costs 🔑172

Attorney's fees cannot be awarded to a successful litigant in absence of a special agreement, special statutory provisions or special circumstances.

George L. Duke, Beverly Hills, and Arthur A. Brooks, Jr., Los Angeles, for appellants.

Sprague & Sparks, Richard W. Sprague and William S. Sprague, Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order awarding the sum of $2,500 to Alberta Grace Burnett, the guardian of Allen Vincent Lundell, a minor, and the chief beneficiary of the estate of Wendell Phillip Lundell, as compensation for her attorneys for successfully contesting an allowance by way of extraordinary attorneys' fees for the executors of the will of decedent.

Facts: In December of 1948, the probate court made an award to the attorneys for the executors of the will of decedent in the sum of $12,000 for extraordinary fees. The attorneys for the guardian of the minor Lundell, who is the chief beneficiary of the will of decedent, objected to the petition for the award and to the award. After the order was made they appealed from the order allowing extraordinary attorneys' fees and obtained a reversal of the order on appeal. 95 Cal.App.2d 352, 212 P.2d 914.

Thereafter the court fixed the amount of the extraordinary fees at $6,500, which order is now final. Respondent filed a petition in the probate proceedings for the costs expended in the sum of $197.67 in contesting the award for extraordinary attorneys' fees and asked for the allowance of $2,500 for fees for her attorneys. Objections were made by the executors for the allowance of any attorneys' fees or costs from the assets of the estate. The probate court, however, allowed respondent the amount requested.

Question: Where, after petition filed by the executors of a will for commissions for extraordinary services and for fees for extraordinary services rendered by their attorney, to which objections are made on behalf of the chief beneficiary under the will of decedent, and an appeal is successfully taken from an order allowing extraordinary fees to the attorney for the executors, may an award payable from the estate for attorney fees be made for the attorney for the beneficiary?

[1–3] *Yes.* The probate court may make an allowance of attorney's fees for services rendered to a party who successfully objects to charges against an estate in an executor's account. Such allowance is predicated upon the equitable rule that fees for legal services rendered in preserving a common fund for the benefit of all heirs or persons interested in an estate are proper charges against such fund. Each beneficiary should bear his proportionate share of expenses of litigation as a result of which he derives a benefit. (Estate of Reade, 31 Cal.2d 669, 671 et seq., [2], 191 P.2d 745.)

In the instant case all the beneficiaries of the estate will benefit from the action of respondent. Hence the foregoing rule is applicable. There is no merit in appellants' contention that the facts in Estate of Reade are not analogous, for the reason that in Estate of Reade attorney's fees were allowed to an heir for causing the administratrix to include certain assets in her estate accounts which the administratrix claimed as her personal funds, thus increasing the fund for the benefit of the heirs; while in the present case the common fund was not preserved or protected because respondent merely prevented the executors from depleting the funds of the estate by making unauthorized payments therefrom. The important feature is that in both Estate of Reade, supra, and the present case the fund was preserved whereby each beneficiary received more than they would otherwise have received because of the services rendered by the attorneys for respondent.

Estate of Olmstead, 120 Cal. 447, 52 P. 804, Estate of Bevelle, 81 Cal.App.2d 720, 185 P.2d 90, Estate of Arnold, 121 Cal.App. 247, 8 P.2d 897, and Estate of Marre, 18 Cal.2d 191, 114 P.2d 591, are factually distinguishable from the instant case and are therefore not here applicable.

[4] Hornaday v. Hornaday, 95 Cal.App. 2d 384, 213 P.2d 91, is authority for the general rule that attorneys' fees cannot be awarded to a successful litigant in the absence of a special agreement, special statutory provisions or special circumstances. However the facts of the instant case bring it within the rule of Estate of Reade wherein the rule stated above is mentioned as one of the exceptions to the general rule.

In re Sielcken's Estate, 176 Misc. 235, 26 N.Y.S.2d 901, Estate of Gratton, 136 Or. 224, 298 P. 231, 79 A.L.R. 517, Westermoreland v. Martin, 24 S.C. 238 and Rosenberg's Estate, 147 Misc. 517, 266 N.Y.S. 99, may not be considered for the reason that they are decisions from other jurisdictions which reach a contrary rule to that of our Supreme Court and must therefore be disregarded. (Estate of Perez, 98 Cal.App.2d 121, 123, 219 P.2d 35.)

Affirmed.

MOORE, P. J., concurs.

107 Cal.App.2d 487

PEOPLE v. HUGHES.

Cr. 4646.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1951.

Lloyd Hughes was convicted in the Superior Court of Los Angeles County, Percy Hight, J., of assault with a deadly weapon and he appealed from the judgment of conviction and the sentence pronounced. The District Court of Appeal, White, P. J., held, inter alia, that refusal of trial court to give instruction of law of self defense proffered by defendant was not error.

Judgment affirmed and attempted appeal from sentence dismissed.

1. Criminal Law ⚿1023(10)

A defendant convicted of assault with a deadly weapon could not appeal from sentence pronounced.

2. Criminal Law ⚿824(5), 829(1)

In prosecution for assault with a deadly weapon trial court did not err in failing to instruct jury that fact that defendant, after fleeing from scene of assault, voluntarily surrendered to police a few days after the assault, was circumstance to be considered in light favorable to defendant, where instruction given on question of flight in language of statute left jury free to consider evidence of flight in connection with fact that defendant voluntarily surrendered, and where defendant did not request an instruction on such specific point.

3. Criminal Law ⚿824(1)

In a criminal prosecution the jury should be instructed on general principles of law which apply to case, and court should give such instructions even though not requested by parties.

4. Criminal Law ⚿825(1)

Where jury in criminal prosecution is otherwise fully instructed on general principles of law, trial court need not instruct on specific points developed at trial unless instructions thereon are requested by parties.

5. Criminal Law ⚿829(5)

In prosecution for assault with a deadly weapon, given instruction fully instructed on law of self-defense and refusal of trial court to give instruction on law of self-defense proffered by defendant was not error.

6. Criminal Law ⚿811(4)

In prosecution for assault with a deadly weapon, paragraph of instruction proffered by defendant which recited that defendant could use force and means he believed to be reasonably necessary, and which would have appeared to a reasonable person, in same or similiar circumstances, to be necessary to prevent injury which appeared to be imminent if a witness for people attempted to assault defendant and placed his hand in his pocket as if to withdraw a weapon, from which conduct defendant reasonably believed vital injury was about to be inflicted upon defendant, was objectionable on ground that it selected facts claimed to be material and would have court indicate an opinion favorable to defendant as to effect of such facts.

7. Criminal Law ⚿806(1)

An instruction in criminal prosecution which contains a second paragraph which is substantially a repetition of the first paragraph, with exception that second paragraph contains reference to specific evidence, should be avoided as far as possible.

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William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

[1] In an information filed by the District Attorney of Los Angeles County defendant was accused of the crime of assault with a deadly weapon. Following a plea of not guilty trial was had before a jury which returned a verdict finding defendant guilty. This appeal is from the judgment of conviction and the sentence pronounced. Since no appeal is authorized

from the sentence imposed, the attempted appeal therefrom must be dismissed.

Epitomizing the factual situation which gave rise to this prosecution the record reflects testimony that at about 2 o'clock on the morning of November 11, 1950, one John Suarez entered a cafe at San Pedro, in the city of Los Angeles. He seated himself on what was called the third stool at the counter and ordered some food. Shortly thereafter, he left his seat at the counter and was proceeding to the restroom. Prior to the entrance of Suarez into the cafe, defendant, accompanied by two ladies, had entered. They occupied a space in the cafe at the far end of the counter, opposite where the victim Suarez sat near the restroom. According to the testimony of Suarez one of the ladies was seated on what was referred to as the ninth or last stool at the counter. Defendant and another lady were standing beside her. The lady who was seated had her feet out in the aisle with her back towards the counter. Suarez bumped into the girl's legs as he was proceeding down the aisle. He told her he was sorry, whereupon the defendant cursed and asked Suarez why he didn't watch where he was going, to which he replied, "Why don't you tell the woman to put her feet under the counter?" Defendant came toward him and he "backed away". One of the ladies with defendant said, "No, don't do it.", and at that time a shot rang out. The victim Suarez did not see anything in the defendant's hands and he, himself had no weapon nor did he threaten to use one. He testified he felt a "flash in his face" and fell to the floor. There is testimony that although the defendant jumped at Suarez, neither one "swung at the other"; there was no discussion and there was no argument or fight. About eight or nine seconds elapsed from the time defendant spoke to Suarez until the latter "felt the flash". He was about two or three feet from the defendant at the time of the episode. There was no prior acquaintance between defendant and the victim.

After Suarez fell to the floor, defendant jumped over him and ran outside the cafe going to the Rancho San Pedro Housing Project, about five blocks away. While going through the grounds of the project he buried the gun in some hedges. He then went to another person's house and while he was there someone in the house said that the "cops" were outside. He left and went to his own home where he buried under his mattress the remaining shells that he had for the weapon. He then left his home but remained around the vicinity of Los Angeles for several days. He interviewed an attorney on the night of the 13th and morning of the 14th and thereafter voluntarily surrendered to the police on the 14th.

The victim was taken to the receiving hospital where it was found he had a bullet wound on the left side of his nose. The gun, a .32 calibre revolver, was found on the project grounds by a boy and was delivered by the latter's mother to the police.

The female companions of defendant were called as witnesses by the prosecution and admitted being in the cafe at the time. One of them, Julie Mae Johnson, stated that the victim came over to her and asked her to dance, that she declined and he "kept asking her". That he "pulled" on her shoulder but did not hurt her. That he then turned to the other lady and asked her to dance but that she too declined. This witness stated that she did not hear any words between defendant and the victim except that the former told the latter to let the witness alone. According to this witness there was no actual fighting.

The other lady's story was somewhat at variance with the foregoing testimony. She stated that she was asked by the victim to dance first and that she declined. She also stated that Suarez touched her on the arm. That the defendant and the victim argued, and that they were hitting at each other with their fists. That she saw defendant with the gun in his hand and that she saw him hit at the victim with the gun which "went off" and the victim fell. According to the testimony of this witness, she actually saw the defendant remove the revolver from his coat pocket. Her testimony was, "Yes, he was coming out with it". That he also pointed it at the victim and then struck at the victim with the gun.

Upon surrendering to the police, defendant stated he had left home about 7 o'clock on the night preceding the altercation and went to downtown San Pedro. While there, at about 9:30 o'clock, he met a merchant seaman who asked for a loan of $10.00 on his gun. Defendant stated he gave $10.00 to the seaman and took the gun which was loaded. That he also received some extra shells with the gun which he kept in his possession. That he then returned to the Paradise Cafe where he had been prior to the episode here in question with the two ladies above referred to and a male companion. That they stayed there until about midnight drinking. They then drove to the cafe here in question on Harbor Boulevard. The defendant further stated that the victim walked over to where he and his female companions were standing and asked the ladies to dance with him but that they declined. That he told the victim to "leave the girls alone", that they didn't want to dance. That the victim struck him on the side of the face with his fist. Defendant further stated he pulled the gun from his right front pocket and shot Suarez. Defendant was asked if the victim had anything in his hand at the time he shot him and he said, "No". He was asked if he saw anything in the victim's hand and he said, "No". He was asked if the victim picked anything off the counter and he responded, "No". That after the shooting he ran out of the cafe and hid the gun in the hedges of a housing project. He further stated that he then remained hidden around Los Angeles until November 14 when, following a conversation with an attorney, he surrendered.

On the following day in another conversation had with defendant he was asked whether he could at all times see the victim's hands, to which he then stated that the victim had his right hand in his pocket.

At the trial, defendant admitted being in the cafe with the two ladies. He testified that the victim came over and first asked one of the ladies to dance, then the other. That the victim placed his hands on the shoulder of one of the ladies and caught the other woman by the hand. That he told Suarez to let the lady alone. That the victim asked him what he had to do with it and that he said, "What do you care what I have to do with it?" That the victim made a "pass" at him with his fist but did not hit him. That he made another "pass". That the first time the "pass" was made defendant jumped back. That when the victim was going to make still another "pass" he took his gun out, struck at the victim with it, and it "went off". He further testified that he had no intention of shooting the victim but that he did intend to hit him with the gun. He further testified that the victim had his hand in his pocket and that he (defendant) was afraid the victim was "going to use something on him". He further admitted stepping over the victim after the latter fell and running out of the place.

On this appeal appellant does not challenge the sufficiency of the evidence to sustain his conviction. It is his contention that the court committed prejudicial error by misdirecting the jury on the issue of flight, and in refusing to give an instruction offered by him on the right of self-defense by a person who is being assaulted.

On the question of flight, the court instructed the jury as follows: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination."

The foregoing instruction is substantially in the language of section 1127c of the Penal Code, which section also expressly provides that "No further instruction on the subject of flight need be given".

There is no denial by appellant that the instruction given was in conformity with section 1127c of the Penal Code, nor does he deny that he fled from the scene of the alleged offense. His contention would appear to be that because some three days later he voluntarily surrendered to the police, it was the duty of the court, on its own motion, and without a request from him, to instruct the jury that this circumstance was to be considered in a light favorable to him.

[2] There are two answers to this claim. In the absence of a request by appellant for a more specific instruction, the one given sufficiently covered the issue of flight as raised by the evidence. Under the instruction given the jury was left free to determine whether the action of appellant in leaving the scene of the claimed assault showed "a consciousness of guilt * * * in the light of all other proved facts". Under such language, the jury was at liberty to consider the evidence of flight in connection with the "proved facts", namely, that appellant voluntarily surrendered himself to the authorities some three days after the altercation. Evidence of this latter circumstance was before the jury and there was nothing contained in the instruction which precluded them from taking that evidence into consideration. Indeed, they were admonished to consider evidence of the claimed flight of appellant in connection with all the other circumstances shown in evidence, which, of course, would include the circumstance of subsequent voluntary surrender.

[3, 4] And secondly, undoubtedly it is the law that in a criminal case the jury should be instructed on the general principles of law which apply to the case, and even though not requested by the parties, the court of its own motion, should give such instructions. But this rule is not applicable to specific points developed at the trial. Where the jury is otherwise fully instructed on the general principles of law involved in the case it is not the duty of the court to instruct on specific points developed at the trial unless instructions thereon are requested by the parties. People v. Klor, 32 Cal.2d 658, 662, 197 P.2d 705; People v. Meichtry, 37 Cal.2d 385, 231 P.2d 847; 8 Cal.Jur., "Criminal Law", secs. 362–363, pp. 309–312. There is nothing in the record to explain why appellant fled from the scene of the alleged assault, why he hid the gun, or why he remained in hiding for three days thereafter.

Finally, appellant contends that the court erred in refusing to give the following instruction offered by him:

"It is lawful for a person who is being assaulted, and who has reasonable ground for believing that bodily injury is about to be inflicted upon him, to stand his ground and defend himself from such attack, and in doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent.

"If you believe from the evidence, which has been admitted in this case, that John Suarez, one of the people's witnesses who testified herein, attempted to assault the defendant and placed his hands in one of his pockets as if to withdraw therefrom some weapon, from which conduct the defendant then and there reasonably believed bodily injury was about to be inflicted upon him, you are further instructed that the defendant had a legal right to use all force and means which he believed to be reasonably necessary and which would have appeared to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which then appeared to be imminent."

[5] Assuming that under the evidence appellant was entitled to have the proffered instruction on self-defense given, we have carefully examined all instructions, both given and refused, and conclude that the jury was fully instructed upon that issue, and that there was no resultant prejudice to appellant.

The trial court gave no instruction in the identical language of the first paragraph of appellant's foregoing requested instruction.

The trial judge also gave an instruction requested by appellant and reading as follows: "A person who has been attacked and who is exercising his right of lawful self-defense is not required to retreat, and he may not only stand his ground and defend himself against the attack but may also pursue his assailant until he has secured himself from danger if that course appears to him, and would appear to a reasonable person in the same situation, to be reasonably and apparently necessary; and this is his right even though he might more easily have gained safety by withdrawing from the scene."

These instructions fully and fairly advised the jury of the law applicable to that phase of appellant's defense, viz., that he was assaulted by the victim first. They contain a clear and correct statement of the rights of appellant to defend himself under the circumstances which he claimed existed at the time of the encounter between himself and the complainant.

[6] Furthermore, the second paragraph of the foregoing instruction offered by appellant is objectionable and open to criticism because it selects certain facts claimed to be material, and would have the court indicate an opinion favorable to appellant as to the effect of such facts by incorporating them into an instruction containing a correct principle of law.

As was said by this court in People v. Hill, 76 Cal.App.2d 330, 342, 173 P.2d 26, 33: "While Section 1127 of the Penal Code provides that the court 'may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case', the same code section emphatically declares that 'either party may present to the court any written charge on the law, but not with respect to matters of fact * * *'. Therefore, instructions bearing on the weight to be attached to a particular piece of evidence are properly refused."

[7] In the instruction offered by appellant the second paragraph is substantially a repetition of the first paragraph thereof, which was given by the court, with the exception of the fact that it contained reference to specific evidence. Repetitions of this character are not necessary and, as far as possible, should be avoided. Not only do such continued repetitions tend to give undue emphasis to the particular point to which they may relate, but they operate to confuse the jury in their consideration of the evidence.

The jury was correctly, fully and fairly instructed on all the necessary elements of the offense of which the appellant was convicted.

The attempted appeal from the sentence is dismissed, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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107 Cal.App.2d 364

RAICH v. SCHWARTZ et al.

Civ. 18337.

District Court of Appeal, Second District,
Division 3, California.

Nov. 7, 1951.

Action by Jay Raich against Will Schwartz, also known as Max Schwartz, and his wife for money loaned. The Superior Court, Los Angeles County, Robert H. Scott, J., entered judgment for plaintiff, and the defendants appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustained the finding that the money had been loaned to the defendant husband and wife.

Judgment affirmed.

1. Corporations ⇨519(3)

In action to recover money loaned, evidence sustained finding that loan had been made to defendant husband and wife and not to corporation through which husband and wife were doing business.

2. Appeal and Error ⇨994(1), 1012(1)

The credibility of witnesses and the weight of their testimony may not be reexamined on appeal.

3. Appeal and Error ⇨1008(1)
Husband and Wife ⇨79, 235(2)

A wife is free to incur a joint obligation with her husband and whether she did so is in action for money loaned, purely a question of fact, determination of which by trial court is conclusive on appeal. Civ. Code, § 158.

◆

Chas. L. Nichols and William R. Law, Los Angeles, for appellant Will Schwartz.

Ivan Miller, Los Angeles, for appellant Bess Schwartz.

Desser, Rau, Christensen & Hoffman, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff sued defendants Will Schwartz and Bess Schwartz, husband and wife, for money loaned, and recovered judgment of $5,000. Defendants, through separate counsel, appeal.

The admitted facts are that plaintiff drew a check for $5,000 in favor of Will Schwartz who endorsed the check and deposited it to the credit of Polycraft Corporation. Shortly thereafter, Mr. Schwartz handed plaintiff a promissory note of the corporation for $5,000 payable two years after date. This note was not due at the time the present action was commenced. After plaintiff had agreed to loan the money, he gave Schwartz his check for $75 and received 1½ shares of stock of the corporation. The check was endorsed "Will Schwartz and B. R. Schwartz." No part of the loan has been paid.

[1] The court found that the loan was made to both defendants and not to the corporation. Defendant husband claims it was established by the evidence, without substantial conflict, that the loan was made to the corporation. This contention is not supported by the record. Plaintiff testified he had never heard the name "Polycraft Corporation" before he made the loan, and that he would not have made the loan to any corporation; that when Schwartz handed him the note of the corporation he objected to receiving it, stated that he had made a loan to defendants personally, and demanded a note signed by Schwartz and his wife; that Schwartz stated the corporation note was given as additional security and promised to give plaintiff a personal note of himself and wife, which he failed to do. There was other testimony to the effect that a loan to the corporation was never discussed by the parties. The finding that the loan was not made to the corporation has firm support in the evidence.

On behalf of Mrs. Schwartz it is contended that if the loan was not made to the corporation it was made solely to her husband. The court found expressly that it was made to the husband and the wife. There was ample evidence to support this finding.

A brief resume of the testimony on this point will suffice. Plaintiff's wife and Bess Schwartz are cousins. Defendants have been married for 32 years. Bess Schwartz, in speaking with Mrs. Raich, stated that they "were going into business and needed some money," and Mrs. Schwartz requested a loan from plaintiff. Mrs. Schwartz stated to plaintiff a number of times that she would see that the money was paid as soon as possible. Mr. Schwartz owned the controlling stock in Polycraft Corporation which had just been incorporated, and he and Mrs. Schwartz were officers. They were engaging in business through the corporation which presumably was a venture in which Mrs. Schwartz would have a community interest. From the evidence as to the relationship of the parties, the activity of Mrs. Schwartz and her assurances that the money would be repaid, as well as the other circumstances surrounding the transaction, it was reasonable to infer that the credit of Mrs. Schwartz was an inducement and a factor in the making of the loan, and that the defendants, as well as plaintiff, understood that the money was being borrowed by the defendants jointly. The court accepted the version of the transaction given by plaintiff and his wife and rejected that of the defendants.

[2] It is argued that plaintiff's testimony was inconsistent with his conduct, and in some respects inherently improbable, if not incredible. This is but to say that the credibility of the witnesses and the

weight of their testimony should be reexamined on appeal, which, of course, may not be done.

[3] Mrs. Schwartz was as free to incur a joint obligation with her husband as with any other person. Whether she did so was purely a question of fact, the determination of which by the trial court is conclusive on appeal. Civ.Code, sec. 158; Lane v. McAlpine, 115 Cal.App. 607, 2 P.2d 184.

The judgment is affirmed.

WOOD, J., concurs.

VALLÉE, J., did not participate.

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107 Cal.App.2d 476

PEOPLE v. BATTAGLIA.

Cr. 4678.

District Court of Appeal, Second District,
Division 3, California.
Nov. 9, 1951.

Charles Battaglia was adjudged by the Superior Court, Los Angeles County, Philip H. Richards, J., to be guilty of having unlawfully kept and occupied a room with books, papers, and paraphernalia for the purpose of recording and registering bets on horse races, and he sought to appeal from the judgment and from an order denying his motion for a new trial. The District Court of Appeal, Parker Wood, J., held that since the trial court had not pronounced judgment but had suspended proceedings and granted probation, purported appeal from the judgment would have to be dismissed, but held that the evidence was sufficient to support the trial court's decision.

Purported appeal from alleged judgment dismissed; order denying new trial affirmed.

1. Criminal Law 🔑1023(10)

Where trial court did not pronounce judgment but suspended proceedings and granted probation, purported appeal from judgment would be dismissed and consideration would be given only to points raised by defendant as ground for reversal of order denying new trial.

2. Gaming 🔑75(1)

A violation of statute making it crime to occupy building with paraphernalia for purpose of recording bets on horse races is complete when it is shown that accused occupied place with papers and paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

3. Gaming 🔑98(5)

In prosecution for unlawfully keeping and occupying room with books, papers, and paraphernalia for purpose of recording and registering bets on horse races, purpose for which place was occupied would not have to be established by direct evidence but could be determined from consideration of all circumstances shown by evidence, and trial judge was not required to find in accordance with testimony of defendant to effect that he recorded his own bets. Pen.Code, § 337a, subd. 2.

4. Criminal Law 🔑935(1)
Gaming 🔑98(5)

In prosecution for unlawfully keeping and occupying room with books, papers, and paraphernalia for purpose of recording and registering bets on horse races, evidence was sufficient to support finding that defendant had occupied room with paraphernalia for purpose of recording bets, and therefore trial court did not err in denying defendant's motion for new trial, after he had been adjudged guilty. Pen.Code, § 337a, subd. 2.

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John J. Bradley and Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was accused of violating section 337a, subdivision 2, of the Penal Code, in that, he did unlawfully keep and occupy a room with books, papers, and

paraphernalia for the purpose of recording and registering bets on horse races. Trial by jury was waived. Defendant was adjudged guilty. His motion for a new trial was denied. Upon the hearing of defendant's application for probation, proceedings were suspended and defendant was granted probation upon the condition that he serve two months in the county jail. His notice of appeal states that he appeals from the judgment and from the order denying his motion for a new trial. Since judgment was not pronounced, the purported appeal from a judgment will be dismissed. People v. Steccone, 36 Cal. 2d 234, 235, 223 P.2d 17.

Appellant contends that the evidence is insufficient to support the decision of the court.

It was stipulated that the judge might consider the testimony given at the preliminary examination. The case was submitted upon that transcript, the exhibits referred to therein, and the testimony given by defendant at the trial.

On November 8, 1950, about 11:30 a. m., an investigator for the district attorney, a deputy sheriff and two employees of the telephone company went to a vacant store building at 3517 East Slauson Avenue in Maywood and found therein four telephones —two main lines and two extensions. The "ringers" (or telephone bells) were either disconnected or cut. About 2 p. m. on that day, the investigator and the deputy sheriff went to an apartment building at 5890 Maywood Avenue which is just around the corner and about 150 feet from the vacant store building. When they entered the kitchen of apartment 17 in that building, they saw the defendant sitting at a table and he had a telephone receiver in his hand. Upon the table there were several pieces of blank paper, a pencil, a scratch sheet, and two telephones from which the number plates had been removed. He was alone in the apartment. On the stove in the kitchen there was a radio which was not turned on. In the drawer of the stove there was a piece of white paper, approximately 7 inches by 12 inches, upon which there was pencil writing. The defendant said he had been in the apartment two days, that no other person had been in there on that date, that he had rented the apartment from a fellow known to him as "Powers" for $70 a month, and that Powers gave him a key to the apartment. The defendant handed a key to the investigator who unlocked the apartment door with it. About fifteen minutes after the officers entered the apartment, the two employees of the telephone company went to the apartment, where the officers were, and investigated the telephone installation. The telephone equipment in that apartment was connected with the telephones in the vacant store building but the connection was not made or authorized by the telephone company. The telephones in the apartment were "working on" the telephone numbers of the telephones in the vacant store. The two telephones furnished a "rotary service," that is, if a line is busy an incoming call will automatically rotate to the other line.

The officers were in the apartment about 45 minutes and during that time the telephone rang approximately ten times and each time it rang someone answered it, but the callers hung up the receiver except one time when the investigator answered the telephone. On that occasion the caller said, "Mucho Hosso have won," and "It is kind of rough" and "Is this Charley?" and "It doesn't sound like him."

It was stipulated that the investigator for the district attorney was qualified as a bookmaking expert. With reference to the piece of paper with the pencil writing on it which was found in the stove, he testified that he would call it a betting marker. He also testified that certain words and numbers on the piece of paper indicated the names of horses, the amounts bet on the horses, and the amounts won; that, in his opinion, the initials "H," "J," and "P," on the betting marker indicated the names of persons who placed the bets; that the scratch sheet showed that horses which had the same names as the names on the betting marker were running on that date at certain race tracks; that a circle in pencil writing around a horse's name on the scratch sheet indicated that that horse won the race; that the scratch sheet showed that a horse by the name of "Mucho Hosso" was running in a race on that date; and that the name "Mucho Hosso" was also on the betting marker.

Defendant testified that the figures on the betting marker were bets which the defendant himself made "to Las Vegas" and that none of the bets had been made in California; that he was betting with three persons in Las Vegas because one man would not take all his bets; and the initial "H" appearing on the betting marker "is" one of the fellows he was betting with. A telephone bill directed to "Philip Dunn Enterprises" was found by the officers in the vacant store, and it indicated that calls had been made to Las Vegas.

[2-4] Appellant contends, as above stated, that the evidence is not sufficient to support the decision of the court. He argues that no evidence was presented that he recorded any bets other than his own which he placed by telephone "to Las Vegas"; that no effort was made by the prosecution to show in rebuttal that Exhibit "2" (the betting marker) was anything but a recordation of appellant's own bets; that, in the absence of any evidence to the contrary, it must be conceded that said exhibit is a record of appellant's own bets. The information herein does not charge that defendant recorded a bet. The charge is that he occupied a room with paraphernalia for the purpose of recording bets. If the defendant did record a bet which had been placed with him, that, of course, would be an important circumstance in determining defendant's purpose in occupying the room. A violation of said section 337a, subdivision 2, of the Penal Code "is complete when it is shown that the accused occupied a place with papers and paraphernalia for the purpose of recording bets on horse races." People v. Abraham, 67 Cal.App.2d 425, 427, 154 P. 2d 450, 451. The judge was not required to find in accordance with the testimony of the defendant to the effect that he recorded his own bets. The purpose for which a place is occupied need not be established by direct evidence but it may be determined from a consideration of all the circumstances shown by the evidence. People v. Renek, 105 Cal.App.2d 277, 233 P.2d 43. In view of the testimony of the bookmaking expert that the initials on the betting marker indicated the names of persons who had placed the bets, and in view of the unusual circumstances herein with respect to the two telephones in defendant's apartment, the judge could have found reasonably that said Exhibit "2" was a record of bets placed with defendant. Irrespective, however, of whether the defendant did record a bet, the evidence was sufficient to support a finding that he occupied a room with paraphernalia for the purpose of recording bets. He was occupying the apartment and he had a key to it. Betting paraphernalia was in the kitchen. A betting marker was concealed in the kitchen stove. The two telephones on the kitchen table in front of defendant were "rotary" telephones from which the number plates had been removed, and they were unauthorized telephone extensions from two main-line telephones, without bells, in a vacant store on another street. It could be inferred that defendant had knowledge of the unusual and unauthorized telephone connection between his apartment and the vacant store. There were no numbers on the telephones in his apartment, and he testified that he telephoned to Las Vegas in making his own bets. It is to be assumed that, in making the long distance calls, he was required to state the number of the telephone from which he was calling. The contention of appellant is not sustainable.

The purported appeal from an alleged judgment is dismissed. The order denying defendant's motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

GRANDI v. WATSON et al.

Civ. 14799.

District Court of Appeal, First District
Division 2, California.

Nov. 8, 1951.

Rehearing Denied Dec. 7, 1951.

Hearing Denied Jan. 3, 1952.

F. Lloyd Grandi brought an action against D. D. Watson, Real Estate Commissioner of the State of California, and R. F. Davis, as Acting Real Estate Commissioner of the State of California, for writ of mandate directing cancellation of an order suspending petitioner's license for 90 days for alleged violations of a Business and Professions Code. The Superior Court of the City and County of San Francisco, Frank T. Deasy, J., entered a judgment adverse to petitioner, and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that evidence sustained findings that petitioner's agent violated statute by selling realty on net listing basis, and that petitioner had guilty knowledge of the transaction.

Judgment affirmed.

1. Mandamus ⚷168(4)

In action by real estate broker for writ of mandate to direct cancellation of order of Acting Real Estate Commissioner suspending broker's real estate license for 90 days because of the alleged violation of Business Profession Code by allegedly wrongful sale by broker's agent of realty on net listing basis instead of for best price possible, evidence sustained finding that owner of realty never intended it as a net listing but intended a sale at the best price obtainable. Business and Professions Code, § 10176(a, g, i), 10179.

2. Mandamus ⚷168(4)

In action by real estate broker for writ of mandate to direct cancellation of order of Acting Real Estate Commissioner suspending broker's real estate license for 90 days because of the alleged violation of Business Profession Code by allegedly wrongful sale by broker's agent of realty on net listing basis instead of for best price possible, evidence sustained finding that broker had guilty knowledge of the transaction, so as to warrant his suspension. Business and Professions Code, § 10176(a, g, i), 10179.

Gardiner & Riede, San Rafael, for appellant.

Edmund G. Brown, Atty. Gen., of California, Richard H. Perry, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

Petitioner and appellant, F. Lloyd Grandi, on October 15, 1948, brought an action in the superior court of San Francisco against R. F. Davis, Acting Real Estate Commissioner, asking for a writ of mandate ordering and directing Davis to cancel and annul an order of September 21, 1948, made by him as Acting Real Estate Commissioner suspending petitioner's real estate license for ninety days based on alleged violations of the Business and Professions Code, sec. 10176, subsecs. (a), (g) and (i). It was stipulated before the trial court that D. D. Watson, now Commissioner, may also be considered as respondent.

Section 10176 of the code provides: "The commissioner may, upon his own motion, and shall upon the verified complaint in writing of any person, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within this State, and he may temporarily suspend or permanently revoke a real estate license at any time where the licensee within the immediately preceding three years, while a real estate licensee, in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following:

"(a) Making any substantial misrepresentation.

* * * * * *

"(g) The claiming or taking by a licensee of any secret or undisclosed amount of compensation, commission or profit or the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation * * * under any agreement authorizing or employing such licensee to sell, buy or exchange real estate for compensation or commission prior to or coincident with the signing of an agreement evidencing the meeting of the minds of the contracting parties, regardless of the form of such agreement, whether evidenced by documents in an escrow or by any other or different procedure.

* * * * * *

"(i) Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing."

The case was submitted to the trial court upon the testimony and exhibits taken before a Deputy Real Estate Commissioner and Hearing Officer together with briefs and short testimony before the court by the acting Real Estate Commissioner and one other witness. The trial court made findings upholding the decision of the Real Estate Commissioner and gave judgment denying the petition for writ of mandate. Motion for a new trial was denied and petitioner appeals from the judgment. Appellant's main contention is that there was no evidence to sustain the findings and judgment of the trial court.

This action arises out of the sale of a lot in Marin County by Charles R. Turner through the Marvelous Marin Realty Company, owned by appellant Grandi. McGrath, whose license was also suspended for ninety days, acted as salesman for Turner in the sale of the lot. In May, 1947, Turner purchased this lot through the realty company for $1,750, $600 down and $40 monthly payments. In November, before he had finished paying for the lot, Turner talked with McGrath, expressed a desire to sell if he could make something on it. He was informed that those lots were selling for around $2200–$2250. There is a slight conflict in the testimony as to the price at which McGrath said he would list it but both parties agree that there was originally a listing of the property at the ordinary commission basis of 10% for either $2200 or $2250. It was a verbal listing; Turner signed no contract with them. In January an offer was made of $2100 which McGrath communicated to Turner. There was some talk of splitting the commission of $210 but Turner refused the offer stating he wanted $2000 net. Appellant states that at that time the records of the company were changed to a net listing of $2000 which was noted on the back of the card containing the listing. From that time on it was handled as a net listing for $2000.

In February another salesman in Grandi's office had a prospect interested in the Turner lot and, according to McGrath's testimony, Grandi told McGrath to telephone Turner and inquire whether the lot was still available for $2000. At this point there is a conflict in the testimony which is important in view of appellant's position that the sale was made on a net listing basis and consequently it was not necessary to divulge the selling price.

McGrath testified: "I told him [Turner] that I thought we might have a possibility of selling it at that time.

"Q. Did he ask you how much you were selling it for? A. No, he did not.

"Q. Did you tell him you were selling it for $2200? A. I didn't tell him any price.

"Q. Why not? A. It was a net listing. In case of that we don't do it."

McGrath then testified he reported to Grandi that the property was still available at $2000 net. On cross-examination Turner testified concerning this same telephone conversation. "He told me he had an offer on the property, and I asked him how much. He said $2200, the amount it was listed for. I said, 'You listed it for $2250.' That is when the conversation I have repeatedly described took place.

"Q. Isn't it true that in that conversation he said they had an offer on the property, no price but he wanted to confirm the net listing of $2,000 to you? You deny that? A. I do deny that, because all I know that I had listed my property for $2250 and that I was supposed to get $2025 back on it * * * it couldn't have been a net listing, as I have understood it since then, or it wouldn't have been necessary to have the conversation about how much commission they were going to get."

The trial court found that Turner had never authorized, expressly or otherwise, the sale of the property on a net listing basis, that Grandi was at all times in possession of full knowledge of the actions of McGrath and concluded that Grandi and

McGrath were guilty of violations of section 10176, subsecs. (a), (g) and (i), Business and Professions Code.

[1] Appellant contends that the findings are not supported by the evidence, that the evidence conclusively demonstrates that there was a net listing and in addition that Grandi knew nothing about the transaction until after it was completed. As for the net listing it is evident in reading the record that Turner intended in stating he would take $2000 net that that was the least he would sell for, it was quite evident that he wanted the company to sell the lot for the best price they could obtain for him and there is substantial evidence to uphold the finding of the trial court that Turner never intended it as a "net listing" in the sense in which McGrath interpreted it.

As to the contention of appellant in his brief on appeal that he had no knowledge of the transaction until after its completion and therefore should not be held liable for the wrongful acts of his salesman or employee under sec. 10179, Business and Professions Code, and that there was no evidence to sustain the trial court on the finding that at all times Grandi was in possession of full knowledge of the action of McGrath the record discloses:

1. Grandi testified on cross-examination that in November, 1947, McGrath told him Mr. Turner had come in and listed the lot at the same price as the other lots they had there on a 10% commission basis.

2. On January 26, after having been told by McGrath that Turner was getting very anxious to sell, Grandi wrote to Turner offering to take back the lot, return Turner's equity in the property and cancel the transaction, which offer was ignored by Turner.

3. In January McGrath informed Grandi of the Graham offer for the lot and at that time told him that Mr. Turner was then asking $2000 net.

4. Some time in January Grandi testified he revised the asking prices on the lots of the subdivision raising the price of the Turner lot to $2950, knowing at the time it was a net sale listing for $2000. Mr. Turner was not informed of the revision on the sale price of the lot.

5. In February Grandi requested McGrath to telephone Turner to learn if the property were still for sale at $2000.

6. On February 24, 1948, Grandi wrote to Turner enclosing a release to be signed regarding the sale of the property, setting forth the balance due from Turner on the lot which would be deducted from the $2000, the amount he stated Turner was to receive from the sale. No mention was made of the price for which the lot was sold.

[2] The foregoing is substantial evidence to refute the contention of appellant that the record is devoid of any showing of participation or knowledge by the appellant of anything relating to the transaction with Turner until after the transaction was closed. However under section 10179, Business and Professions Code, upon which appellant relies, it is necessary that the employer had "guilty knowledge" of the violation on the part of his real estate salesman or employee before his license can be revoked or suspended. It is true Grandi testified to the effect that McGrath told him the property was to be sold on the basis of a $2000 net listing and he accepted it as such. However there is some contradiction in his testimony. On direct examination he was asked: "Was there anything that Mr. McGrath told you, or anyone in your office, that at any time led you to believe that this was a commission—a sale, or a listing for sale for commission? A. No, it was a net listing so far as I knew, and so far as our records show. Q. Was there anything in any of the records that came to your attention as the broker, or any records of the salesmen, any entries they made, that would give you any reason to believe that this was other than a net listing sale of $2000? A. No, we only have the listing card for that type of thing, unless it is an exclusive * * *." Yet the original listing on a commission basis was put on the card, the net listing at $2000 on the back. Mr. Grandi was bound to know, if he consulted the card at all, that it was originally listed on a commission basis. If he had

so testified we would be constrained to reverse the judgment because, without any guilty knowledge of any misdeed of the agent, we would be justified in assuming, on the face of the card alone, that there had been a change in the listing by mutual consent of the owner and the agent. But he testified on cross-examination that McGrath had informed him when Turner first wished to sell that the sale was to be made on a commission basis, and later told him that Turner had changed his position and was willing to sell for $2000 net which directly contradicted his testimony that at no time did he consider it other than a net listing. This was sufficient to show that he did have knowledge of the double listing. Whether he had knowledge that the change was made without the consent of the owner is the determining factor as to whether he had "guilty knowledge" under the terms of the statute. His testimony having been so inconsistent and unsatisfactory the trial court was justified in making the finding against him.

There is substantial evidence to sustain all the findings of the trial court and the conclusion that Grandi was guilty of a violation of section 10176, (a), (g), and (i) of the Business and Professions Code.

Judgment affirmed.

GOODELL, J., concurs.

DOOLING, Justice.

I concur. Without regard to the question of guilty knowledge discussed in the main opinion I am satisfied that the evidence sufficiently shows a violation of section 10176(g), Bus. & Prof.Code, by appellant himself. That section makes a cause for discipline "the failure of a licensee to reveal to the employer of such licensee the full amount of such licensee's compensation, commission or profit under any agreement authorizing or employing such licensee to sell * * * real estate for compensation or commission * * *." Even if appellant honestly believed that Turner had orally authorized the net listing of his property at $2000 he must have known as an experienced realtor that Turner was not legally bound by a mere oral authorization. Civil Code, sec. 1624, subd. 5. That he knew there was no binding agreement to sell for $2000 net is made clear by his asking McGrath to telephone Turner to ascertain if he was still willing to take that amount.

His duty of disclosure of the true selling price under those circumstances is clear on fundamental principles of agency. See Annotation in 53 A.L.R. 136 et seq., "Duty of broker to inform principal of enhanced value of property." Knowing that he had no enforceable net agreement with Turner he was bound to disclose to Turner that he was making a $950 profit on the sale before procuring Turner's release for $2000.

No agent should put his own interests above those of his principal which is clearly what appellant deliberately did in this case.

Hearing denied; CARTER, J., dissenting.

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107 Cal.App.2d 220

SECURITY FIRST NAT. BANK OF LOS ANGELES v. ROSPAW et al.

Civ. 4179.

District Court of Appeal, Fourth District, California.

Nov. 1, 1951.

Rehearing Denied Nov. 20, 1951.

The Security First National Bank of Los Angeles, as executor of the estate of Minnie Beal Miller, deceased, brought action against Frank Rospaw and his wife to recover on a written promissory note executed by defendants and delivered to Minnie Beal Miller and her husband, also since deceased, as payees. Defendants in their answer admitted the execution and delivery of the note but denied that any amounts were due thereunder, basing their denial of liability on an alleged oral agreement with payees at the time of execution of the note to effect that the note should be effective only insofar as payments and interest thereunder became due during the lifetime of the payees. The Superior Court, Orange County, Franklin G. West, J., entered judgment on the pleadings for plaintiff, and thereafter denied defendants' request to file an amended answer alleging a conditional delivery of the note, and defendants appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the allegation of the answer failed to raise any issue of fact or state a defense, since parol evidence of the alleged oral agreement would be inadmissible, and held that the trial court had not abused its discretion in overruling defendants' motion to amend their answer.

Order and judgment affirmed.

1. Bills and Notes 🔑474

In action on installment note brought by executor of last surviving payee, allegation of makers' answer basing denial of liability on alleged contemporaneous oral agreement between parties to note, to effect that note should be effective only insofar as payments and interest thereunder became due during lifetime of payees, failed to raise any issue of fact or to state any defense. Civ.Code, § 3097; Code Civ.Proc. §§ 1856, 1962, subd. 2.

2. Evidence 🔑444(6)

In action on installment note brought by executor of last surviving payee, parol evidence was not admissible to show that at time of execution of note parties thereto had orally agreed that note should be effective only insofar as monthly payments and interest thereunder became due during lifetime of payees. Civ.Code, § 3097; Code Civ.Proc. §§ 1856, 1962, subd. 2.

3. Accord and Satisfaction 🔑25(2)

In action on installment note brought by executor of last surviving payee, allegation of makers' answer basing denial of liability on alleged contemporaneous oral agreement between parties to note, to effect that note should be effective only insofar as payments and interest thereunder became due during lifetime of payee, did not show an accord and satisfaction. Civ. Code, §§ 1521–1523.

4. Appeal and Error 🔑103

An appeal does not lie from an order denying a motion for leave to amend an answer. Code Civ.Proc. § 473.

5. Appeal and Error 🔑959(1)

Pleading 🔑236(4)

Under statute relating to relief from judgment taken by mistake, the trial court is given discretionary power in granting motion to file amended pleading after judgment has been entered on pleadings, and therefore in absence of abuse of discretion, the Court of Appeal may not interfere. Code Civ.Proc. § 473.

6. Bills and Notes 🔑487

In action on note, where answer admits execution and delivery, trial court is authorized to deny request to file amended answer alleging conditional delivery of note. Code Civ.Proc. § 473.

Harold A. McCabe, Fullerton, for appellants.

Mize, Kroese, Larsh & Mize, Santa Ana, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent, as executor of the estate of Minnie Beal Miller, deceased, brought this action against defendants and appellants Frank Rospaw and wife to recover on a written promissory note dated April 3, 1945, for the principal sum of $3,000, payable in payments of $35 or more on the 3rd of every month, with interest from that date until paid at the rate of six per cent per annum.

Plaintiff alleges in paragraph I of the complaint that Mrs. Miller died February 21, 1949, and that respondent bank was duly appointed executor. Paragraph II sets up a copy of the note, alleges its delivery to Mrs. Miller and her husband, Arthur W. Miller. Paragraph III alleges the death of Mr. Miller on September 16, 1947, the entry of a decree establishing the fact of his death and terminating his interest in the note, that Mrs. Miller was sole owner thereof, and that the devisees of Mrs. Miller's estate are now owners of the note. Paragraph IV alleges default in payment and that $2,002.01, plus interest, is due thereon. Paragraph V alleges certain attorneys' fees are due under the provisions of the note.

The answer admits the allegations of paragraphs I, II and V, but denies that Mrs. Miller was the owner of the note and denies that her devisees are now its owner. It admits that the sums alleged in paragraph IV have not been paid, but denies that such sums are now due and payable, by reason of some alleged contemporaneous oral agreement, i. e., that it was orally agreed between the parties, at the time the note was signed (notwithstanding the written terms of the note) it was to be effective only so far as the monthly payments and interest became due, during the lifetime of the deceased payees, and that therefore the note should be null and void.

On March 10, 1950, the court granted respondent's motion for judgment on the pleadings upon the grounds that the answer failed to raise any issue of fact or state a defense. The judgment was entered on March 15, 1950, from which appellants appeal.

The only claim presented by the appellants on this appeal is that the court erred in granting the motion because the answer did set up a *defense* which should have been heard on its merits, i. e., that parole evidence was admissible for two reasons: (1) that there was a conditional delivery of the note for a special purpose, which was evidenced by a contemporaneous oral agreement; and (2) that under the pleadings it amounted to an offer to prove an executed oral agreement in the nature of accord and satisfaction, citing sec. 3097, Civil Code, and such cases as Ellington v. Pacific Coast Pulp, etc., Corp., 135 Cal. App. 703, 713, 28 P.2d 404; Peterson v. First National Bank of Bay Point, 101 Cal.App. 532, 536, 281 P. 1104; Treadwell v. Himmelmann, 50 Cal. 9; Silva v. Gordo, 65 Cal.App. 486, 224 P. 757; P. A. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411; and Howard v. Stratton, 64 Cal. 487, 2 P. 263. Respondent contends otherwise.

The death of Mrs. Miller, the legal status of respondent as executor, the due execution and *delivery* of the note to Mr. and Mrs. Miller, and that the principal sum of the note as alleged in the complaint is unpaid except the sum of $997.99, is admitted by the pleadings. It is further admitted that one installment of $35, plus interest, was due and unpaid on February 3, 1949, and that no further payments on said note have been made. No point is made on this appeal about the allegation, which is denied in the answer, that at the time of Mrs. Miller's death she was sole owner of the note and that her devisees, subject to the administration of her estate, were thereafter the owners thereof. Under these circumstances, we will turn our attention only to the question of the claimed oral contemporaneous agreement alleged, and as to whether or not it was a provable defense. Overton v. White, 18 Cal.App.2d 567, 570, 64 P.2d 758, 65 P.2d 99.

[1, 2] We conclude that the allegations of the answer set forth only a claimed contemporaneous oral agreement between the parties to the note, affecting only the question as to whether or not payments thereon should continue after the death of the payees, which claimed oral agreement is contrary to the very terms of the written agreement. This same claimed defense was urged in Seth v. Lew Hing, 125 Cal.App. 729, 736, 14 P.2d 537, 14 P.2d 190, where the court said that such an oral agreement was inadmissible and that the maker of a promissory note cannot rely upon an oral promise not to pay in the absence of fraud, mistake, or want of consideration, and that when there is neither fraud nor mistake and a *consideration has passed,* the maker is bound by his written promise and may not rely upon parole evidence to prove a collateral agreement for relieving him from liability. Any evidence taken under this claimed defense would be inadmissible. Sec. 1856, C.C.P.; Sec. 1962, subd. 2, C.C.P.; Van Fleet-Durkee, Inc., v. Oyster, 91 Cal.App.2d 411, 205 P.2d 32; McArthur v. Johnson, 216 Cal. 580, 582, 15 P.2d 151. The general purpose of this rule is clearly reflected in the instant case where the payees are deceased and payors are endeavoring to establish some claimed oral contemporaneous agreement with them, contrary to the terms of the written agreement. The facts in the instant case distinguish the cases relied upon by appellants

which hold that a *conditional delivery* may constitute a defense under sec. 3097 of the Civil Code. The execution and *delivery* of the note and the payment thereon are admitted. The only claimed defense is that the parties orally agreed that upon the death of the payees no further payments would be exacted.

[3] The facts pleaded do not show an accord and satisfaction. See secs. 1521–1523, Civ.Code; 1 Cal.Jur. p. 124, sec. 1; and B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 170, 137 P. 624, 626, where it is said:

"The phrase 'accord and satisfaction' as it is known and applied in the law means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. * * *

"As a matter of course an agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the pre-existing agreement * * *."

It was held in Ayoob v. Ayoob, 74 Cal. App.2d 236, 168 P.2d 462, [quoting from the syllabus] that: "For a new agreement to constitute an accord and satisfaction, generally a right of action must have already accrued on the old obligation."

On March 16, 1950, one day after entry of the judgment on the pleadings, appellants filed a "Petition to File an Amended Answer", accompanied by the proffered amended answer which set up the same claimed defense related and a further claimed defense that the *delivery* of the note was *conditional,* predicated upon an oral agreement between the parties that said note would not go into effect so long as the payors paid the payees $35 per month during the payees' lifetimes; that this understanding was made because of the fondness of the Millers for the son of defendants and because "it would give the defendants an opportunity to help the son when he returned from military service." The court denied the petition and defendants appealed from the order.

[4] An appeal does not lie from an order denying a motion for leave to amend an answer. Overton v. White, 18 Cal.App. 2d 567, 64 P.2d 758, 65 P.2d 99; Brown v. Volz, 90 Cal.App.2d 793, 204 P.2d 110. However, in said petition is contained a request to "set aside" the "Order Granting Judgment on the Pleadings", and to allow defendants to file the proffered amended answer, on the ground of excusable neglect in that counsel for appellants neglected to ask the court, prior to or at the time of the hearing on the motion for judgment on the pleadings, for permission to amend the answer. Appellants contend this is, accordingly, an appealable order under sec. 473 of the Code of Civil Procedure.

[5, 6] Assuming, for the purpose of argument, that appellants have brought themselves within the provisions of sec. 473, supra, the trial court, under that section is given discretionary power in granting the motion, and in the absence of an abuse of discretion this court may not interfere. Weck v. Sucher, 96 Cal.App. 422, 274 P. 579. The trial court was authorized to believe that the showing made of excusable neglect, inadvertence and mistake was insufficient to warrant an order granting relief. Where a defendant admits due execution and delivery of a note in his answer the court is authorized to deny a request to file an amended answer, where defendant changes his position and alleges a conditional delivery. Overton v. White, supra; Lee v. Hensley, 103 Cal.App.2d 697, 230 P.2d 159.

Order and judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

107 Cal.App.2d 523

HALL v. HAGERMAN.

Civ. 7976.

District Court of Appeal, Third District, California.

Nov. 14, 1951.

Action by John M. Hall against Ralph Hagerman on common count for money had and received. The defendant filed a cross-complaint seeking an accounting with relation to partnership between defendant and plaintiff. The Superior Court of Napa County, Mervin C. Lernhart, J., disallowed the claims of both plaintiff and defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, J., held that evidence sustained finding that agreement executed between parties, in view of evidence concerning execution, had dissolved partnership and had completely and finally settled its affairs and distributed its assets and that neither party had received any property or money for use and benefits of the other.

Judgment affirmed.

1. Partnership ⚷108

An action at law by partner or copartner on claim growing out of partnership transaction will not lie until business is wound up and partners' affairs finally settled.

2. Partnership ⚷120

If action between partners is for balance due, complaint must aver settlement of firm affairs and determination of amount owing by defendant to plaintiff, but if action is for money received, based on theory that final settlement has been had, complaint in form of common count need not allege that there has been accounting or settlement of partnership affairs.

3. Evidence ⚷458

In action by plaintiff against former partner on common count for money had and received in which partner filed counterclaim for accounting, wherein instrument executed by parties and termed agreement for dissolution of partnership was on its face ambiguous as to whether it was final dissolution of partnership, taking of evidence of circumstances surrounding execution of such agreement for purpose of interpretation thereof was proper.

4. Partnership ⚷296(3)

In action by plaintiff against former partner on common count for money had and received which made no reference to prior partnership, wherein partner filed counterclaim for an accounting, and wherein it appeared that written agreement for dissolution of partnership had been executed by parties and that such agreement was ambiguous, evidence sustained court's finding that agreement had dissolved partnership and finally settled its affairs and distributed assets.

5. Evidence ⚷370(5)

In action by plaintiff against former partner for money had and received, wherein central controversy was whether agreement executed by parties was final dissolution of partnership and final division of assets, refusal of court to admit memorandum written by former partner's wife on business record as evidence concerning whether division of assets after sale by partner of business was contemplated by original agreement was proper when it appeared that wife was not bookkeeper or in any way agent of partner or possessed of authority to bind him by her writing.

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Riggins, Rossi & King, Napa, for appellant.

Ralph Trower, Napa, for respondent.

VAN DYKE, Justice.

[1, 2] On July 22, 1947, the parties hereto became copartners under written articles. The business of the firm was the wholesaling and retailing of candy, nuts, gum and allied lines of merchandise. The business centered in Napa and involved three sales routes for the covering of which the partnership had three trucks, two driven by the copartners and one by an employee. On July 23, 1948, the partners executed a document entitled "Agreement for Dissolution of Partnership", and this action arose out of the varying interpretations which the parties thereto placed upon that instrument. The action was begun by Hall who filed a complaint against Hagerman in the form of a common count for money had and received, claiming recovery of the sum of

$1,347.90. No mention of the partnership was made in that pleading. Hagerman answered, denying generally the common count allegations of the complaint. He also counterclaimed for money had and received, seeking recovery of $96.54. He cross-complained for the same amount and in that pleading he alleged the execution of the articles of the copartnership and the execution of the dissolution agreement, attaching both documents to his pleadings as exhibits. He declared that by the dissolution Hall had received assets exceeding in value in the amount sued for those he had received. In his prayer, he also asked that an accounting be had of the partnership affairs. It is well at this point to refer to the well-established rules that an action at law by a partner or copartner ordinarily will not lie on a claim growing out of the partnership transactions until the business is wound up and the partners' affairs finally settled, 68 C.J.S., Partnership, § 108, p. 550; that if an action between partners is for a balance due, the complaint must aver a settlement of firm affairs and a determination of the amount owing by defendant to plaintiff; but that if the action is for money received, based on the theory that a final settlement has been had, a complaint in the form of a common count need not allege that there had been an accounting or settlement of the partnership affairs, 68 C. J.S., Partnership, § 129, p. 565, and, finally, that an action upon a common count for money had and received proceeds upon the theory that a final settlement has been made. Crudo v. Guida, 43 Cal.App.2d 26, 29, 110 P.2d 109. It is thus apparent that plaintiff by pleading in common count for money had and received, without mention of the past existence of the partnership between himself and the defendant proceeded upon the theory that a dissolution had occurred and a final settlement and distribution of assets had been arrived at. What the theory of defendant and cross-complainant Hagerman was is not so clear, for he did pray for an accounting, a relief consistent only with the nonoccurrence of any settlement of partnership affairs.

At the trial the plaintiff placed in evidence the agreement for dissolution and sought by the interpretation which he placed upon the document to sustain his cause of action. It was at once apparent from that document that it contained many inconsistencies and was fraught with much ambiguity. There is practically no contention by either party that the court did not need evidence of the circumstances attendant upon its execution in aid of its interpretation. Such evidence was therefore taken and the trial court construed the document as having constituted not only an agreement for the dissolution of the partnership but also an agreement for final settlement of partnership affairs and for the distribution between the partners of the assets of the partnership with one contingency, which was that if by the immediate sale of certain partnership assets received by defendant Hagerman he should realize a substantial profit or increase over the amount at which the partners had valued these assets, then he was to make a further division of the profit or increase so derived, turning over one-half of it to plaintiff Hall. The court found, however, as to this contingency that no such profit had been realized and therefore adjudged the plaintiff was to take nothing. The trial court also disallowed the claim of defendant Hagerman for the sum sued for by counterclaim and cross-complaint and denied Hagerman's prayer for an accounting. Plaintiff Hall has appealed. Defendant and cross-complainant Hagerman has not.

The question on appeal is whether or not the trial court's interpretation of the contract finds support in the instrument itself, as that interpretation is aided by the evidence taken. The rules by which we are guided in the solution of this problem are well stated in such cases as Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17; Crillo v. Curtola, 91 Cal.App.2d 263, 272, 204 P.2d 941, and Nuland v. Pruyn, 99 Cal. App.2d 603, 609, 222 P.2d 261. We need not restate those rules here. Appellant makes some further contentions which will be stated and disposed of later. The written agreement for dissolution contains many contradictions among its terms and is affected by much ambiguity. We think it must be quoted. It reads as follows:

"Agreement for Dissolution of Partnership

"This Agreement made and entered into in duplicate this 23rd day of July, 1948, by and between Ralph Hagerman of Napa, California, party of the first part and John M. Hall of the same place, party of the second part.

"Witnesseth:

"That said parties and each of them have mutually agreed and do hereby agree to a dissolution of the partnership entered into by and between them on the 22nd day of July, 1947, and which business has been heretofore conducted by them under the name of Hagerman and Hall. It is understood and agreed upon the execution of these instruments that the party of the second part is to receive and is entitled to withdraw from the bank account of said business heretofore conducted by them as above set forth the sum of One Thousand Six Hundred Eight and 30/100 Dollars ($1,608.30), and the party of the first part shall be entitled to withdraw the sum of One Thousand Dollars ($1,000.00).

"The party of the second part shall be also entitled to receive, accept and collect all accounts receivable owing to said copartnership and the said accounts receivable are hereby fixed and established in a sum of Four Hundred Fifty-seven and 74/100 Dollars ($457.74); second party is also entitled to receive and to dispose of one (1) Chevrolet truck and one (1) Ford truck belonging to said co-partnership and to receive and keep the proceeds derived on the sale of the same.

"It is understood and agreed that each of said parties did upon the commencement of said co-partnership invest the sum of Five Thousand Seven Hundred and Fifty Dollars ($5,750.00) in said business, and it is the desire and intention of each of the parties hereto that they and each of them shall receive from said business on the dissolution thereof and of said partnership the amount of their original investment plus any profit or proceeds derived on the sale of said business by the party of the first part.

"It is further understood and agreed that the accounts payable amount to the sum of Two Hundred Seventy-six and 72/100 Dollars ($276.72), which said amount the party of the first part agrees to assume and pay. The party of the first part is to keep the stock on hand belonging to said co-partnership which by mutual agreement is hereby fixed at Three Thousand Six Hundred Nine and 83/100 Dollars ($3,609.83), and in addition thereto he is to take over the unexpired insurance amounting to Ninety-eight and 65/100 Dollars ($98.65) and the prepaid rent in the sum of Forty Dollars ($40.00) and also one (1) Dodge truck belonging to said co-partnership, all of which shall be and become the property of the party of the first part on the dissolution of said partnership.

"It is further understood and agreed that the party of the first part is to try to effect an immediate sale of the business heretofore conducted by the parties hereto, and if and when said sale is effected the amount for which it is sold is to be added to the amount received by the party of the second part and the total is to be divided equally between them. It is further understood and agreed that a notice of this dissolution of partnership shall be published not less than twice in the Napa Register.

"In witness whereof, the said parties have hereunto subscribed their hands the day and year hereinbefore written.

"(Signed) Ralph Hagerman
Party of the First Part
(Signed) John Hall
Party of the Second Part"

It is thus seen that unequivocally the parties agree by the document that the partnership is dissolved. This would, of course, lead to such liquidation proceedings as the parties might agree upon or as might be implied in law. It then goes forward, however, to state that Hall, appellant here, is to receive $1,608.30 of the cash on hand, and Hagerman, the respondent here, is to receive the balance of $1,000. This unequal division, when the parties were entitled under the articles of copartnership to equal ownership indicates the beginning of settlement provisions. Appellant Hall is also to receive, accept and collect accounts receivable and is entitled to receive and dispose of two of the three trucks and to "keep the proceeds derived on the sale of the same." These are all terms of settlement. Then, skipping a paragraph, to which we will return, respondent Hagerman assumes and agrees to pay the accounts payable, but is to keep the stock on hand and to "take over" the unexpired insurance, the prepaid rent and the Dodge truck, all of which, says the agreement, "shall be and become the property" of Hagerman "on the dissolution of said partnership." These terms also are terms of final settlement and division of assets. But the paragraph we skipped is now to be considered, and it recites that the copartners had invested in the beginning each the sum of $5,750 and desired and intended that they should each receive on dissolution the amount of these original investments "plus any profit or proceeds derived on the sale of said business" by respondent Hagerman. And the concluding paragraph provided that Hagerman was to try to effect an immediate sale of the business and if and when he did so the sale price was to be added to the amount received by appellant Hall, and the total was to be divided equally between the parties. It is clear that these provisions are inconsistent with any logical interpretation of the other provisions we have referred to and indicate that no settlement had in fact been effected, but that the assignments of property were rather by way of allocation of duties of the two partners in liquidating the partnership.

[3, 4] Upon the face of the instrument we think that the conflict cannot be reconciled and the trial court of necessity took evidence of the circumstances surrounding the execution of the so-called dissolution agreement. We need only refer to those parts of the testimony taken which support the interpretation of the trial court. And so we find that respondent Hagerman testified that after the agreement was executed no consultations were had between himself and appellant concerning the operation of the business; that the name of the business was changed to that of "Hagerman Candy Company"; that notice of dissolution was published as provided for; that he alone sold the business some three months after his take-over, during which time he had conducted it under the new name; that while he told appellant about the sale no demand was made by appellant for any share of "profit" nor was any intimation given by appellant that he considered respondent to be continuing a partnership business after dissolution anticipatory to sale; that when he and appellant talked of dissolving the partnership appellant had come to him with a paper upon which he had made notations proposing a settlement; that by this appellant was to get the two trucks, the amount he later got from the bank account, and the accounts receivable, while respondent was to take the remaining truck, the stock on hand and assume the debts; and having agreed upon that they went to a Mr. Graves who drew up the agreement for them. Respondent further testified that the only reason the agreement was drawn up was to protect appellant in case he, respondent, would be able at once to sell the business "at a fine profit", $7,000 or $8,000 profit being mentioned. He testified he endeavored to sell the business, but he could not and was compelled to continue it until a sale could be effected. When asked if there was anything in those conferences about appellant sharing in any possible loss if respondent sold at less than the values mentioned in the agreement, he replied that there was not, but that he told Mr. Graves he "didn't want any figures in there" because he might not be able to sell at a profit, he might have to sell at a loss. The business was actually sold at less than the value of it as stated in the agreement. Respondent testified that two of the routes were abandoned when the trucks by which they had been worked were turned over to appellant and that he continued to drive the remaining route; that the sale he made was influenced as to price by his developing a bad knee with a dislocated cartilage which interfered with his ability to continue driving the truck on the route. We think that in view of the general trend of the agreement which we have noted and which is in favor of a construction of final settlement, the evidence is sufficient to support the court's interpretation that by this agreement the parties not only dissolved the partnership, but completely and finally settled its affairs and distributed its assets with the contingency heretofore mentioned as to further payment to appellant of the profit which respondent might make upon immediate sale.

[5] Appellant contends further that the court erred in excluding from evidence a certain memorandum. During the course of the trial respondent on demand produced certain business records wherein was found a lead pencil memorandum which it appeared had been made by respondent's wife and which it may be said would tend to show that the parties had not intended a final settlement, but had contemplated a division of assets after respondent should have sold the business. But the proof showed that the memorandum was not a business record, that Mrs. Hagerman was not the bookkeeper or in any way the agent of respondent, that she had no authority to bind him by the memorandum she wrote; and we think, therefore, that the trial court was justified in refusing to admit the memorandum in evidence. The memorandum is characterized by respondent as mere speculation and "doodling" indulged in by respondent's wife and we think this description is accurate. Appellant further contends that the findings do not support the judgment. The rules by which the sufficiency of findings are to be tested and the rules for interpretation thereof where interpretation is needed are fully set forth in Richter v. Walker, 36 Cal.2d 634, 639, 226 P.2d 593, and we need not restate them here. Tested by these rules we think the findings are sufficient. The court found that respondent is not indebted to plaintiff in any amount for money had and received as alleged by plaintiff's complaint; that appellant was not indebted to respondent as claimed in respondent's counterclaim and that although there had been a partnership the same had been dissolved when the dissolution agreement had been signed and that by the dissolution agreement the parties had intended to distribute all the assets of the partnership, with the aforesaid contingency as to a profit upon the immediate sale of the business; that no such profit had been made. No demand for any more specific findings appears to have been made. Summarized, and given the benefit of proper implications, they are to the effect that the parties had dissolved their partnership and made a complete settlement and distribution of assets and therefore that neither had received any property or money for the use and benefit of the others.

The judgment is affirmed.

SCHOTTKY, J. pro tem., and ADAMS, P. J., concur.

L. B. LABORATORIES, Inc. v. MITCHELL.

Civ. 18177.*

District Court of Appeal, Second District,
Division 3, California.

Nov. 6, 1951.

Hearing Granted Jan. 3, 1952.

The L. B. Laboratories, Inc., a California corporation, brought an action against Walter A. Mitchell, a certified public accountant who allegedly was specially employed to prepare plaintiff's tax returns for each of the calendar years 1943 and 1944, to recover interest and penalties resulting from late filing of 1943 federal income tax returns, for interest resulting from late filing of 1943 state return, for interest and penalties resulting from late filing of 1944 federal returns, for interest resulting from late filing of 1944 state return, and for counsel fees incurred in negotiating a settlement with the Treasury Department. The Superior Court of Los Angeles County, Carl A. Stutsman, J., rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, on rehearing, Shinn, P. J., held, inter alia, that the action was for negligent breach of professional duty and not for breach of contract and that two-year statute of limitations was applicable.

Judgment reversed with directions.

Prior opinion, 235 P.2d 253.

1. Limitation of Actions 🔑39(1)

Where defendant who had agreed to prepare state and federal income tax returns for years 1943 and 1944 for plaintiff, filed "tentative" returns, and amended returns were subsequently filed in 1946, and Internal Revenue agent determined there should be an assessment for additional taxes and penalties, if defendant was guilty of breach of duty it was because defendant's imperfect performance constituted negligence, and not because defendant altogether failed to perform, and action for damages was for negligent breach of professional duty and not for breach of contract, and two-year statute of limitations was applicable. Code Civ.Proc. § 339, subd. 1.

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* Subsequent opinion 244 P.2d 385.

2. Negligence ⚷4

A member of the learned professions, and any one who undertakes employment because of his possession of exceptional skill, impliedly represents that he possesses and will employ the degree of learning and skill usually possessed by those in good standing practicing their specialties in same locality, and impliedly agrees to use his best judgment, does not guarantee results.

3. Contracts ⚷326

The failure of person to achieve a guaranteed result is actionable, independently of negligence.

4. Negligence ⚷4

Where person undertakes to employ special skill there is no breach of duty if such skill and operator's best judgment are put forth, and under such circumstances, mere errors of judgment are not actionable.

5. Negligence ⚷4

When an act is negligent if done without reasonable skill, skill which the actor is required to exercise to avoid being negligent in the doing of the act is that which he as a reasonable man, should recognize as neecssary to prevent the act from creating an unreasonable risk of harm to another.

6. Principal and Agent ⚷79(1)

Every failure of an agent to file completed income tax returns for principal on time is not, as a matter of law, a negligent breach of duty.

7. Principal and Agent ⚷79(5)

In action by taxpayer against certified public accountant, who had been employed to prepare tax returns, for damages in having to pay interest, late filing penalties for federal taxes and counsel fees for negotiations with Treasury Department, evidence did not justify finding of negligence on part of defendant in not having filed completed tax returns on time.

8. Limitation of Actions ⚷55(3)

Where defendant had agreed to prepare state and federal tax returns for years 1943 and 1944 for plaintiff, and defendant filed "tentative" tax returns, and amended returns were finally filed in 1946, and Internal Revenue agent determined that there should be an assessment for additional taxes and penalties, plaintiff could have maintained negligence action against defendant, when amended returns were filed by defendant, to recover damages consisting of amount of plaintiff's interest obligation and damages suffered by reason of exaction of penalties for late filing of returns and late payment of taxes, notwithstanding there may have been separate breaches of duty with respect to 1943 and 1944 taxes, and two-year statute of limitations commenced to run from that time. Code Civ.Proc. § 339, subd. 1.

9. Indemnity ⚷13(1)

One who has incurred a liability as result of negligence of another has sustained recoverable damage and may sue therefor even though he has not satisfied the obligation.

10. Action ⚷38(1)

Where damage is suffered as result of breach of duty amounting to a tort, there is but a single cause of action for recovery of damages, past, present and future.

11. Limitation of Actions ⚷55(1)

Whenever damage is sustained in more than a nominal amount as result of tortious conduct, the statute of limitations is set in motion.

12. Limitation of Actions ⚷55(3)

Where defendant had agreed to prepare state and federal tax returns for years 1943 and 1944 for plaintiff, and defendant filed "tentative" tax returns, and amended returns were finally filed in 1946, and Internal Revenue agent determined that there should be an assessment for additional taxes and penalties, two-year statute of limitations on plaintiff's right of action for negligence was not tolled by fact that amount of defendant's liability was in some respects uncertain or incapable of exact ascertainment. Code Civ.Proc. § 339, subd. 1.

13. Damages ⇨6

Where it is made certain that liability exists and damage will be suffered as result of defendant's negligence, defendant may not complain of uncertainty as to amount of damages awarded where court acts upon best evidence available and award is supported by reasonable probabilities with respect to amount of damages.

14. Limitation of actions ⇨95(1)

Where defendant had agreed to prepare state and federal tax returns for years 1943 and 1944 for plaintiff, and defendant filed "tentative" tax returns, and amended returns were finally filed in 1946, and Internal Revenue agent determined that there should be an assessment for additional taxes and penalties, uncertainty of plaintiff as to extent of plaintiff's probable liability for penalties for late filing of returns and late payment of taxes, and for interest, did not affect running of statute of limitations as to plaintiff's cause of action for negligence from date when plaintiff knew of defendant's breach of duty.

◆

Sheppard, Mullin, Richter & Balthis, Gordon F. Hampton and E. Talbot Callister, Los Angeles, for appellant.

Walter G. Danielson and H. Spencer St. Clair, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant Mitchell, a certified public accountant, appeals from a judgment for plaintiff in the amount of $17,428.83 rendered after a trial to the court.

The complaint, filed December 7, 1948, alleged defendant was specially employed to prepare plaintiff's tax returns for each of the calendar years 1943 and 1944, that defendant negligently failed to prepare and file proper returns until 1946, and as a result plaintiff was damaged in having to pay interest and late filing penalties for federal taxes, as well as counsel fees for negotiations with the Treasury Department. These grievances are stated in the form of five causes of action: (1) For interest and penalties resulting from late filing of 1943 federal returns; (2) for interest resulting from late filing of the 1943 state return; (3) for interest in penalties resulting from late filing of 1944 federal returns; (4) for interest resulting from late filing of the 1944 state return; (5) for counsel fees incurred in negotiating a settlement with the Treasury Department. For some purposes of the discussion that follows the claims on account of interest charges will be considered together, likewise the claims based upon the penalties paid. The conclusions we have reached have application to both state and federal returns for both years.

Defendant is a certified public accountant who has conducted his own practice in Los Angeles since 1935. He held himself out as a specialist in tax matters and had prepared returns for plaintiff in 1941 and 1942. On February 7, 1944, defendant wrote a letter to plaintiff agreeing to conduct an income tax review of plaintiff's books and prepare state and federal tax returns for the year 1943. A similar agreement was made in January, 1945, covering the 1944 tax returns. On March 15, 1944, defendant filed "tentative" 1943 returns which consisted of entries of $20,000 for "net income" and $5,300 for income tax due, which amount was paid by plaintiff at that time. These entries were estimates based on the corresponding figures on the corporation's 1942 tax return. Mitchell asked for and was granted an extension of time until May 15, 1944, to file an amended or completed return. A second extension was granted until June 15, 1944, at which time he filed another return which was identical with the "tentative" return previously filed. Thus in 1944 no 1943 return fully listing income and deductions was filed but the estimated tax was paid on time. In 1945 the same "tentative" and "completed" procedure was followed, with the indicated tax being paid. Finally, in March, 1946, defendant filed "amended" returns for 1943 and 1944 which clearly contained the necessary information. The additional indicated tax was paid by plaintiff at the time the "amended" returns were filed. A similar procedure was followed with respect to the California franchise returns for 1943 and

1944. In the margin we have set out the estimates and payments made over the two-year period as well as the figures composing the damages as found by the trial court.[1]

On January 9, 1947, after the "amended" returns were filed, an Internal Revenue agent made an audit of plaintiff's books and determined that there should be an assessment for additional taxes and penalties in the amount of $52,386.46. A portion of Mrs. Olson's salary for each year was disallowed. The agent stated to defendant that since the Olsons owned all the stock excessive salary might be, in part, regarded as dividends, and as such, not deductible from the corporation income. The agent also informed defendant there would probably be a late filing penalty unless reasonable cause for such delay in filing completed returns were shown. Defendant prepared a comprehensive affidavit stating that the late filing was not due to an intent to evade the law, and that the final returns were late because the corporation relied on defendant and he was unable to do the work because of insufficient accounting assistance due to the manpower shortage. Olson, president of the plaintiff corporation, refused to sign the affidavit. His reason was that it presented the Swedish officers of the corporation in an unfavorable light. Defendant later prepared and filed his own late filing affidavit. On behalf of plaintiff a protest was filed by defendant to parts of the proposed additional assessment of $52,386.46, and he later met with the Conference Section of the Internal Revenue Agent in Charge, Los Angeles Division. The protest was denied and in June, 1947, defendant requested a hearing before the Conference Section of the Technical Staff, Pacific Division, Bureau of Internal Revenue. The hearing was set for March 15, 1948, and when notified defendant informed Mr. Olson who immediately called his attorney, Mr. Danielson. They dismissed defendant

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[1] The various tax figures involved in this case are as follows:

	1	2	3	4	5	6	7	8
	Paid at time tentative return filed	Indicated tax March 22 1946	Paid at time amended return filed 3-22-46	Interest Due March 22 1946	Additional taxes due after Treasury Audit	Total taxes paid	Statutory Penalties Proposed	Compromise payments in addition to deficiencies
Federal Income:								
1943	5300.00	4908.55	(391.45)	0.00	(refund)	4908.55	1227.21	613.61
1944	5300.00	6255.29	955.29	58.88	69.93	6325.22	1581.30	790.65
Decl Val Excess Profits								
1943	0.00	0 00	0.00	0.00	0.00	0.00	0.00	0.00
1944	0.00	1064.10	1064.10	65.69	415.53	1479.63	369.91	184.95
Excess Profits								
1943	0.00	18606.14	18606.14	2352.74	5265.47	23871.61	5967.90	2983.95
1944	0.00	44047.24	44047.24	2715.07	5066.22	49113.46	12278.36	6139.18
State								
1943	766.12	1324.99	558.87	67.71	0.00	1324.99	0.00	0.00
1944	705.04	24433.11	1727.07	106.50	0.00	2433.11	0.00	0.00
				5366.59	10817.15		21424.68	10712.34
				(4)	(5)		(7)	(8)

The judgment awarded by the court below is composed of:

The interest paid (column 4)	$ 5366 59
The compromise payment (col. 8)	10712.34
Counsel fees (not shown above)	1350.00
Total	$17428.93

The amounts listed in column 5 were paid by plaintiff at the time of the settlement and are not directly involved in this lawsuit.

The total of column 7 is the *statutory penalty* which was not imposed but rather a compromise sum as indicated by the total of column 8 was paid by plaintiff.

and turned the negotiations over to Alva Baird, an attorney and tax practitioner. A compromise settlement was reached regarding penalties and the proposed deficiency assessments, and plaintiff paid the amount agreed upon. (See note 1.) It is this compromise sum which is the major element of damage in this action.

The complaint stated a cause of action for negligence. It alleged that defendant represented himsef to be an expert on all tax matters and a specialist in the field of federal and state tax practice admitted to practice before the United States Treasury Department and the United States Court of Tax Appeals, and that plaintiff in reliance upon the representations employed defendant as alleged and that all the specified acts of defendant pursuant to the employment were negligently performed.

Plaintiff contends that its action is for breach of contract; defendant insists that it is for negligence. This is the important question in the case, upon which depend defendant's claims that the evidence was insufficient to prove negligence, and that the action is barred by the statute of limitations.

[1] In support of its contention that the action is for breach of contract, plaintiff claims complete failure of performance on the part of defendant. It contends that the "tentative" returns were nullities and that their preparation and filing and all defendant's subsequent efforts in its behalf amounted to not even partial performance by defendant. The court found that the returns were "nullities" and of no force or effect whatever. It also was found that defendant breached his contracts of employment and that his failure to perform was due solely to his own negligence. We will agree that if there was complete failure of performance on defendant's part, recovery would necessarily have been for breach of contract. But we think the designation of the returns as "nullities" was a mere generalization which does not furnish an answer to the question of partial performance. We agree with defendant that the filing of the "tentative" and "completed" returns constituted partial performance, that the filing of the "amended" returns constituted full performance except for the delay, and that the incompleteness of the "tentative" and "completed" returns, and the delay in filing the "amended" returns are elements of performance which go to the question of negligence. At the proper times, plaintiff filed returns and paid taxes, although the returns were incorrect and incomplete and thus did not comply with section 52 of the Internal Revenue Code, 26 U.S.C.A. § 52. Plaintiff now says, in effect, that it was in the position of one who had filed no returns at all. We must disagree. The two defaults and their consequences are dissimilar. The incomplete returns, although not legally sufficient, were recognized by the Bureau of Internal Revenue as giving notice of possible tax liability and plaintiff was not, and could not have been accused of having wilfully failed to file returns. Also, as we shall see, the element of wilfulness had a decisive influence in the matter of the assessment of penalties and the filing of the first returns furnished evidence of plaintiff's good faith. The legal conclusion that the returns were "nullities" does not detract from the fact that defendant was attempting to utilize his skill in performing the contract under adverse circumstances. It should be noted that although the penalty is nominally for late filing it is actually for late payment of taxes. If defendant had made sufficient estimates of taxes on the "tentative" returns, and they had been paid, there would have been no penalties even though the returns were legally insufficient. Moreover, it is reasonable to suppose that the attempted compliance with the law was an important factor in the compromise settlement, under which the penalties were reduced to one-half of the amounts that could have been assessed. If defendant was guilty of any breach of duty it was because his imperfect performance constituted negligence, not because he altogether failed to perform. We conclude that the action was for negligent breach of professional duty.

[2] The courts have uniformly based recovery upon principles of negligence where there has been failure to employ the knowledge, skill and judgment which is engaged to be rendered in professional employment, or other employment of a highly specialized nature. A member of the learned professions, and for that matter any one who undertakes employment because of his posses-

sion of exceptional skill, impliedly represents that he possesses and will employ the degree of learning and skill usually possessed by those in good standing practicing their specialties in the same locality. He impliedly agrees to use his best judgment but does not guarantee results. Roberts v. Parker, 121 Cal.App. 264, 8 P.2d 908. "In all those employments where peculiar skill is requisite, if one offers his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretensions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully, and without fault or error; he undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith, or dishonesty, but not for losses consequent upon mere errors of judgment." Cooley on Torts (4th ed.), vol. 3, p. 335. Lawyers are in this category. Hays v. Ewing, 70 Cal. 127, 11 P. 602; Gambert v. Hart, 44 Cal. 542; 3 Cal. Jur. 670. The rule has been applied to abstractors, architects and financial agents, Cooley, supra, p. 336; also to engineers, Cowles v. City of Minneapolis, 1915, 128 Minn. 452, 151 N.W. 184; explosive experts, Jackson v. Central Torpedo Co., 1926, 117 Okl. 245, 246 P. 426, 46 A.L.R. 338; oculists, Price v. Ga Nun, 1895, 11 Misc. 74, 32 N.Y.S. 801, 802; river pilots, The Tom Lysle, D.C.Pa. 1891, 48 F. 690, 693; threshers, Van Nortwick v. Holbine, 1901, 62 Neb. 147, 86 N.W. 1057; and accountants, Smith v. London Assur. Corp., 1905, 109 App.Div. 882, 96 N.Y.S. 820; see, also, In re Kingston Cotton Mill Co. (1896), 2 Ch. 279, 288.)

[3, 4] While the failure to achieve a guaranteed result is actionable, independently of negligence, this is not true where there is no guaranty of the result. Where the undertaking is to employ special skill there is no breach of duty if such skill and the operator's best judgment are put forth. Under such circumstances, mere errors of judgment are not actionable. Where the duty is breached by negligent performance the cause of action is for negligence alone. In Harding v. Liberty Hospital Corp., 177 Cal. 520, 524, 171 P. 98, 100, after reviewing the California cases the court said: "Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury, and that the fact that the parties stand in contractual relation to each other does not operate to change the rule or extend the time for the commencement of such actions." See Denning v. State, 123 Cal. 316, 55 P. 1000; Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 134 P. 993; Krebenios v. Lindauer, 175 Cal. 431, 166 P. 17; Marty v. Somers, 35 Cal. App. 182, 169 P. 411. In the Denning case the theory of the action was breach of contract on the part of the employer to furnish a safe place for work, and in holding the action was in tort, the court said, 123 Cal. at page 323, 55 P. at page 1002: "Here the contract of employment has nothing whatever to do with the liability, except to create a duty on the part of the employer,—a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages. Nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz, that of employer and employe, and under the old system of pleading was always classed as an action *ex delicto*."

As previously stated, the court found that defendant had been negligent in failing to prepare and file proper returns on time. The next question in the case is whether this finding of negligence has support in the evidence. Since the cause of action was for negligence it was necessary that negligence be proved by competent evidence, or such evidence as the law requires to establish breach of professional duty. If it can be said to be of common knowledge, under the facts in evidence, that defendant did not employ the learning, skill and care usually employed by those in the same profession in like matters, and that defendant's dereliction involved an unreasonable risk of loss to his client, the finding is supported. Upon the other hand, if the question was one as to which expert evidence was required, the finding is without support, inasmuch as there was no expert testimony introduced by plaintiff.

[5] In determining whether defendant was negligent, the test is whether defendant realized or should have realized that there was an unreasonable risk involved in what he was doing, under the rule that "When an act is negligent if done without reasonable skill, the skill which the actor is required to exercise to avoid being negligent in the doing of the act is that which he, as a reasonable man, should recognize as necessary to prevent the act from creating an unreasonable risk of harm to another." Rest., Torts, sec. 299, p. 803.

[6] It is not enough to say that defendant failed to file sufficient returns on time, that this was the basis of the claim for penalties, and that plaintiff compromised the claim, yet in final analysis no more than this was proved. It cannot be denied that the dereliction involved some risk of harm to plaintiff through the imposition of penalties. That would be true of any default for which no acceptable excuse was given under the penalty provisions. But it is clear that it cannot be held, as a matter of law, that every failure of an agent to file completed income tax returns on time is a negligent breach of duty. In the inquiry whether defendant was negligent, numerous factual elements were to be taken into consideration. Defendant's work was handicapped by the absence of his four men accountants who were in military service, and defendant was unable to fill their positions. The account books of plaintiff were inaccurate, showing for the year 1943 a profit of $30,554.37, which was later shown by defendant's audit to be $41,526.73. As soon as defendant obtained additional help in December, 1945, he made an audit of the books, which took six weeks of continuous work. The failure to file completed returns on the due date, or within the time extended, would not necessarily have resulted in the imposition of penalties. The matter rested largely within the discretion of the personnel of the taxing authorities. This was an important fact bearing upon the question whether the matter of delay was, under the circumstances of the case, a material departure from standard practice.

Section 291(a) of the Internal Revenue Code, 26 U.S.C.A. § 291(a), provides that the penalty shall be exacted "In case of any failure to make and file [a] return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, *unless* it is shown that such failure is due to reasonable cause and not due to willful neglect, * * *." The commissioner's general interpretation of the exception in the statute is that if the delinquency occurs notwithstanding the exercise of ordinary care and caution, the penalty will not be charged. Many cases under this section hold that no penalties will be imposed where a taxpayer in good faith relies on the advice of a tax expert. See, Orient Invest. & Finance Co. v. Commissioner of Internal Revenue, 83 U.S.App.D.C. 74, 166 F.2d 601, 3 A.L.R.2d 612. It would have been material to inquire whether Mitchell had reasonable cause for believing that the facts stated in the affidavit which he prepared for the signature of Olson would be accepted as sufficient to relieve plaintiff from the payment of penalties, and if so, whether such belief and reliance would accord with standard practice of accountants, under the same or similar circumstances. In this connection Mitchell testified that he informed Olson that it was his opinion the filing of "tentative" returns under the circumstances would be accepted as evidence of good faith and that a sufficient showing could be made to secure a waiver of penalties. He testified that he so believed. He had filed returns for Taylor Soap & Chemical Company, Inc., a subsidiary of plaintiff, for 1944. The accounts of the subsidiary were confused with those of plaintiff. "Tentative," and later "amended," returns were filed for the subsidiary in the identical manner followed in filing plaintiff's returns. Mitchell represented the company when the circumstances of the case were reviewed and no late filing penalties were assessed. It was in evidence that Mitchell had likewise filed "tentative" and later "amended" returns for another corporation, and that although a penalty had been recommended, it was eventually waived. This testimony, if believed, indicated that he was exercising his best judgment and believed he was following a safe practice.

[7] The intricacies of income tax laws, regulations, policies and practices are not within common knowledge. Only those versed and experienced in that field would be qualified to judge whether defendant's conduct failed to measure up to standard practices, or, in other words, whether among competent accountants and tax specialists it would be deemed to involve unreasonable risk. Expert testimony was required for the reasons that it is required in malpractice cases where resort must be had to technical knowledge in order to pass judgment on the questioned conduct. Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642; Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695. In the absence of evidence which would support a finding of negligence under the rules stated a reversal of the judgment is required.

While insufficiency of the evidence was the principal ground of our original reversal, we repeat it in the present opinion for the reason that we deem it to be of considerable importance. The remainder of the opinion will be devoted to a separate ground for reversal which results from our holding that the action is *ex delicto*.

Defendant pleaded the statute of limitations. If, as plaintiff claims, the action is one for damages resulting from breach of written contracts of employment, the four-year statute applies and none of the claims are barred. Code Civ.Proc., sec. 337(1). Under our holding that the gravamen of the action is negligent performance of the contracts, that is, failure to use the skill of the profession, the two-year tort statute applies to bar all causes of action. Code Civ.Proc., sec. 339(1).

[8, 9] It is clear from the evidence that if Mitchell was guilty of breach of duty, such breach occurred not later than March 22, 1946. When the "amended" 1943 and 1944 returns were filed on that date their filing constituted the final act required of Mitchell under his employment to prepare and file returns for those years. If he was guilty of a breach of duty it was then known to plaintiff, and if detriment was suffered at or prior to that time a cause of action then arose for the recovery of damages due to negligence. It cannot be questioned that detriment was suffered by plaintiff by reason of its fixed liability for the payment of interest on the sums due as taxes which, by the returns, were shown to be in excess of those that had been paid. The finding on that point is conclusive in the absence of evidence that the use of the money was worth what it cost plaintiff to retain it. It is of no consequence that the interest was not paid until later, a portion of it in January, 1947, and the remainder when the settlement was made with the Government in November, 1948. One who has incurred a liability as the result of the negligence of another has sustained recoverable damage and may sue therefor even though he has not satisfied the obligation. Church v. Payne, 35 Cal.App.Supp.2d 752, 92 P.2d 406; Nelson v. Kellogg, 162 Cal. 621, 123 P. 1115; 25 C.J.S. Damages, § 47, page 527. Plaintiff could have maintained an action against Mitchell at least as early as March, 1946, for damages consisting of the amount of its interest obligation. The remaining question is whether it could also have claimed in that action damages that might be suffered by reason of the exaction of penalties for late filing of returns and late payment of taxes. The question requires an affirmative answer. In considering the applicability of the statute of limitations plaintiff must be deemed to have had but one action for damages. Although there may have been separate breaches of duty with respect to the 1943 and the 1944 returns, this would be immaterial under the facts of the case. The breaches occurred at least as early as March, 1946, and none occurred thereafter. While it is true there were different elements of damage, this would not split a single cause of action into a separate cause of action for each type of damage.

[10] It is well settled that where damage is suffered as a result of breach of duty amounting to a tort there is but a single cause of action for the recovery of damages, past, present and future. Hawthorne v. Siegel, 88 Cal. 159, 25 P. 1114; Kidd v. Hillman, 14 Cal.App.2d 507, 58 P.2d 662.

[11–13] Whenever damage is sustained in more than a nominal amount as a result of tortious conduct the statute of limitations is set in motion. Lattin v. Gillette, 95 Cal. 317, 30 P. 545; cf. Miller v. Bean, 87 Cal. App.2d 186, 196 P.2d 596. Here the statute commenced to run at least as early as March, 1946, and was not tolled by the fact that the amount of defendant's liability was in some respects uncertain or incapable of exact ascertainment. Under such circumstances recovery may be had not only for damages already sustained, but also for future damages which can be established with reasonable certainty. Exactness in the ascertainment of future damages is never required. Once it is made certain that liability exists and damage will be suffered, the wrongdoer may not complain of uncertainty where the court acts upon the best evidence available and the award is supported by the reasonable probabilities with respect to the amount of damage. Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co., 17 Cal. App.2d 265, 271, 61 P.2d 944; 25 C.J.S., Damages, § 162, page 816.

The court found that the statute of limitations was tolled as to all five alleged causes of action. This amounts to a finding that the statute was tolled as to the single cause of action which we are discussing. It rests upon certain additional findings, namely, that defendant represented to plaintiff from time to time that said tax returns had been prepared and filed by him on time, that the representations were known to be false, and were relied upon by plaintiff. If these findings are construed to mean that the representations were made or were relied on subsequent to March, 1946, they are directly contrary to the admitted facts. It is certain that as early as March 22, 1946, when the "amended" returns were filed showing additional taxes due, plaintiff knew that defendant had not filed proper returns on their respective due dates and that the proper amounts of taxes had not been paid. What plaintiff knew or believed prior to that time is of no consequence. It is unnecessary to refer to other evidence, standing uncontradicted, that plaintiff's officers well knew more than two years prior to bringing suit that returns had not been filed in the manner and form required by law.

[14] There was a further finding that defendant is estopped from asserting the defense of the statute of limitations. This finding is based upon the last mentioned finding that defendant concealed the facts with relation to the incompleteness of the returns that had been filed; and also upon the finding that plaintiff, its officers or attorneys, had no knowledge that insufficient returns had been filed and that late filing penalties were sought to be imposed upon plaintiff, until on or about March 15, 1948. The findings upon which the conclusion of estoppel is based have no support in the evidence. Plaintiff had been compelled to pay penalties in the past for late filing of income tax returns and this fact was well known to plaintiff's president, Olson. Even if plaintiff's officers had believed, prior to the filing of the "amended" returns in March, 1946, that the "tentative" returns were sufficient, the finding that they were in ignorance as to the deficiencies of those returns cannot stand in the face of their admission of liability for interest as shown by the 1946 returns. They knew that the liability was due to the defects in the earlier returns which reported less than the taxable income. Plaintiff did not know what the penalties would be until the settlement was made, but uncertainty as to the extent of its probable liability did not affect the running of the statute of limitations from the date when plaintiff knew of defendant's breach of duty. See, Jensen v. Sprigg, 84 Cal.App. 519, 258 P. 683. No facts were established which furnished a basis for an estoppel of defendant to plead the statute of limitations.

The views we have expressed render it unnecessary to pass upon the other points urged by defendant.

Inasmuch as the evidence of the parties was complete and conclusive as to the defense of the statute of limitations it would serve no purpose to retry the case.

The judgment is reversed with directions to make new findings with respect to the defense of the statute of limitations in accordance with the foregoing views, and to enter judgment for defendant.

PARKER WOOD and VALLÉE, JJ., concur.

38 Cal.2d 28

MONOGRAM CO. OF CALIFORNIA et al. v. KINGSLEY et al.

S. F. 18446.

Supreme Court of California, in Bank.

Nov. 13, 1951.

Action by Monogram Company of California, and others, against Mr. Lewis A. Kingsley, and others, for damages for libel and slander and unfair competition. The Superior Court, Alameda County, James R. Agee, J., denied motions of two groups of defendants for change of place for trial from Alameda County to County of Los Angeles, and defendants appealed. The Supreme Court, Spence, J., held that venue was properly laid in county of residence of particular defendant who was joined in complaint in twelve of twenty counts even though such defendant had consented to transfer of cause to another county.

Order affirmed.

Prior opinion, 231 P.2d 925.

1. Venue ⚷41

Under statute providing that county in which defendants, or some of them, reside at commencement of action is proper county for trial of action, a defendant is not entitled to have action removed to county of his residence unless it appears that none of the other defendants are residents of county in which action is brought. Code Civ.Proc. §§ 392–395.

2. Venue ⚷41

Under statute providing that county in which the defendants, or some of them, reside at commencement of action is proper county for trial of action, if complaint attempts in apparent good faith to state of action against defendant who resides in county in which action was commenced, venue will not be changed without consent of plaintiff even though all defendants join in demand for or consent to change. Code Civ.Proc. §§ 392–395.

3. Venue ⚷22(1), 41

Under statute providing that county in which the defendants, or some of them, reside at commencement of action, is proper county for trial of action, when defendant who resides in county in which action is brought is necessary and proper party defendant, it is immaterial that another and principal defendant resides in another county and venue will not be changed for such reason. Code Civ.Proc. §§ 392–395.

4. Venue ⚷22(1)

Under statute providing that county in which defendants, or some of them reside at commencement of action is proper county for trial of action, plaintiff who brought action for libel and slander against group of defendants in county in which one necessary and proper party defendant resided was not, by consent of all defendants to change of venue, deprived of his right to maintain cause in county in which first commenced. Code Civ.Proc. §§ 392–395.

5. Venue ⚷68

Where all of group of defendants are nonresidents of county in which action is commenced, burden is on plaintiff, who claims exceptional right of having cause tried in some other county than county in which one of principal defendants resides, to establish facts giving rise to right to maintain action in county in which commenced, but such principle is inapplicable when action is in fact commenced in county of residence of one of defendants. Code Civ.Proc. §§ 392–395.

6. Venue ⚷22(3)

Where action against several defendants consists of several causes, statutory provisions for joinder of causes of action must be correlated with venue provisions in determining whether action has in fact been commenced in county of residence of a necessary and proper party defendant. Code Civ.Proc. §§ 379b, 392–395, 427.

7. Venue ⚷22(1)

Where complaint in 20 counts against group of defendants for transitory cause joined particular defendant in 12 of such counts, venue was properly laid in county of residence of such defendant, despite fact that defendant was not party to eight of such causes, since joinder rules, which must be correlated with venue provisions, allow number of causes of action to be joined in same complaint without requirement that each defendant be included in every cause of action. Code Civ.Proc. §§ 379b, 392–395, 427.

Hagar, Crosby, Crosby & Vendt, Oakland, O'Melveny & Myers, Los Angeles, Peter J. Crosby, Jr., Oakland, J. H. Sapiro, San Francisco, and Wolfson & Essey, Beverly Hills, for appellants.

Freed, Gebauer & Freed, Eli Freed, Emmett Gebauer and Scott Fleming, San Francisco, for respondents.

SPENCE, Justice.

This is an appeal from an order denying motions made by certain defendants for a change of venue from the county of Alameda to the county of Los Angeles. There is no dispute as to the material facts, and it appears therefrom that the challenged ruling should be sustained.

Plaintiffs brought this action for libel, slander and unfair competition in the county of Alameda, where one of the defendants, Lewis, admittedly resides. All of the other defendants reside in the county of Los Angeles. The complaint contains 20 counts, charging on behalf of each plaintiff various acts of libel and slander as well as conduct constituting unfair competition allegedly committed by defendants, in some instances by all of them and in others by some of them. The nonresident defendants, appearing in two groups, filed concurrently motions for change of venue and demurrers, with the latter pleadings specifying, among other grounds, the misjoinder of parties plaintiff and the misjoinder of causes of action. At the hearing of the motions for change of venue, based solely on the ground of residence of the petitioning defendants, the resident defendant, Lewis, through his counsel, expressly consented to the proposed transfer. The motions were denied, and from the order accordingly entered, this appeal is taken.

[1-4] The propriety of the court's ruling stems from the general statutory provision that in the absence of specified exceptional cases not here involved (Code Civ. Proc. secs. 392, 393, 394), the "county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action." (Code Civ.Proc. sec. 395.) Consistent therewith, the basic principles governing the determination of the venue issue were recently stated in the case of Independent Iron Works v. American President Lines, 35 Cal.2d 858, at page 860, 221 P.2d 939, at page 941: "A defendant is not entitled to have an action removed to the county of his residence unless it appears that none of the other defendants are residents of the county where the action is brought. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730. Even when all of the defendants join in a demand for or consent to a change of venue the cause will be retained if the complaint attempts in apparent good faith to state a cause of action against a defendant who resides in the county where the action was commenced. McClung v. Watt, 190 Cal. 155, 211 P. 17. When a defendant who resides in the county in which an action is brought is a necessary and proper party defendant it is immaterial that another and the principal defendant resides in another county. Hellman v. Logan, 148 Cal. 58, 82 P. 848." Accordingly, a plaintiff who has brought his action in the proper county will not be compelled to go elsewhere merely because all of the defendants prefer it. Hearne v. De Young, 111 Cal. 373, 376, 43 P. 1108; Greenleaf v. Jack, 135 Cal. 154, 155, 67 P. 17; Quint v. Dimond, 135 Cal. 572, 574, 67 P. 1034; O'Brien v. O'Brien, 16 Cal.App. 193, 197, 116 P. 696; Aisbett v. Paradise Mountain Mining and Milling Co., 21 Cal.App. 267, 269, 270, 131 P. 330; Mitchell v. Kim, 42 Cal.App. 111, 114, 183 P. 368; also Delno v. Market Street Ry. Co., 63 Cal.App.2d 489, 500, 147 P.2d 67; Yellow Mfg. Acceptance Corp. v. Stoddard, 93 Cal.App.2d 301, 303, 208 P.2d 1040.

[5] Defendants argue that the present case is distinguishable in that it concerns not a single cause of action against a number of defendants one of whom is a resident of the county wherein suit was commenced, but rather a number of causes of action, in some of which resident and nonresident defendants are joined but in others only the nonresidents are named, so that the latter are entitled to a change of venue where not opposed by the resident defendant. As support for their position, defendants cite the case of Hagan v. Gilbert,

83 Cal.App.2d 570, 189 P.2d 548, involving a complaint in four counts, one of which failed to state a cause of action against the resident defendant. In affirming the order granting the nonresident defendants' motion for transfer of the place of trial to the county of their residence, the court stated 83 Cal.App.2d at page 574, 189 P.2d at page 551: "When a nonresident defendant is entitled to a change of venue upon one cause of action stated in a complaint, he may not be deprived of that right because plaintiff included other causes of action in the same complaint upon which such defendant is not entitled to a change of venue." The cases cited in support of this proposition involve the distinguishable consideration of the joinder of local and transitory causes of action, Code Civ.Proc. sec. 392; Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786, or the contract exceptions to the general venue provision, Code Civ.Proc. sec. 395; Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104, 108, and where *none* of the defendants resided in the county in which the respective actions were commenced. In such situation, reference is made to the "important right * * * of the defendant to have the cause tried in the county of his residence" and to the burden of the plaintiff in claiming "the exceptional right of having the cause tried in some other county," to "clearly bring himself within a statutory exception." Goossen v. Clifton, supra, 75 Cal.App.2d 44, 49, 170 P.2d 104, 108; see, also, Bardwell v. Turner, supra, 219 Cal. 228, 230, 25 P.2d 978; Turlock Theatre Co. v. Laws, supra, 12 Cal.2d 573, 576–577, 86 P.2d 345. It therefore follows that these last mentioned cases properly apply only where *all* of the defendants are nonresidents of the county in which the action is commenced and the plaintiff has not shown facts entitling him to have the action tried in some county other than that constituting the residence of a defendant. See, also, Sexton v. Simondet, 97 Cal.App.2d 894, 900, 218 P.2d 1021. It has been said that "Section 396b of the Code of Civil Procedure permitting the defendant to have certain actions tried in the county where he resides is remedial in nature and should be liberally construed to the end that a defendant may not be unjustly deprived of that right." Lyons v. Brunswick-Balke-Collender Co., 20 Cal.2d 579, 582, 127 P.2d 924, 926, 141 A.L.R. 1173. But no analogous basis for the application of such principle appears in the Hagan v. Gilbert case, where the action was in fact commenced in the county of residence of one of the defendants. Accordingly, the determination of the venue issue in that case, without regard for the noted distinguishing factor, must be disapproved.

[6, 7] By reason of the liberal statutory joinder rules, a number of causes of action may properly be joined in the same complaint, Code Civ.Proc. sec. 427, and it is not necessary that each defendant be included in every cause of action. Code Civ. Proc. sec. 379b. As so noted, these joinder provisions must be correlated with the venue provisions—the former prescribing what causes and parties a single action may include and the latter prescribing where such action as an entirety may be tried. No objection is raised here with regard to Lewis as a properly named defendant in 12 of the 20 transitory causes of action joined in the present complaint. Accordingly, the action as an entire cause was properly retained in the county of his residence. Kraft v. Innis, 57 Cal.App.2d 637, 135 P.2d 29; Stokes v. Newsom, 89 Cal.App.2d 147, 200 P.2d 17. Such conclusion complies with the statutory design for determination of the proper place of trial, as reference to the last cited cases will demonstrate.

In Kraft v. Innis, supra, three physicians were sued in separate counts for malpractice, two of the defendants being residents of Kern County, where the action was commenced, and the third being a resident of Los Angeles County. The latter defendant moved for a change of venue to Los Angeles, and he also demurred to the complaint on the grounds of misjoinder of parties defendant and misjoinder of causes of action. In considering the venue problem 57 Cal.App.2d at page 640, 135 P.2d at page 31, the court recognized at the outset that had the nonresident been "the only defendant", the propriety of the proposed transfer to his county of residence "could not be doubted." But then observing the conflicting places of residence of the several defendants, each of whom had the same right as each of the other defendants, the court quoted the governing principle from 25 Cal.Jur. 879: "* * * a defendant may not have the action changed to the county of his residence in the absence of a showing that none of the other defendants is a resident of the county in which the action was brought, even though all the defendants join in the demand or consent to the change. In such case the cause will be retained if any of the defendants reside in the county of venue, provided the complaint attempts in apparent good faith to state a cause of action against the defendant or defendants in whose county of residence the action is commended * * *." Accordingly, the order denying the nonresident defendant's motion for a change of venue was affirmed. The parties' respective positions as to the alleged misjoinder of causes of action were discussed in a subsequent appeal before this court, Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23, and in sustaining the joinder of the separate tort claims as consistent with considerations of justice in the effective disposition of the entire action, passing reference was made to the venue problem there involved as follows, 24 Cal.2d at page 130, 148 P.2d at page 26: "The facts that defendants reside (and practice) in different counties and that one of them may have to attend court and present his defense in a county other than that of his residence, present a consideration which must be presumed to have been hypothetically weighed by the Legislature in enacting the law. The axiology of the matter was for that body; * * *."

In Stokes v. Newson, supra, the complaint was in four counts. Three of the counts sounded in contract and the fourth in fraud. The first three counts stated no cause of action against the defendant Coffee, who resided in the county where the action was brought, but the fourth did. In affirming an order denying a motion to change the place of trial to the county of the other defendant's residence, the court said 89 Cal.App.2d at pages 149, 150, 200 P.2d at page 19: "It is readily apparent from an examination of the complaint that if it went no further than the first three causes of action * * * it would be fatally defective * * *. However, by virtue of the fourth cause, which is based upon an alleged fraud of the resident defendant Coffee and the non-resident defendant and appellant Newsom the action is properly triable in Stanislaus County, it being 'the county in which the defendants, or some of them, reside at the commencement of the action', and therefore the trial court properly denied the motion. (Code Civ.Proc. sec. 395.)"

As appears from these cases, plaintiffs have the right to select the venue within the restricted statutory limits. In contemplation of a situation where there are multiple defendants, not all of whom are joined in the several causes of action, and the venue problem for the entire action must be resolved in the light of their various counties of residence, the last sentence of section 395(1), Code of Civil Procedure, expressly provides: "If any person is improperly joined as a defendant, or has been made a defendant solely for the purpose of having the action tried in the county * * * where he resides, his residence must not be considered in determining the proper place for the trial of the action." No contention is made that the resident defendant, Lewis, is identifiable with either of these objectionable considerations authorizing disregard of his residence in determining plaintiffs' right to choose the venue for this action. (Code Civ.Proc. sec. 405.) However, defendants insist that they are entitled to the removal by reason of the fact that the resident defendant, Lewis, expressly consented thereto, and they claim that the principle of decision in the Kraft v. Innis and Stokes v. Newsom cases therefore rests on a distinguishable ground in that such consent was not there given to the transfer proposed by the nonresident defendant. But the alleged distinction lacks validity in the light of the plain wording of the statute prescribing the applicable limitations affecting the venue question. While there is language in some of the earlier cases tending to support the defendants' position, e. g. Sullivan v. Lusk, 7 Cal.App.

186, 189–190, 94 P. 91, the effect of joinder in the venue motion or consent to the change was not a point in issue, and such language must be disapproved as constituting an incorrect statement of the law under the applicable statute. Code Civ. Proc. sec. 395; see Aisbett v. Paradise Mountain Mining and Milling Co., supra, 21 Cal.App. 267, 269–270, 131 P. 330; White v. Anderson, 50 Cal.App.2d 634, 636, 123 P.2d 543. Rather here as in other cases in which venue depends upon the residence of a defendant, the general rule prevails in determining the "proper county for the trial of the action" and the consent of the resident defendant to the proposed transfer cannot deprive the plaintiffs of their right to have the action tried in the county of the consenting defendant's residence. Independent Iron Works v. American President Lines, supra, 35 Cal.2d 858, 860, 221 P.2d 939, 941.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

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38 Cal.2d 21

HELVEY v. SAX et al.

L. A. 21436.

Supreme Court of California, in Bank.

Nov. 13, 1951.

A. C. Helvey brought action against Selia Sax and others to quiet title to realty. The Superior Court of Los Angeles County, Stanley Mosk, J., entered a judgment adverse to the plaintiff, and the plaintiff appealed. The Supreme Court, Traynor, J., held that plaintiff failed to prove his title to realty in question.

Judgment modified and, as modified, affirmed.

Prior opinion, 229 P.2d 796.

1. Quieting Title ⇨10(1)

In a quiet title suit, plaintiff may recover only on the strength of his own title and not on the weakness of defendant's title.

2. Quieting Title ⇨10(2)

A plaintiff relying on paper title alone in suit to quiet title must trace his title to the government, or to a grantor in possession at time of conveyance to plaintiff, or to a source common to the chains of title of plaintiff and defendant.

3. Taxation ⇨2

The state's taxing power is derived from its sovereign authority, and not from any grant to it by the owner of the property.

4. Taxation ⇨573½

A property tax operates in rem against the property.

5. Taxation ⇨778

A title granted by a tax deed, pursuant to a valid sale of property for nonpayment of taxes, conveys not merely the title of the person assessed, but a new and complete title under an independent grant from the state. Revenue and Taxation Code, §§ 3520, 3712.

6. Taxation ⇨781

A tax deed is not limited to a conveyance of only such interest as the taxpayer has in the land conveyed. Revenue and Taxation Code, §§ 3520, 3712.

7. Taxation ⇨730

A purchaser at a tax sale may receive a better title than that of the person against whom the taxes were assessed, unless he is the defaulting taxpayer or some one acting in his behalf.

8. Taxation ⇨679(3)

Title to realty acquired by the state in tax proceedings is dependent on the validity of the tax proceedings, just as the interest of an ordinary grantee is dependent on an effective conveyance by his grantor.

9. Taxation ⇨734(1)

If tax proceedings are invalid, the assessee retains his interest in realty, and the assessee and those claiming under him are therefore not barred from attacking the title of the tax sale purchaser.

10. Taxation ⚷810(3)

In action to quiet title by plaintiff who relied only on quitclaim deeds of realty, evidence was insufficient to trace plaintiff's title to a source common to chain of title of plaintiff and defendant.

11. Limitation of Actions ⚷6(5)

Section of the County Water District Act preventing any action attacking a deed of the district six months after recordation of the deed, or three months after effective date of the section, whichever is later, applies to tax deeds executed both before and after enactment of the section. Gen.Laws, Act 9124, § 45.5.

12. Waters and Water Courses ⚷183½

Where plaintiff brought action to quiet title to realty against defendant having tax deed from County Water District, more than six years after effective date of section of the County Water District Act preventing any action attacking a deed to the district six months after the recordation of the deed or three months after the effective date of the section, whichever is later the action was barred as to that section. Gen.Laws, Act 9124, § 45.5.

13. Waters and Water Courses ⚷183½

In action to quiet title to realty against holders of tax deeds from County Water District, tax deeds were properly admitted in evidence over objection that defendants did not show that County Water District had power to levy taxes. Gen.Laws, Act 6178; Act 9124, §§ 1 et seq., 21, 22, 47.

14. Waters and Water Courses ⚷183½

Tax deeds from County Water District were prima facie evidence that realty was assessed by the district as required by law. Gen.Laws, Act 9124, § 47.

15. Waters and Water Courses ⚷183½

In action to quiet title to realty against defendants who held tax deeds from County Water District, plaintiff could not successfully contend that taxes were void on ground that realty involved received no benefits by being included in the district, where assessed owners through which plaintiff claimed, did not avail themselves of their statutory remedy to have their realty excluded from the district on ground that it was not benefited by inclusion therein. Gen.Laws, Act 9124, §§ 28, 38.

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William M. Taylor, Coachella, for appellant.

Newby, Holder & Newby and Newman & Newman, Los Angeles, Earl Redwine, Riverside, and Jonah Jones, Jr., Long Beach, for respondents.

TRAYNOR, Justice.

The plaintiff, A. C. Helvey, brought this action to quiet title to several parcels of land in the Coachella Valley County Water District. Taxes levied by the District became delinquent and the several parcels were sold to the District in September, 1939. The parcels were not redeemed within the time allowed by law and were sold by the District to the defendants at public auction in 1946 and 1947.

Defendants base their titles on their tax deeds. Plaintiff relies on quitclaim deeds obtained in 1946 and 1947. Two of the deeds are from assessees named in the tax deeds; the third deed is from a person not listed as an assessee. There is no proof that any of the three predecessors of plaintiff were in possession at the time of their deeds to plaintiff nor is there any proof of antecedent title of the three grantors. Judgment was entered for defendants and plaintiff appeals.

The question arises at the outset whether plaintiff offered sufficient evidence supporting his title to make out a prima facie case to avoid a nonsuit. See Santens v. Los Angeles Finance Co., 91 Cal.App.2d 197, 202, 204 P.2d 619; cases collected in 22 Cal.Jur. 167.

[1, 2] In a quiet title suit, the plaintiff may recover only upon the strength of his own title and not upon the weakness of defendant's title. Rockey v. Vieux, 179 Cal. 681, 178 P. 712; see, 22 Cal.Jur. 167. A plaintiff relying on a paper title alone must trace his title (1) to the government; or (2) to a grantor in possession at the time of the conveyance to the plaintiff; or (3) to a source common to the chains of title

of plaintiff and defendant. Rockey v. Vieux, supra.

Plaintiff did not offer evidence to sustain a prima facie case on either of the first two alternatives. He did show that his title to two of the three lots was derived from Moore and McFadden assessees named in the deeds from the collector to the Water District.

It is contended that plaintiff failed to show a common source of title, even as to Moore and McFadden, on the ground that the new and complete title acquired by the tax deed was derived from the state and not from the owner of the property.

[3–7] The state's taxing power is derived from its sovereign authority, not from any grant to it by the owner of property. A property tax operates in rem against the property, and a title granted by a tax deed pursuant to a valid sale of the property for nonpayment of taxes, conveys not merely the title of the person assessed, but a new and complete title under an independent grant from the state. Rev. & Tax Code, §§ 3712, 3520; California Loan, etc., Co. v. Weis, 118 Cal. 489, 492, 494, 50 P. 697; Connors v. Jerome, 83 Cal.App.2d 330, 188 P.2d 770; see Smith v. Addiego, 54 Cal.App.2d 230, 237, 129 P.2d 953; Roddenberry v. Simpson, 171 Ga. 715, 156 S.E. 583, 75 A.L.R. 416; 51 Am.Jur. Taxation, 937. The statement in Syme v. Warden, 114 Cal.App. 707, 712, 300 P. 863, that a tax deed conveys only such interest as the taxpayer has in the land was unnecessary to the decision therein. It is inconsistent with the foregoing cases and presently controlling statutes and is disapproved. In Dorn v. Baker, 96 Cal. 206, 209, 31 P. 37, the purchaser at the tax sale received only the equitable interest of the assessee in state school land, since the fee owned by the state was not subject to taxation. People v. Chambers, 37 Cal.2d 553, 556, 233 P.2d 557; State Land Settlement Board v. Henderson, 197 Cal. 470, 479, 241 P. 560; San Pedro, etc., R. R. Co. v. City of Los Angeles, 180 Cal. 18, 22, 179 P. 393. A purchaser at the tax sale may thus receive a better title than that of the person against whom the taxes were assessed, unless he is the defaulting taxpayer or some one acting in his behalf. Dowd v. Glenn, 54 Cal.App.2d 748, 755, 129 P.2d 964.

[8, 9] It does not follow however, that an owner out of possession, or persons claiming under him, cannot establish a prima facie case by tracing title to the assessed owner. The proceedings against the property are the means by which the state obtains its title. If the proceedings are invalid, the assessee retains his interest. If the proceedings are valid, the interest of the assessee is replaced by the state's new and paramount title. The title of the state is thus dependent on the validity of the tax proceedings just as the interest of an ordinary grantee is dependent on an effective conveyance by his grantor. The assessee's interest is extinguished, because he fails to pay the taxes or redeem the property. The fact that the state acquires the property by virtue of his default rather than by grant makes him no less the source of the state's title and of the title of the purchaser from the state. Denning v. Green, 88 Cal.App. 379, 381, 263 P. 819; Denning v. Green, 119 Cal.App. 102, 104, 6 P.2d 317; Ginaca v. Peterson, 9 Cir., 262 F. 904, 907; Godding v. Swanson, 165 Pa.Super. 193, 67 A.2d 814; Porter v. Carroll, 84 Fla. 62, 92 So. 809. The assessee and those claiming under him are therefore not barred from attacking the title of the tax sale purchaser.

The principles established by the Revenue and Taxation Code and the decisions construing it, are applicable to the similar statute involved in the present case. 3 Deering's Gen.Laws, Act 9124, Sec. 47.[1] now Water Code Sec. 31948; see Dowd v. Glenn, 54 Cal.App.2d 748, 129 P.2d 964.

[10] The plaintiff in this action traced his paper title to lots four and six to the as-

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[1] "Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor inclusive up to the execution of the deed. The deed conveys to the district the absolute title to the lands described therein, free of all encumbrances, except when the land is owned by the United States or this State in which case it is prima facie evidence of the right of possession."

sessees. On lot two, however, plaintiff produced only a quitclaim deed from one Brady. The deed to the District is included in the record and shows that the property was assessed to one Ivans. An inference may be drawn from the testimony that Ivans was the deceased mother of Brady. Plaintiff, however, did not produce a deed or a decree of distribution to show that the property passed from Ivans to Brady. Plaintiff was thus unable to make out a prima facie case by tracing his and Dunlap's title to a common source.

[11, 12] Plaintiff's action against defendant Budrovic is barred by the statute of limitations, which Budrovic pleaded. Section 45.5 of the County Water District Act (now Water Code Sections 31950, 31952) prevents any action attacking a deed to the District six months after the recordation of the deed, or three months after the effective date of the section (January 30, 1941), whichever is later. The statute applies to tax deeds executed both before and after its enactment. McCaslin v. Hamblen, 37 Cal.2d 196, 231 P.2d 1; Tannhauser v. Adams, 31 Cal.2d 169, 176, 187 P.2d 716, 5 A.L.R.2d 1015; Central Valley Equip. Co. v. State of California, 98 Cal.App.2d 778, 220 P.2d 811; Davault v. Essig, 80 Cal.App.2d 970, 183 P.2d 39. Since plaintiff commenced this action in 1947, over six years after the effective date of Section 45.5, his action is barred.

Although defendant Carreon did not plead the statute of limitations, plaintiff's attack on his title fails on the merits. For the same reasons his attack on the titles of Dunlap and Budrovic must fail, even if he were able to make out a prima facie case against Dunlap and his action against Budrovic were not barred by the statute of limitations.

[13, 14] There is no merit in plaintiff's contention that the tax deed could not be introduced in evidence, on the ground that defendants did not show that the District had the power to levy taxes. The District has all the powers of districts organized under the County Water District Act, 3 Deering's Gen.Laws, Act 9124, now Water Code, Sec. 30000 et seq.; see 2 Deering's Gen.Laws, Act 6178, now Water Code Sec. 33135, which authorizes the District to levy taxes and sell property taxed, if the taxes are not paid. 3 Deering's Gen.Laws, Act 9124, Sections 21–22; now Water Code, Sections 31745 et seq. Moreover, the tax deeds were prima facie evidence that the property was assessed as required by law. 3 Deering's Gen.Laws, Act 9124, Sec. 47, now Water Code Sec. 31947).

[15] Plaintiff contends that the taxes are void on the ground that the parcels involved in this action received no benefits by being included in the District. This contention comes too late. The assessed owners through whom plaintiff claims did not avail themselves of their statutory remedy to have their property excluded from the District on the ground that it was not benefited by inclusion therein. 3 Deering's Gen.Laws, Act 9124, Sec. 28, now Water Code Sec. 32200 et seq.; see Hand v. El Dorado Irr. Dist., 97 Cal.App. 740, 276 P. 137; San Joaquin Agricultural Corp. v. Board of Supervisors, 121 Cal.App. 468, 8 P.2d 1051. Moreover, there is nothing in the evidence to show that plaintiff's predecessors challenged the taxes in the manner provided by the County Water District Act. There was no attempt to have the tax assessments modified or cancelled, or to set aside the tax deeds to the District. 3 Deering's Gen.Laws, Act 9124, Sec. 38, now Water Code Sec. 31965. Since plaintiff's predecessors in interest failed to challenge the tax in the manner required by statute, plaintiff is now precluded from making a collateral attack on the tax proceedings. Wall v. M. & R. Sheep Co., 33 Cal.2d 768, 772, 205 P.2d 14; see Reclamation District No. 542 v. Turner, 104 Cal. 334, 335, 37 P 1038; see Dumbarton Land, etc., Co. v. Murphy, 32 Cal.App. 626, 630, 163 P. 866.

Plaintiff also contends that the liens of the taxes were released by the Federal Reclamation Act, 43 U.S.C.A. §§ 423, 423a, which provides that lands found to be permanently unproductive by the Board of Survey and Adjustments shall be excluded from irrigation districts. Even if it is assumed that this statute applies to a California water district on the ground that California ratified the Colorado River Compact, plaintiff made no attempt to plead or prove that the Board of Survey and Adjustments had made such a finding with respect to the lands involved in this case.

The trial court ordered judgment for plaintiff on parcels five and eight, against defendants who had defaulted, but the judgment as entered failed to give judgment to plaintiff against the defaulting defendants. Plaintiff is entitled to a correct judgment. The trial court is therefore directed to modify the judgment to quiet plaintiff's title against the defaulting defendants to lots five and eight. In all other respects the judgment is affirmed. Plaintiff shall bear the costs of appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

107 Cal.App.2d 480

MASON v. LANE, Treasurer Glenn-Colusa Irr. Dist.

Civ. 8122.

District Court of Appeal, Third District, California.

Nov. 13, 1951.

Rehearing Denied Nov. 30, 1951.

Hearing Denied Jan. 10, 1952.

Proceeding by J. R. Mason against Amy G. Lane, treasurer, Glenn-Colusa Irrigation District, for a writ of mandate commanding respondent to cease and refrain from paying any due or past due principal or interest to any holder of district bonds contrary to order of maturity and presentation prescribed and required by law, wherein the Supreme Court transferred the matter. The District Court of Appeal, Van Dyke, J., held that the treasurer of the district violated no law in refusing to make payment of any funds of the district to the petitioner upon the obligation of the district evidenced by his bonds in view of fact that district had been relieved of liability by bankruptcy proceedings and only right remaining to petitioner was to present bonds to court and collect his ratable share under credit composition.

Writ discharged.

1. Bankruptcy 🔑38

Provisions of Bankruptcy Act permitting irrigation district to make composition of its bonded indebtedness was enacted by Congress to provide a plan for the composition of the indebtedness of taxing agencies or instrumentalities throughout the nation which were insolvent. Bankr.Act, § 81 et seq., 11 U.S.C.A. § 401 et seq.

2. Bankruptcy 🔑38

Where irrigation district had composition of its bonded indebtedness confirmed, treasurer of district violated no law in refusing to make payment of any funds of district to creditor upon obligation of district bonds which had been discharged by bankruptcy proceeding and only right remaining to creditors affected by composition of bonded indebtedness was to present bonds to clerk of court in accordance with decrees entered in bankruptcy proceedings for payment. Bankr.Act, § 81 et seq., 11 U.S.C.A. § 401 et seq.

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J. R. Mason, San Francisco, in pro per.

Duard F. Geis, Willows, for respondent.

VAN DYKE, Justice.

Petitioner filed in the Supreme Court his petition for a writ of mandate directed to respondent, Amy G. Lane, as Treasurer of Glenn-Colusa Irrigation District. The matter was transferred to this Court. The petition alleges that the Glenn-Colusa Irrigation District is an irrigation district formed under the laws of this State and that, under date of October 1, 1920, it issued its general obligation bonds in the amount of $2,587,000; that petitioner is the owner and holder of legal title to three of said bonds maturing January 2, 1934; that on that date petitioner presented his bonds to respondent who then failed, as treasurer of the district, to pay the same, whereupon the bonds were registered by the treasurer as required by law; that thereafter respondent persisted and continues to persist in unlawfully disbursing funds of the district to owners of subsequently maturing bonds, while refusing any payment of petitioner's bonds. Petitioner asked a writ of mandate commanding respondent to cease and refrain from paying any due or past due principal or interest to any holder of the district's bonds contrary to the order of maturity and presentation prescribed and required by law. In view of these allegations this Court issued its alternative writ of mandate, to which respondent had made answer, alleging the following matters, the truth of which is not disputed: That in a proceeding brought in the District Court of the United States, for the Northern District of California, Southern Division, entitled "In the Matter of Glenn-Colusa Irrigation District, Debtor (in Bankruptcy No. 29763–G)", in which proceeding petitioner appeared, there was presented to said District Court a petition for confirmation of a plan of composition of the bonded indebtedness of the district, consisting of the same issue of bonds referred to in the petition herein; that said proceeding was brought pursuant to Chapter IX of the Uniform Bankruptcy Laws of the United States as revised by Act of Congress approved June 22, 1938, 11 U.S.C.A. § 401 et seq. that the said court proceeded to hear said petition and plan of composition and after due proceedings to that end entered its interlocutory decree confirming the plan of composition; that it was therein adjudged that the petitioner district was insolvent and was unable to meet its debts, and that the plan of composition as offered by it was fair, equitable and for the best interests of its creditors and that all other conditions existed warranting the approval thereof. It was therefore decreed that the plan of composition be approved and confirmed; that all of the outstanding bonds of the district, including those referred to in the petition in this Court, be allowed as obligations of the petitioner and that the several holders thereof be permitted to participate ratably in the distribution of funds in accordance with said plan. The district was authorized to issue and sell refunding bonds to the Reconstruction Finance Corporation to obtain funds wherewith to meet the demands of the plan and the district was ordered to deposit with the court's disbursing agent the sums necessary to pay the holders of its outstanding bonds the respective amounts to be paid under the plan of composition. Notice was ordered given, directing every holder of said outstanding bonds to deposit the same with the disbursing agent or with the clerk of the court for payment in accordance with the plan and decree or be forever barred from claiming and asserting as against the district or any individually-owned property located therein any claim or lien arising out of said bonds. This interlocutory decree was entered April 13, 1940, and various bondholders, including petitioner herein, participated in taking an appeal therefrom, which appeal later was dismissed by the Circuit Court of Appeals to which the same was taken. On March 1, 1945, a final decree was entered by the district court which recited compliance by the district with the conditions of the interlocutory decree; found that only 14 old bonds of the district in the total principal amount of $13,100 were still outstanding and that the amount on deposit with the clerk of the court as registrar was sufficient to pay said bonds as provided in the interlocutory decree. It was therefore decreed that the district be fully discharged from all debts and liabilities dealt within said plan and that said plan was binding upon all creditors affected by it.

[1] Chapter IX of the Bankruptcy Act above referred to and under which the foregoing proceedings were taken was enacted by the Congress so as to provide a plan for the composition of the indebtedness of taxing agencies or instrumentalities throughout the nation which were insolvent, a condition which, when the legislation was passed, afflicted thousands of such agencies. The constitutionality of the legislation was upheld by the Supreme Court of the United States in the case of United States v. Bekins, 304 U.S. 27–54, 58 S.Ct. 811, 82 L.Ed. 1137.

[2] By virtue of the proceedings taken as hereinabove recited, the Glenn-Colusa Irrigation District has been discharged from all liability to petitioner here in respect of the bonds referred to in his petition and it results that the respondent treasurer of the district violates no law in refusing to make payment of any funds of the district to the petitioner upon the obligation of the district

formerly evidenced by his bonds. The only right remaining to petitioner in respect thereof is to present them to the Clerk of the United States District Court in accordance with the interlocutory and final decrees referred to. The writ is discharged.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; CARTER, J., not participating.

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107 Cal.App.2d 647

THOMPSON v. SPRAGUE.

Civ. 4158.

District Court of Appeal, Fourth District, California.

Nov. 21, 1951.

Hearing Denied Jan. 17, 1952.

Roland Thompson brought an action against L. E. Sprague for rescission of a contract of sale of a truck which defendant had sold to plaintiff. The Superior Court, Orange County, Russell S. Waite, J., gave judgment to plaintiff, and defendant appealed. Upon the death of Roland Thompson, Ruby A. Thompson, executrix of the estate of Roland Thompson, was substituted as party plaintiff and respondent. The Court of Appeal, Mussell, J., inter alia, held that the evidence supported the finding that the truck was not in as good mechanical condition as represented to Roland Thompson by the defendant.

Affirmed.

1. Automobiles 🔑**19**

In action by buyer of truck against seller for rescission of contract of sale, evidence showed that seller had not, prior to service of rescission notice, delivered certificate of registration, and that buyer had not been able to obtain such certificate or the license plates or the certificate of ownership, and that therefore buyer, being unable to obtain title, had been in a position to rescind the contract. Vehicle Code, § 186.

2. Automobiles 🔑**19**

Although registration certificate was in possession of the Department of Motor Vehicles, in absence of notification to such Department of sale of the truck or a request that the Department transfer or deliver the registration certificate to the buyer, the Department did not have the duty to make the necessary transfer upon receipt of the endorsed certificate of ownership. Vehicle Code, § 186.

3. Sales 🔑**52(7)**

In action by buyer of truck against seller for rescission of contract of sale, evidence supported finding that truck was not in as good mechanical condition as represented to buyer by seller.

◆

Winthrop O. Gordon, Santa Ana, for appellant.

George E. Bradley and Frank L. Bowman, Santa Ana, for respondent.

MUSSELL, Justice.

Roland Thompson brought this action to recover the purchase price paid by him to defendant for a used 1942 GMC 2-½ ton dump truck. Recovery was sought on the grounds that defendant failed to complete the transfer of title to the truck involved by failing to comply with the provisions of Section 186 of the Vehicle Code and that defendant misrepresented the mechanical condition of the truck. The trial court gave judgment for plaintiff on both grounds. After this appeal was filed Roland Thompson died and Ruby A. Thompson was substituted as party plaintiff and respondent. The question presented for our consideration is whether the evidence is sufficient to support the findings and judgment.

On or about March 30, 1947, plaintiff, an attorney, entered into negotiations with the defendant, who was in the trucking business, for the purchase of a used truck for use by plaintiff's sons to haul sand and rock in connection with a building-material business at Desert Hot Springs in Riverside County. Defendant pointed out the truck to plaintiff and stated that it was in good condition; that it would do the intended work all right and give plaintiff many months of good service; that if plaintiff purchased the truck, defendant would put it in "first class" mechanical condition before it was taken away; that he and his mechanic would "go over" the truck and "check it" and if any new parts were required, they would be put in at defendant's expense; that when the truck was turned over to plaintiff, it would be in good mechanical condition and would give no trouble. The purchase price agreed upon was the sum of $2,000, and on April 1st the parties met at a bank where the entire purchase price was paid to defendant. Defendant endorsed and delivered the certificate of ownership ("pink slip") to the bank, which took a chattel mortgage to secure repayment of the part of the purchase money advanced by it. In response to the banker's request for the registration certificate ("white slip") defendant stated that it had not yet come back from Sacramento but that "it would be back in two or three days." The bank sent the pink slip to the Department of Motor Vehicles and it was thereafter retained by the Department. The defendant received the white slip and the 1947 license plates for the truck on or about April 27, 1947, but did not tender them to plaintiff until September 30th of that year. Plaintiff served defendant with a notice of rescission of the contract to purchase on September 20th and declined to accept the white slip and plates tendered ten days later. Between April and September plaintiff had requested the white slip of defendant on several occasions, one of which requests was by letter mailed to defendant on June 18, 1947.

Section 186 of the Vehicle Code, insofar as is material here, provides as follows:

"(a) * * * No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements:

"(1) * * * The transferor shall have made proper endorsement and delivery * * * of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the United States mail, addressed to the department, such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration * * * or

"(2) * * * The transferor shall have delivered to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer * * *."

Admittedly, the plaintiff did not receive the 1947 license plates for the truck in question or the white slip prior to the service of his notice of rescission of the contract and it appears from the evidence that plaintiff was unable to obtain the pink slip from the Department of Motor Vehicles. In San Joaquin Valley Sec. Co. v. Prather, 123 Cal.App. 378, 383, 11 P.2d 45, this court held that under the provisions of section 45 of the Vehicle Act, as it existed in 1927, Statutes 1925, p. 402, the division was not authorized to re-register a car or issue a new certificate of ownership or a new certificate of registration until it had received both the certificate of ownership and certificate of registration as provided in the statute. In Parke v. Franciscus, 194 Cal. 284, 293, 228 P. 435, the court held that the failure of the transferee of the "ownership" in a car to procure the registration certificate properly indorsed does not make the sale void *ab initio* but in the terms of the statute it is incomplete. In Wehrle v. D. E. McDaneld, Inc., 96 Cal.App. 356, 358, 274 P. 421, where a defendant failed to complete the sale by obtaining and delivering to the purchaser the certificate of registration and ownership as provided by the Vehicle Act, it was held that the purchaser became entitled to a return of the money paid by him.

[1] It clearly appears under the circumstances here shown that the plaintiff was never able to obtain the certificate of ownership, the plates or certificate of registration to the truck in question prior to September 20, 1947, and not being able to obtain title, he was in a position to rescind the contract, which he did.

[2] Defendant argues that it was the duty of the Department of Motor Vehicles

to make the necessary transfer because the white slip was in its possession at the time of the receipt by it of the pink slip. There is no evidence indicating that the Department was notified of the situation or requested to transfer or deliver the white slip to plaintiff. The evidence shows that the white slip and plates were actually returned to the defendant by the Department on April 27, 1947. Obviously, there could be no duty on plaintiff's part to send the white slip to the Department since it was not received by him and was in defendant's possession at all times after April 27, until notice of rescission of the contract.

Defendant's second contention is that the evidence is insufficient to support the judgment under the allegations of the third cause of action based upon alleged misrepresentations of defendant which induced plaintiff to purchase the truck. In this connection, the evidence shows that following the purchase transaction of April 1st, the truck was left with defendant for about a week before its delivery in order that the defendant might "check it over" and put in "A-1 condition."

Plaintiff's son, Charles T. Thompson, took delivery of the truck from the defendant and drove it to his place of business in Desert Hot Springs and on the trip experienced trouble with the brakes. Shortly thereafter, plaintiff's son drove the truck to Los Angeles, intending to pick up a half ton of steel but experienced so much trouble with the truck's faulty brakes, its lack of power and its excessive oil consumption that he did not attempt to obtain the steel. A few days later plaintiff's sons attempted to haul a three ton load of building blocks but the truck was unable to pull the load. The truck was then returned to the defendant for repairs, and after it was returned to plaintiff, it was used on a few occasions to haul light loads and equipment. The truck did not perform satisfactorily and it was again delivered to the defendant. Subsequently, Mr. Reynolds, a mechanic assisting one of plaintiff's sons, attempted to use the truck in hauling crushed rock from Whitewater to Desert Hot Springs, a distance of ten miles. Reynolds testified that the truck had very little power, compared to other trucks which he had driven over the same route; that a connecting rod burned out despite the fact that the motor had plenty of oil in the crankcase; that the motor burned about three quarts of oil each round trip of twenty miles while hauling these loads; that he dismantled the motor and found that the crankshaft was worn badly and was "out-of-round or oval", with the result that it could not retain a connecting rod bearing for very long; that the cylinders were so worn that they were oval and "out-of-round" and could not be corrected by piston rings alone; that he tested the compression which should have been between 80 and 90 pounds if the motor were in good mechanical condition and found that it was down to 40 to 75 pounds on the various cylinders. Reynolds further testified that he was obliged to change the connecting rods and pistons in this motor twice and on the second occasion this change was made at a garage in Colton, where the truck remained until it was returned to defendant's yard for the third and last time in August, 1947.

[3] There is ample evidence in the record from which the trial court could and did conclude that the truck in question was not in good mechanical condition as represented to plaintiff by the defendant. The findings are sufficiently supported by the evidence.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

107 Cal.App.2d 356

GASPARD et al. v. EDWIN M. LE BARON, Inc. et al.

Civ. 18278.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1951.

Action by F. J. Gaspard, and another against Edwin M. LeBaron, Inc., a corporation, and others to quiet title to a strip of land. The Superior Court of Los Angeles County, Philip H. Richards, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that where land in question had been effectively dedicated as a roadway and was accepted as such by long continued use, a purported assessment of such land for taxes and a tax deed upon failure of payment of taxes were ineffective, and the plaintiffs who purchased at tax sale had no rights whatsoever in the land.

Affirmed.

1. Dedication ⚿19(3)

The fact that in a document dedicating certain land, certain parcels of land were referred to as avenues but were not marked as such on the map accompanying the dedication was immaterial to the validity of the dedication.

2. Dedication ⚿44

In action to quiet title to a strip of land, the evidence sustained finding of trial court that land in question was offered for dedication as a public road and that it was accepted as such by long continued use by the public.

3. Taxation ⚿187

No authority exists for assessment and levy of taxes on a public road, and such an assessment is entirely void and ineffective to destroy or alter the public right. Const. art. 13, § 1.

4. Constitutional Law ⚿196

Taxation proceedings initiated without authority to tax cannot be validated by subsequent legislation.

5. Taxation ⚿187, 734(5)

Where roadway had been validly dedicated to public use and had been accepted as such by long continued use by the public, purported assessment upon such roadway for taxes and a deed of such land upon failure to pay taxes had no effect whatsoever and the purchaser of such tax deed had no right upon the land. Pol.Code, § 3787; Revenue and Taxation Code, §§ 3534, 3552.22, 3712; Const. art. 13, § 1.

6. Taxation ⚿829, 831

Where judgment in quiet title action established only that a public easement existed over land in question, and that the land was not subject to being taxed, the plaintiffs, who purchased land at tax sale, were not entitled to recover amount they had paid for their deed and taxes as a condition to entry of judgment in favor of defendants.

H. E. Bianchi, Bakersfield, for appellants.

Watson, Hart & Mieras, Los Angeles, for respondents.

SHINN, Presiding Justice.

This is an action to quiet title to a strip of land approximately 982 feet in length and 18 feet in width which extends along the top of a ridge that was subdivided into lots prior to 1911. The defendants are a few of a great number of owners of lots in the subdivision. The judgment declares that plaintiffs are not the owners or entitled to exclusive possession of the land, but that the same is, and for many years has been, a public road. Plaintiffs appeal.

The property is described as Lot E, Block 3, of Tract 1146, in the City of Los Angeles. A subdivision map of Tract 1146 was filed in the recorder's office in 1911. It embraced only a part of a large tract that had previously been subdivided according to a recorded map. The lot lines of Tract 1146 conform to those shown on the earlier map. Tract 1146 contains 73 numbered lots. In addition to the numbered lots the map designated certain areas by letter, as lots C, D and E. While only lot E is here involved, the purpose and plan of the subdividers were expressed in the delineation of the areas, lots C and D, as well as lot

E. It will assist in an understanding of the map to visualize lots E and C as alleys reaching the rear boundaries of all the lots, and lot D as a road extending around the boundaries of part of the tract that did not face upon existing streets.

At the time Tract 1146 was laid out, San Rafael Avenue was an existing street extending across the southerly boundary of the tract from Ocean View Avenue, the southwest corner of the tract, and northerly along the easterly boundary for a comparatively short distance. It furnished a means of access to the front of 17 lots. Ocean View Avenue was an existing street which formed the westerly boundary of 34 lots. Along the easterly and northerly sides of the tract from the point where San Rafael Avenue ended, to the northerly end of Ocean View Avenue, there were 24 lots which did not face on any street. Lot D, 42 to 52 feet or more in width, was delineated upon the map as the front boundary line of these 24 lots. If it was not intended to be a road, there would have been no means of access to the front lines of 24 of the lots. Lot E, as laid out, was approximately 18 feet wide and 982 feet long. It extended from San Rafael Avenue on the east approximately half way across the subdivision; thence it extended southerly, and had certain east and west laterals. The entire Lot E, with its laterals, formed the rear boundary lines of 26 of the lots. At its southerly terminus there was a "turn around" circle. Lot C served the same purpose with relation to the remainder of the tract. It was about 18 feet wide and 1639 feet long. It also started in San Rafael Avenue and extended northerly, forming the rear boundary lines of 46 of the lots. At its northerly terminus it also had a "turn around" circle.

The trial court found that the map constituted an offer of dedication of Lot E as a public road. This was an inescapable conclusion. Lots C and E and their turn around circles were unquestionably intended to be used for traffic to gain access to the rear of the lots, just as Lot D was intended to give access to the front boundary lines of lots bordering thereon. The subdivision map contained an offer of dedication reading as follows: "We hereby certify that we are the owners of or interested in the land included within the subdivision shown on the annexed map and that we are the only persons whose consent is necessary to pass a clear title to said land and we consent to the making of said map and subdivision as shown within the colored border lines and we hereby dedicate for public use all the Avenues shown on this map within the colored border lines. [Signatures.]" On the 6th day of March, 1911, the Board of Supervisors adopted a resolution approving the map and providing, "that all streets, lanes, alleys, roads and other portions of the land shown upon said map, surveyed January ——, 1911, and therein offered for dedication, be and the same are hereby accepted as public highways." It was also found that the offer of dedication had been accepted by long continued use by the public.

[1] Upon the trial there was introduced in evidence a photostatic copy of the recorded map. It is in black and white and while it does not show in color the border lines to which the certificate of the owners referred it has been stipulated on the appeal that such colored border lines extend along the outer boundaries of all lots facing on San Rafael Avenue and Ocean View Avenue, also along the outer boundary of the parcel marked Lot D, and the outer boundaries of San Rafael and Ocean View Avenues. It therefore appears that the map was an express offer to dedicate lots C, E and D, as public roads. They could have served no other purpose. They were the parcels, and the only parcels, to which the dedication referred. The fact that they were referred to as Avenues and were not so marked is immaterial. Gross v. City of San Diego, 125 Cal.App. 238, 13 P.2d 820; 9 Cal.Jur., p. 40. Upon the evidence which is before us we find that by the proceedings above related the land here in question was dedicated as a public road in 1911.

[2] We might add, without reciting the evidence on the subject, that there also was ample evidence to support the finding that

lot E was offered for dedication as a public road and that it was accepted as such by long continued use by the public.

Defendants are purchasers of lots under conveyances which made reference to the recorded map. Plaintiffs claim title under a tax deed from the State of California issued May 15, 1944, based upon an assessment of lot E for the year 1927. They contend that their tax deed establishes conclusively that they have a fee title to the land, citing section 3787 of the Political Code, which reads: "Such deed, duly acknowledged or proved, is (except as against fraud) conclusive evidence of the regularity of all other proceedings, from the assessment of the assessor, inclusive, up to the execution of the deed. Such deed conveys to the state the absolute title to the property described therein, free of all encumbrances * * *"; and also section 3712 of the Revenue and Taxation Code, which reads as follows: "The deed conveys title to the purchaser free of all encumbrances of any kind existing before the sale" except "Easements constituting servitudes upon or burdens to the property" etc. Section 3534 of the Revenue and Taxation Code continued in existence an advisory committee on tax deeded property. The sections which follow authorize the committee to classify and reclassify tax deeded property, as suitable for public use, suitable to go back to private ownership, or essentially waste land not fit for either public or private use. Only property classified as suitable to go back to private ownership may be sold. Section 3552.22 provides that except as against actual fraud the deed is conclusive evidence of compliance with the article on classification of tax deeded property and has the same effect as evidence and as a conveyance as a deed to a private purchaser after sale of tax deeded property. It is the contention of plaintiffs that the property in question was classified as property suitable to be returned to private ownership, else the State would not have sold it. Therefore, it is argued, the deed furnishes conclusive evidence that Lot E was not a public road. At the same time, appellants say: "We submit that the court was in error in its holding that Lot E in its entirety was a public street. If such finding is upheld the entire sale would be a nullity so far as plaintiffs are concerned." Defendants in their brief do not answer the argument of plaintiffs.

[3-5] The underlying and fatal weakness in plaintiffs' claim of title is that the roadway was not subject to assessment for taxes. No authority exists for the assessment and levy of taxes on a public road, or, to state the matter differently, any attempted assessment, levy and sale of land impressed with an easement for use as a public road is entirely void and ineffective to destroy or alter the public right. San Leandro v. Le Breton, 72 Cal. 170, 177, 13 P. 405; Lantz v. City of Los Angeles, 185 Cal. 262, 270, 196 P. 481; Burk v. City of Santa Cruz, 163 Cal. 807, 127 P. 154; Constitution of California, Art. XIII, Sec. 1. Taxation proceedings initiated without authority to tax cannot be validated by subsequent legislation. People v. Goldtree, 44 Cal. 323; Miller v. McKenna, 23 Cal.2d 774, and cases cited p. 782, 147 P.2d 531. Plaintiffs' deed was void and of no effect whatever to validate the unauthorized levy and sale of rights in a public road.

Although there were a great many lot owners in the tract whose interests would be affected, plaintiffs sued only a few of them and the case was at issue only as to those defendants previously mentioned. The City of Los Angeles was not made a defendant. It was evidently the theory of plaintiffs that certain defendants claimed private easements over lot E. The answering defendants claimed private easements, although they also asserted the public character of the land. The court found against the defendants as to the existence of private easements and these findings are not now questioned. Obviously the City, and all the owners whose lots touch lot E, are parties interested in the character of the land, since the lot owners and the general public would be adversely affected by any determination that the parcel is not a public road. The judgment declares that plaintiffs are not the owners or entitled to exclusive possession of the land. It does not declare that they have no interest in it. Subsurface rights as between plaintiffs and the owners of lots bordering on lot E were not in issue nor determined. The judgment that a road exists over lot E determines only that the taxation proceedings were ineffectual to destroy or impair the public easement for road purposes.

[6] Inasmuch as the judgment establishes only a public easement over lot E, which was not subject to being taxed, and since no one owed the tax that was levied, plaintiffs were not entitled to recover the amount they had paid for their deed and taxes as a condition to the entry of judgment in favor of defendants.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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107 Cal.App.2d 514

PEOPLE v. COSTELLO.

Cr. 4681.

District Court of Appeal, Second District, Division 3, California.

Nov. 14, 1951.

Rehearing Denied Nov. 26, 1951.

Hearing Dismissed Jan. 3, 1952.

Alfred S. Costello was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of two offenses of grand theft, and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence warranted inference that money entrusted to defendant to purchase automobiles for customers had been wilfully and fraudulently misappropriated and sustained conviction of grand theft, notwithstanding offers of restitution, in whole or in part, subsequently made by defendant.

Judgments affirmed.

1. Criminal Law 🔑573

Procedure by which information was filed within thirty days after defendant was committed to answer and he was brought to trial within sixty days after the filing of information was in compliance with statute and defendant was accorded a speedy trial to which he was entitled under the Constitution. Pen.Code, § 1382; Const. art. 1, § 13.

2. Criminal Law 🔑232

Where defendant was represented by an attorney at time of his arraignment on charges of grand theft and was informed by court of the charges against him and of his right to the aid of counsel in every stage of proceedings and, though he was not represented by counsel at preliminary examination, defendant announced his willingness to proceed, defendant was sufficiently advised of his right to representation by counsel and was so represented.

3. Embezzlement 🔑44(1)

Evidence that money was entrusted to defendant to purchase automobiles for customers and that defendant did not attempt to use the money for such purpose warranted inference that the money was wilfully and fraudulently misappropriated and sustained conviction of grand theft, though defendant later reimbursed one customer in part and offered to transfer to the other customer an automobile of a model different from that which customer had ordered and paid for.

4. Embezzlement 🔑11(1), 23

Offenses of grand theft were complete when defendant wilfully and fraudulently misappropriated money entrusted to him to purchase automobiles for customers, and his subsequent offers of restitution, in whole or in part, were only matters which court might consider in mitigation of punishment.

5. Criminal Law 🔑662(8)

Where defendant, though not represented by counsel at preliminary examination announced his willingness to proceed, and at trial, being represented by counsel, he stipulated to the use of transcript of evidence taken at preliminary examination, defendant waived his right to be confronted by the witnesses against him.

6. Criminal Law 🔑232

Defendant waived his right to be represented by counsel at preliminary examination by announcing his willingness to proceed without aid of counsel.

7. Criminal Law ⚷232

Defendant could waive his right to be represented by counsel at preliminary examination and could not retract such waiver after conviction.

8. Criminal Law ⚷1121(1)

Record of proceedings resulting in conviction of grand theft failed to sustain contention that court had treated lightly some of the evidence in the case and had disregarded it.

9. Criminal Law ⚷706

In prosecution for grand theft, district attorney was not guilty of misconduct through inquiry as to amount of money defendant had in bank to cover a check that he had written.

10. Criminal Law ⚷982

Superior court, having imposed sentence under judgment of conviction of grand theft, had jurisdiction to revoke probation granted in a former case in which proceedings had been suspended and defendant sent to state hospital and to impose sentence under former judgment to run concurrently with sentence imposed for grand theft, though former proceedings had been before a different judge.

Alfred S. Costello, in pro. per.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial defendant was convicted of two offenses of grand theft. It was alleged and found to be true that defendant had suffered a prior felony conviction of issuing a check without sufficient funds. A third count of the information charging issuance of a check without sufficient funds was dismissed on defendant's motion under section 995, Penal Code.

Trial by jury having been waived, the case of the People was submitted on the testimony and exhibits introduced at the preliminary examination. The court expressed doubt as to the present sanity of the defendant, suspended proceedings and appointed two medical experts to examine defendant and report their findings to the court. Subsequently, after considering the reports and defendant's medical record, the court found that defendant was presently sane, and trial was resumed. Defendant testified and introduced evidence consisting of numerous exhibits. Defendant made a motion for a new trial and filed an application for probation, both of which were denied. The present appeal is taken from the judgments of conviction.

Although defendant was represented by counsel at the trial, he prosecutes his appeal in propria persona. The offenses of which defendant was convicted consisted of: The receipt from one Byron H. Brown of $3,294.25 as the purchase price of an automobile; the car was delivered to Mr. Brown and when he asked whether anything more was due, defendant represented that everything had been taken care of and that Brown would receive a pink registration slip from the Bureau of Motor Vehicles within ten days or two weeks; after receiving Brown's check, defendant purchased the car from Leslie Lumley, Inc., issuing therefor his check for $3,221.52, which was dishonored by the bank; the seller demanded the car from Brown, who informed defendant of that fact; defendant agreed to make good the check but failed to do so; Brown reported the matter to the Police and defendant sent him $1,500 which he paid over to Lumley; shortly thereafter, Brown paid Lumley the unpaid balance of $1,721.52; Brown has been reimbursed by defendant to the extent of $1,900 and no more. The other complaining witness, Lloyd G. Dennee, paid defendant $4,185 for an automobile which defendant represented would be delivered within ten days; defendant placed an order for the automobile with Leslie Lumley, Inc., paying down $100; Mr. Dennee never received the automobile nor was he reimbursed by defendant in any amount. Defendant at the time was doing business as Consolidated Purchasing and Sales Company. Mr. Brown's check was drawn in this name and was so endorsed, and also endorsed by defendant. Immediately after the deposit of $3,194.25 in the account of

Consolidated, the amount was withdrawn by defendant and appropriated to his own use. Defendant had one account in the Lynwood Branch of the Security First National Bank in the name of Consolidated Purchasing and Sales Company with a balance of $99.31, also a commercial account in his own name with a balance of $6.50, together with a savings account of $100. At none of the times in question did he have in his own account more than $634.73. We have read defendant's testimony and do not find therein any reasonable explanation of his failure to deliver to the complaining witness Dennee the automobile which he had purchased, or to furnish clear title to the car which was delivered to Mr. Brown. It appears from the testimony of Mr. Dennee, as well as that of defendant, that about a month and a half after making his purchase, Dennee demanded the return of his money and that defendant stated he was unable to return it. It also appears that defendant agreed to deliver Dennee a 62 Cadillac Convertible, that Dennee afterwards expressed a willingness to accept a sedan, and that defendant afterwards offered to transfer to Dennee a 61 Cadillac, but that the transfer was never made.

[1] The first contention of defendant to be considered is that he was denied a speedy trial. The record shows that he was held to answer, November 3, 1950; that the information was filed November 17, 1950; and that he was brought to trial January 3, 1951. The information was filed within 30 days after he was committed to answer and he was brought to trial within 60 days after the filing of the information. This procedure was in compliance with section 1382 of the Penal Code and therefore defendant was accorded a speedy trial to which he was entitled under the Constitution, Article I, Section 13.

[2] The second point raised by defendant is that at the time of the preliminary examination he was not represented by an attorney and that he was not and had not been informed of his right to be represented by counsel. A transcript of the docket of the municipal court of the proceedings had therein has been filed as a supplement to the record on appeal. It is shown by the record that at the time defendant was arraigned he was represented by an attorney and the court informed defendant of the charges against him and of his right to the aid of counsel in every stage of the proceedings. At the time of the preliminary hearing the court stated to defendant that it was understood he did not have an attorney, which fact was affirmed by defendant. Nevertheless defendant announced his willingness to proceed. It therefore appears that defendant had been sufficiently advised of his right to the aid of counsel, had been so represented, and for some reason not disclosed was willing to proceed with the preliminary examination without the aid of counsel. There is no merit in the contention that he was not sufficiently advised as to his rights. People v. Stein, 23 Cal.App. 108, 113, 137 P. 271.

[3] The following facts were established by the evidence. Brown parted with his money upon the strength of defendant's representation that he had a fleet deal with General Motors under which he was able to purchase a new car for less than the list price, and that Brown gave him the money to use in the purchase of a car. There was no representation or understanding that defendant had the car to sell; the money was entrusted to defendant with which to acquire the car. The same is true as to defendant's transaction with Mr. Dennee. His money was entrusted to defendant to be used in purchasing a car which would be shipped from Detroit. Defendant's representations were false; he did not use or attempt to use the money in accomplishing the purpose for which it had been entrusted to him. It was a reasonable deduction that the money was wilfully and fraudulently misappropriated. People v. Fewkes, 214 Cal. 142, 4 P.2d 538.

[4] It was not a defense to the grand theft from Brown that he received an automobile, the purchase price of which he paid to Lumley, and that he was later reimbursed by defendant to the extent of $1,900. Neither was it a defense to the charge in the Dennee transaction that at some unstat-

ed time defendant offered to transfer to Dennee an automobile of a model different from that which Dennee had ordered and paid for. The offenses were complete, and the offers of restoration, in whole or in part, were only matters which the court might consider in mitigation of punishment. See People v. Kay, 34 Cal.App.2d 691, 696, 94 P.2d 361.

[5–7] We discern no merit in the contention that defendant was deprived of his right to be confronted by witnesses at the trial through the use by the People of the evidence taken at the preliminary examination. Defendant was represented by counsel at the trial and in stipulating to the use of the preliminary transcript he waived his right to be confronted by the witnesses against him. Although defendant had no attorney at the preliminary, he cross-examined the witnesses. As previously shown, he waived his right to be represented by the counsel at the preliminary. It was a right that could be waived and defendant cannot now retract the waiver. In Re Connor, 16 Cal.2d 701, 709, 108 P.2d 10; People v. O'Neill, 78 Cal.App.2d 888, 891, 179 P.2d 10; People v. Jewett, 84 Cal. App.2d 276, 190 P.2d 330.

[8, 9] There is no merit in the contention that the court treated lightly some of the evidence in the case and disregarded it, nor in the contention that the district attorney was guilty of misconduct through inquiry as to the amount of money defendant had in bank to cover a check that he had written.

[10] After sentence was imposed in the present case, the court revoked probation in a former case in which proceedings had been suspended and defendant sent to the Camarillo State Hospital. Defendant was sentenced under the former judgment, the sentence to run concurrently with that imposed on counts one and two of the present information. The point is urged that the court was without jurisdiction, since the former proceedings had been before another judge. There was no lack of jurisdiction. People v. Connolly, 103 Cal.App.2d 245, 229 P.2d 112. Moreover, no appeal in the former case is before us, nor does it appear that one was taken.

We have examined the other points urged and find them to be without merit. They do not require particular discussion.

The judgments are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

107 Cal.App.2d 308

KOPASZ v. KOPASZ.

Civ. 17030.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1951.

Rehearing Denied Nov. 28, 1951.

Hearing Denied Jan. 3, 1952.

Separate maintenance action by Edith Louise Lawrie Kopasz against John Charles Kopasz. The Superior Court, Los Angeles County, Carl A. Stutsman, J., rendered judgment for plaintiff, and the defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence was insufficient to show that husband who had military residence in Nevada from June to October, 1943, and from March to May, 1944, had such intention to remain permanently or indefinitely in Nevada as would establish domicile which would give Nevada court jurisdiction to grant him a divorce.

Judgment affirmed.

See also, 237 P.2d 287.

1. Appeal and Error 🔑1011(1)

A finding on the issue of domicile, based upon conflicting evidence, is conclusive upon the District Court of Appeal.

2. Domicile 🔑4(2)

The state of one's domicile is primarily determined by one's intention.

3. Domicile 🔑4(1)

Enlistment in the military service and compliance with the Army's orders with respect to locality of military service does not necessarily effect a change of the soldier's legal domicile, even though he be transported 2,000 miles from his place of enlistment.

4. Domicile ⚷9

Behavior and declaration of defendant made without any apparent object to deceive those to whom they are addressed are competent evidence of defendant's intention with respect to his domicile.

5. Divorce ⚷327

Evidence was insufficient to show that husband who had military residence in Nevada from June to October, 1943, and from March to May, 1944, had such intention to remain permanently or indefinitely in Nevada as would establish domicile which would give Nevada court jurisdiction to grant him a divorce.

6. Appeal and Error ⚷984(1)
Husband and Wife ⚷298(1)

The determination of a woman's needs and of her husband's ability to pay rests in the sound discretion of the trial court, and only upon a showing of an abuse of such discretion will the appellate court interfere with maintenance and support allowance.

7. Husband and Wife ⚷298(3)

In wife's separate maintenance action, allowance of $125 per month for maintenance and support of wife and $750 as counsel fees for wife's attorneys was not abuse of discretion as excessive and beyond husband's ability to pay in view of evidence that husband had an income of approximately $400 per month.

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Blanche & Fueller, Pasadena, for appellant.

Louis Kaminar and Wm. U. Handy, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from a decree of separate maintenance awarded to his wife Edith on the grounds of the husband's cruelty and desertion. He set up as an affirmative defense to the action a purported divorce decree he had previously obtained in the state of Nevada on July 3, 1945. This defense was rejected. The Nevada decree was held to be invalid and of no force or effect on the theory that the Nevada court was without jurisdiction. Such determination was based upon the trial court's finding that appellant had never established a bona fide domicile in our sister state.

[1] Appellant contends that the finding is unsupported by the evidence. Thus the primary issue is whether there is sufficient, substantial evidence in the record that will support the judgment. It is a truism that a finding on the issue of domicile, based upon conflicting evidence, is conclusive upon this court. Re Winzeler's Estate, 42 Cal. App.2d 246, 249, 108 P.2d 720; Estate of Peters, 124 Cal.App. 75, 77, 12 P.2d 118.

Appellant and respondent have known each other since 1939 in New York. They were married November 5, 1942, at appellant's army station in Colorado. After residing in Denver with her husband for ten days respondent returned to New York to complete her nurse's training. Appellant was transferred to Camp Warren, Wyoming, at which location the parties lived together during March and April, 1943. On June 12, 1943, appellant was sent to Las Vegas, Nevada, where his duty lasted until October. He was then sent to Camp Lee, Virginia, but returned to Las Vegas in March, 1944, for further military service and there remained until May of the same year when he was transferred elsewhere. His only subsequent visits to Nevada occurred in April, 1945, for the purpose of filing his divorce action, and again in July, 1945, to attend the divorce trial.

[2, 3] Appellant's claim to domicile in Nevada is based upon such military residence there from June to October, 1943, and from March to May, 1944. Without question he could have established a domicile there, since the state of one's domicile is primarily determined by one's intention. Enlistment in the military service and compliance with the army's orders with respect to locality of military service does not necessarily effect a change of the soldier's legal domicile even though he be transported 2,000 miles from his place of

enlistment. Johnston v. Benton, 73 Cal. App. 565, 569, 239 P. 60; 17 Am.Jur., sec. 73, p. 634.

[4, 5] The record contains substantial evidence from which the court reasonably inferred that appellant during his two brief sojourns in Nevada never formed an intention to remain there permanently or indefinitely. Appellant was officially ordered to Nevada by military authorities. He had never been there before except for one night. While there as a soldier he lived on the army base, in hotels, motels and rooming houses. He never cast a ballot or registered to vote in Nevada; never owned property or worked there as a civilian. While there he corresponded regularly with respondent, yet he never informed her of any change of domicile. On the contrary, he expressed dissatisfaction with conditions in Nevada; complained about the climate and living accommodations in the town where he stayed and referred to his army post as "stinking." He declared that he was anxious to be transferred to the east. He requested respondent to keep in touch with one of his former eastern business associates as the "war could end abruptly." While in New York city on leave in December, 1943, he discussed plans for going into business there after the war. Finally, to seal the proof of his domiciliary intent, less than a month after obtaining the Nevada decree, appellant remarried in Santa Ana, California, and has since resided in this state. Such behavior and declarations of appellant made without any apparent object to deceive those to whom they were addressed are competent evidence of his intention. Warren v. Warren, 127 Cal.App. 231, 240, 15 P.2d 556; 10 Cal.Jur., sec. 372, pp. 1155–56. Other proof reflects the nonexistence of an intent on the part of appellant to acquire a Nevada domicile but the above furnishes ample support for the finding adverse to appellant's contention. It follows that this court is powerless to alter the conclusion that the Nevada court was without jurisdiction to render its decree.

[6, 7] Appellant's second assignment of error is that the allowance of $125 per month for maintenance and support of respondent and the allowance of $750 as counsel fees for his wife's attorneys are excessive and beyond his ability to pay. The determination of a woman's needs and of her husband's ability to pay rest in the sound discretion of the trial court. Only upon a showing of an abuse of such discretion will the appellate court interfere. Hopkins v. Detrick, 97 Cal.App.2d 50, 59, 217 P.2d 78; Melny v. Melny, 90 Cal.App. 2d 672, 679, 203 P.2d 588.

The record herein reveals that appellant earned approximately $3,000 during 1947 while working as a real estate broker. He testified that he did not know the extent of his earnings in 1948 to the date of the trial—September 7—but that he thought his books would show that he was not breaking even during September. His "books" consisted of numerous folders containing loose bills. The court suggested that appellant prepare some sort of statement or summary of the records and refused the documents as such. Appellant never offered such statement to the court. Moreover, his testimony revealed that he also received a government pension of $157.50 per month, and that his new wife was the possessor of independent means. From the facts established it was not an arbitrary finding that appellant had an income of approximately $400 per month.

Appellant argues that it was shown that respondent was employed as a nurse earning a salary of $2,400 per year and that consequently her need was not shown. However, testimony in the record shows that respondent was then on an indefinite leave of absence from her work, presumptively without pay, that she had recently undergone two serious major surgical operations and was not then in good health, being unable to remain upon her feet for long periods of time. She testified that she was then in debt by reason of her surgical and medical care in the sum of $500.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; SCHAUER, J., dissenting.

107 Cal.App.2d 312

KOPASZ v. KOPASZ.

Civ. 17257.

District Court of Appeal, Second District,
Division 2, California.

Nov. 7, 1951.

Hearing Denied Jan. 3, 1952.

Separate maintenance action by Edith Louise Lawrie Kopasz against John C. Kopasz. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., entered an order awarding the plaintiff $900 attorney fees and $350 costs for defending the appeal taken by defendant from separate maintenance judgment in favor of plaintiff, and the defendant appealed. The District Court of Appeal, Moore, P. J., held that the allowance of fees and costs was not abuse of discretion.

Order affirmed.

Husband and Wife ⚷295

Allowance to wife of $900 attorney fees and $350 costs for defending husband's appeal from separate maintenance judgment in favor of wife was not abuse of discretion as beyond husband's ability to pay and in excess of wife's needs, where wife had a judgment which she had the right to maintain, and judgment was rendered on account of husband's own behavior, and the action was bitterly contested by both sides, and several days were consumed in the trial and numerous appearances were made by counsel.

◆

Blanche & Fueller, Pasadena, for appellant.

Louis Kaminar and Wm. U. Handy, Los Angeles, for respondent.

MOORE, Presiding Justice.

This is a companion appeal to Kopasz v. Kopasz, Cal.App., 237 P.2d 284. No. 17030, decision filed this date.

In the instant cause appellant husband has appealed from the order awarding respondent $900 attorney's fees and $350 costs for defending the appeal taken by husband from the separate maintenance judgment.

The sole question for decision here is whether the court abused its discretion in awarding these sums, appellant's contention being that such award is beyond his ability to pay and in excess of respondent's needs.

In view of the reasons given in the opinion in cause No. 17030 as to the propriety of the court's award for expenses and separate maintenance, it cannot be said that the court abused its discretion in fixing fees to be paid. Respondent has a judgment which she has the right to maintain. It was rendered on account of appellant's own behavior. The payment of counsel fees and costs is a necessary luxury for one who so manages his affairs as to be required to pay them. Nine hundred dollars is not an excessive fee under the circumstances. The action has been bitterly contested by both sides. Several days were consumed in the trial; numerous appearances were made by counsel.

Affirmed.

McCOMB, J., concurs.

Hearing denied; SCHAUER, J., dissenting.

107 Cal.App.2d 367

EAVES v. TIMM AIRCRAFT CORP.

Civ. 18347.

District Court of Appeal, Second District,
Division 3, California.

Nov. 7, 1951.

Rehearing Denied Dec. 5, 1951.

Hearing Denied Jan. 3, 1952.

Helen Quinby Eaves, substituted as plaintiff in lieu of Harold Ladd Pierce, sued Timm Aircraft Corporation for the recovery of a sum alleged to be the reasonable value of services rendered by Harold Ladd Pierce at the special instance and request of the defendant. The Superior Court, Los Angeles County, William B. McKesson, J., entered judgment in favor of defendant pursuant to an order sustaining a demurrer to the complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the complaint alleged insufficient facts to support a recovery under a written agreement between the parties and that facts alleged likewise did not state a cause of action for reformation of such an agreement.

Affirmed.

1. Pleading ⚷54

Where one cause of action is based upon specific facts set forth in another cause of action, they should be read together.

2. Brokers ⚷7

Where affiliation of first airplane manufacturer with another manufacturer engaged in same business was manifest object of agreement between first manufacturer and broker, services rendered by broker in connection with business arrangement entered into between manufacturers by which first manufacturer leased property to second manufacturer and borrowed money from second manufacturer were not within scope of agreement.

3. Brokers ⚷40

Where terms of agreement between broker and airplane manufacturer were unambiguous and had no local or technical meaning, broker's recovery could not be based upon attempted variations imposed upon agreement under guise of interpretation.

4. Evidence ⚷442(4)

Where airplane manufacturer seeking to expand its operations, by written agreement employed broker to procure affiliation with another manufacturer, broker could not recover on theory that broker signed agreement in reliance on airplane manufacturer's oral representation that affiliation included sale or lease of plant or loan of money.

5. Brokers ⚷82(1)

In action by broker against airplane manufacturer for commission for services allegedly rendered under written contract to procure affiliation with another manufacturer, allegations that broker submitted plan for leasing of one or both of principal's plants and for borrowing money, that, during negotiations between principal and another, broker was not permitted to assist in negotiations but that he was advised he would be paid commission at stipulated rate on consummation of transaction did not state cause of action.

6. Reformation of Instruments ⚷36(3)

Broker's allegations that principal did not intend that affiliation should include sale or lease of principal's plants or loan or other financing but that, in order to induce broker to enter into agreement to procure affiliation, principal represented that affiliation was that inclusive and that broker was so induced did not state cause of action for reformation, since there was no mutual mistake or mistake on part of broker known to principal. Civ.Code, § 3399.

7. Contracts ⚷238(2)
Reformation of Instruments ⚷16

Intention of one of parties not to fulfill oral agreement which would add new terms to their written agreement does not render oral agreement valid or provide ground for reformation.

8. Appeal and Error ⚷758(1)

Aspects of case not discussed in briefs would not be considered.

Bachrack & Wilson, Los Angeles, for appellant.

Hyman Smith and Howard R. Harris, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff appeals from a judgment in favor of defendant entered pursuant to an order sustaining a demurrer to plaintiff's fifth amended complaint without leave to amend.

The first cause of action was for the recovery of $19,800 alleged to be the reasonable value of services rendered by one Harold Ladd Pierce at the special instance and request of the defendant. The second cause of action alleges the following facts: Timm (Timm Aircraft Corporation) was a manufacturer of airplanes, airplane parts and accessories and other commodities, owning and operating its "Saticoy plant" and "San Fernando plant." Marquardt Aircraft Company was engaged in the same or a similar business. On April 15, 1948, Timm gave Harold L. Pierce a letter reading in material respects as set out below.[1] This letter was accepted in writing by Pierce. He was a licensed real estate salesman acting for plaintiff, his undisclosed principal, who was a licensed real estate broker. He first sued as plaintiff's assignee of the claim but later reassigned to plaintiff who was substituted in his place. Through the efforts of Pierce, Timm and Marquardt were brought together and concluded a business arrangement according to one of the plans outlined by Pierce. Timm leased to Marquardt its Saticoy plant for a period of six years commencing November 1, 1948, for a total rental of $360,000, payable $5,000 per month, gave Marquardt an option to buy the plant within three years for $280,000 and the following three years for $160,000 and also borrowed of Marquardt $300,000. Plaintiff's demand of $19,800 is equal to three per cent of the combined total of the rent to be received and the money that was borrowed by Timm. The third cause of action purports to state grounds for reformation of the agreement.

[1] Since the first cause of action was based upon the specific facts set forth in the second cause of action they should be read together. Neal v. Bank of America, 93 Cal.App.2d 678, 209 P.2d 825.

[2] First to be considered is plaintiff's claim that the services alleged to have been rendered were within the scope of those described and specified in the agreement. In this plaintiff is clearly mistaken. Timm was seeking expansion of its operations. As stated in the letter it hoped to do this by "* * * profitably affiliating itself in production work with another corporation known to you [Pierce] in connection with production contracts held by such other corporation." "Affiliation" is mentioned several times as the objective of the employment of Pierce. No affiliation was brought about; no expansion of operations was accomplished. Upon the contrary, Timm curtailed its operations through the leasing of one of its plants. Pierce was not employed to negotiate a lease or a loan.

The written agreement was first alleged in plaintiff's second amended complaint. In an endeavor to broaden the meaning of the wording of the agreement with respect to proposed affiliation with another corporation in production work, so as to bring the services rendered within the scope of the employment, plaintiff alleged that Timm orally represented and assured Pierce that the agreement would entitle Pierce to compensation if the defendant sold or leased either of its plants or borrowed money from a corporation produced by Pierce. In the second cause of action of the fifth amended complaint it was alleged that when the writing was signed defendant orally represented to Pierce that the term "affiliating itself in production work" was intended by defendant to include the sale or lease of either plant or the loan of money and that Pierce, relying upon defendant's representation and interpretation, signed the agreement and rendered the services which culminated in Timm's transaction with Marquardt.

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[1] "Dear Mr. Pierce * * * You have represented that there is a possibility of Timm Aircraft Corporation profitably affiliating itself in production work with another corporation known to you in connection with production contracts held by such other corporation. The identity of the other corporation, the nature of the product and the contracts therefor are unknown to Timm Aircraft Corporation.

"You have represented that you are willing to submit a proposal to both Timm Aircraft Corporation and the other corporation for the affiliation of both of said corporations as aforesaid. Therefore, we have mutually agreed as follows:

"(1) In the event, as the result of the proposal to be submitted by you, there shall be an affiliation of Timm Aircraft Corporation with the other corporation known to you, then and in such event Timm Aircraft Corporation agrees to pay you as a commission for your services a sum equal to 3% of any and all considerations received by Timm Aircraft Corporation from the other corporation. The commission shall be payable to you in the form received by Timm Aircraft Corporation; that is to say, if Timm Aircraft Corporation shall receive cash, you shall receive 3% of such cash. Similarly, if Timm Aircraft Corporation shall receive property of any description whatsoever, you shall receive 3% of such property.

"(2) Timm Aircraft Corporation shall have, and it hereby reserves, the unqualified right to reject any and all proposals submitted by you for the affiliation of both of said corporations, or otherwise, and shall not be indebted to you for any commissions whatsoever, or otherwise, unless it shall accept the proposal submitted by you and there shall result therefrom an affiliation of both of said corporations. * * *"

[3, 4] Stripped of a profusion of allegations evidentiary in character the second cause of action in substance asserts the claim that while the writing said one thing it was represented by defendant to mean something quite different. Plaintiff seeks to recover not upon the contract as written but as enlarged in material respects by defendant's representations as to its meaning wholly at variance with its unambiguous expressions. Such recovery under the guise of interpretation may not be allowed where the terms used are unambiguous and have no local or technical meaning. Long v. Hammond, 168 Cal. 790, 145 P. 527; Peterson v. Chaix, 5 Cal.App. 525, 90 P. 948. It is clearly an attempt to vary the terms of the written agreement in a material respect.

[5] It was also alleged in the second cause of action that Pierce had submitted to Timm a plan for the leasing of one or both of its plants and for borrowing money from Marquardt; that during the negotiations between Timm and Marquardt Pierce was advised that his further services in the negotiations were not required but that upon consummation of a transaction with Marquardt he would be paid a commission at the stipulated rate; that Pierce stated his willingness to assist in the negotiations but was not permitted to do so. It was not alleged that a new agreement was entered into different from the written agreement under which plaintiff's services had been rendered, that is to say, it was not alleged that Timm agreed to pay Pierce a commission based upon rental that might be received or money that might be borrowed from Marquardt. Insufficient facts were alleged in the second cause of action to support a recovery of a commission.

[6–8] The third cause of action incorporated the allegations of the second cause of action but also alleged that Timm did not intend that the terms "affiliating itself in production work and/or affiliation * * * were to include a sale or lease of either or both of said plants or a loan or other form of financing thereon." Although it was alleged that Timm made the representation for the purpose of inducing Pierce to enter into the agreement and that he was so induced, the facts alleged did not state a cause of action for reformation. Civ.Code, sec. 3399; Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157; Miller v. Lantz, 9 Cal.2d 544, 548, 71 P.2d 585. There was no mutual mistake, nor a mistake on the part of Pierce, known to Timm. Upon the contrary it was alleged that Timm's understanding was directly the reverse of that alleged to have been entertained by Pierce. The intention of one of the parties not to fulfill an oral agreement which would add new terms to their written agreement does not render the oral agreement valid nor provide a ground for reformation. Plaintiff does not suggest that under the facts alleged Timm should be held estopped to urge invalidity of the claimed oral agreement as an interpretation of the written agreement. We need not pass upon aspects of the case which are not discussed in the briefs. It is also unnecessary to consider numerous other points raised by appellant.

It is apparent that in the fifth amended complaint plaintiff stated as favorably as was possible the facts upon which she relied.

The demurrer was properly sustained without leave to amend.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

107 Cal.App.2d 531

In re COON'S ESTATE.

COONS v. COON.

Civ. 8003.

District Court of Appeal, Third District, California.

Nov. 14, 1951.

Hearing Denied Jan. 10, 1952.

Proceeding in the matter of the estate of Albert Coon, also known as A. R. Coons, deceased, wherein Berness Nevada Coon, alleged widow of deceased, sought family allowance, and was opposed by Mathilda Coons, executrix and purported widow of the deceased. The Superior Court, Sacramento County, B. F. Van Dyke and Grover Bedeau, JJ., granted the family allowance and the executrix appealed. The District Court of Appeal, Adams, P. J., held that evidence supported finding that claimant had married decedent in a valid ceremony, and established that there had been no divorce.

Order affirmed.

1. Evidence ⚷383(4)

In probate proceeding wherein alleged widow sought family allowance, certificates of county clerk of every county wherein record showed that either deceased or alleged widow had resided after their marriage in 1907, to the effect that no divorce or annulment action had been instituted therein by either of the parties, was a sufficient showing of no divorce.

2. Marriage ⚷50(1)

In probate proceeding wherein alleged widow sought family allowance, evidence on issue of whether minister who performed marriage inadvertently dated marriage certificate as prior to date on marriage license, and whether marriage ceremony actually took place after license had been issued was sufficient to sustain finding in favor of validity of marriage.

3. Evidence ⚷83(1)

There is presumption that public officials performed their duty and properly issued a marriage license prior to marriage ceremony.

4. Marriage ⚷40(10)

In probate proceeding wherein alleged widow sought family allowance on ground that she had married deceased in 1907 and had not been divorced, opposed by executrix who had married deceased in 1948, evidence was sufficient to overcome presumption that deceased did not commit bigamy when he consummated two marriages subsequent to 1907.

5. Executors and Administrators ⚷184, 190

Widow who had married deceased in 1907 was not guilty of laches or estoppel from asserting right to family allowance from his estate as against subsequent wives of deceased, where widow had no knowledge of the subsequent marriages and hence no obligation to inform subsequent wives that she was wife of deceased.

6. Executors and Administrators ⚷188
Husband and Wife ⚷304

Separation alone does not constitute abandonment of a spouse or of a right to family allowance from spouse's estate.

7. Husband and Wife ⚷4

Right of a wife to support for herself and her child is a continuing right and is not lost by separation.

8. Executors and Administrators ⚷190

Delay of a wife in asserting right to family allowance from deceased husband's estate does not affect her right to such allowance.

9. Executors and Administrators ⚷188

Where wife had resided with deceased in California and returned to Indiana for a visit in 1916 but he failed to fulfill promise to send her money for return and discouraged her return by writing of his lack of steady occupation or means, and wife never rejoined deceased but supported herself and her child thereafter, the wife did not abandon the deceased or her right to a family allowance from his estate upon his death in 1948. Civ.Code, § 174.

10. Executors and Administrators ⚷190

Widow who asserted her right to family allowance from deceased's estate within 14 months after his death was not guilty of laches.

11. Executors and Administrators ⚷199

Where deceased had purchased real property worth $15,000 one year prior to death and built a house on it for $4,000, and had taken title to other real estate in joint tenancy with possible value of $18,000, and at time of death had $1,600 in checking account, and jewelry and other items of estate had value of $1,455 and estate account had $1,700 in cash, family allowance of $100 per month to widow who had married deceased in 1907 was reasonable and not an abuse of discretion.

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Edward E. Craig, Berkeley, for appellant.

Thomas J. MacBride, Charles F. Gray, Jr., Sacramento, for respondent.

ADAMS, Presiding Justice.

A. R. Coon, also known as A. R. Coons, a chiropractor, died testate on November 23, 1948, a resident of Sacramento County. He left as his purported widow and as the executrix of his will, one Mathilda Coons, whom he had married on July 23, 1948.

Berness Nevada Coon, also known as Vada Coon, claiming to be the wife of decedent by reason of a marriage with him consummated in Winchester, Indiana, on August 15, 1907, sought and was granted a family allowance from the estate of decedent. Mathilda Coons, as executrix of the estate, has filed an appeal from the order granting such allowance. Appellant's contentions are that the evidence adduced by Berness Nevada Coon was insufficient to support her claim to be the widow of decedent, that even if the evidence of her marriage to decedent was sufficient there was evidence that she had abandoned any right she might have had for such an allowance, was estopped from asserting rights to same, and was guilty of laches; and that the amount allowed by the court, $100 per month, was excessive and its allowance constituted an abuse of discretion.

In support of her claim to be the widow of decedent, Berness Coon introduced in evidence the applications of Albert G. Coon and herself for a marriage license, in Randolph County, Indiana, dated August 14, 1907, the license itself, bearing the same date, and the certificate of Rev. C. E. Hiatt that he joined decedent and Berness Nevada Kem in marriage. Said certificate was a part of the license, but bore the date August 8, 1907. The authenticity of these records is not questioned, but it is asserted by appellant that they do not evidence a valid marriage because they indicate that the ceremony before Rev. Hiatt took place before the filing of the applications by the parties and the issuance of the license by the County Clerk. Testimony was given by Hazel Hiatt, daughter of Rev. C. E. Hiatt, that she knew Berness and Coon before their marriage, was present at the ceremony, and played the wedding march; and that the ceremony took place on August 15, 1907. She also testified that Berness and Albert Coon thereafter lived together as man and wife, that she saw them frequently, and knew when a son, John Thomas, was born to them. She identified pictures of father and child together.

Testimony of Charles Lindsay, son of decedent's sister, tended to establish a marriage between Berness and Albert Coon, the existence of a son of the marriage, and that the marriage was never dissolved. He testified to a statement by Coon in 1945 that he "never even got a divorce"; and that decedent had a photograph of his son John in the living room of his home.

John Thomas Coon testified that to the best of his knowledge his parents were Vada and Albert Coon; that he saw his father in San Francisco in 1936. He identified a letter written to him at Winchester, Indiana, June 1, 1935, signed "Your Father," and postmarked Fairfield, California; he also said that his father usually sent him Christmas cards, and occasionally wrote letters; that when he saw his father in San Francisco they talked about his mother, and his father asked for and was given a picture of Vada; that any divorce from Vada was not mentioned; that on a second visit with his father the latter mentioned a "lady that stayed with him," but did not say they were married.

[1] Berness Coon testified as to her marriage with decedent, and that it took place on August 15, 1907; that she lived with Coon for nine years; that a son of

the marriage, John Thomas Coon, was born November 5, 1913, at Winchester, Indiana. An exemplified copy of the birth certificate was introduced, which named Berness as the mother and Albert as the father. Two deeds executed by Albert Coon and Vada Coon, his wife, on March 27, 1927, and December 15, 1911, were introduced in evidence. The earlier one was acknowledged by both before a notary in Randolph County, Indiana, and the later one acknowledged by Vada before a notary in Randolph County, Indiana, and by Albert before a notary in Solano County, California. She stated that she lived with Coon in San Francisco in 1915; that Coon had come there in April, 1914, and she joined him in January, 1915, and remained until June, 1916, when she returned to Winchester on a visit. She identified letters written to her by Coon in 1917 and 1918, after her return to Winchester, which were addressed to "Mrs. Albert Coon." In one of these letters from San Francisco, dated March 23, 1918, Coon suggested that one or the other of them got a divorce, but she too, took no action. He also sent her some money, but put off her return to California. She also testified that she had never divorced Coon, nor had she ever been served with any divorce or annulment papers; that she had never been notified that Coon had secured a divorce or annulment; that she knew all of the Coon family and saw them frequently; that she never was told by anyone that Coon had remarried. She also introduced into evidence several letters written to her by Coon, each being addressed to "Mrs. Albert Coon." She also introduced certificates of the county clerk of every county wherein the record shows that either of the parties had resided after the marriage in 1907, including certificates from every county in Nevada, to the effect that no divorce or annulment action had been instituted therein by either Albert or Vada Coon. This was a sufficient showing. In re Estate of Smith, 33 Cal.2d 279, 281, 201 P.2d 539. Also in her behalf there were introduced photostat copies of old newspapers kept on file in the office of the Records of Randolph County, Indiana, which papers carried accounts of the issuance of a marriage license to Berness Nevada Kem and Albert G. Coon, and their marriage on August 15, 1907.

Evidence was adduced showing the marriage of Albert R. Coons to Loretta McMahon on July 3, 1918, in San Francisco. The application for the marriage license recites, under the heading "Single, widowed or divorced," "Single"; and under "Number of marriage", "1"; and as to "Residence", a hotel in San Francisco. This was the first time, as far as this record shows, that decedent used the name "Coons", though he did so thereafter. It is to be noted that this marriage was consummated just over three months after the letter dated March 24, 1918 was written to Berness by Coon in which he suggested that either she or he secure a divorce; and it was some nine years prior to the execution in 1927 of the deed by Coon and "Vada Coon, his wife." Obviously no divorce could have been secured by Coon in California within the three months period that elapsed between the letter and his marriage to Loretta, nor in Nevada, either, since in that year residence of six months in a specific county in Nevada was required before a divorce could be secured. And not until 1927 was this residence requirement changed, and then to three months, Stats.1927, c. 96, p. 126, which continued to be the requirement as to residence until 1931 when it was changed to six weeks. See Tesoriere v. Second Judicial District, 50 Nev. 302, 258 P. 291; Latterner v. Latterner, 51 Nev. 285, 274 P. 194. And as for an annulment, no grounds for such an action appear, nor could a decree of annulment have been secured without service of some kind upon Berness, which she testified was not affected.

The evidence shows that Loretta died January 7, 1947, and that on July 23, 1948, Coon married appellant in whose favor he left a will, appointing her as executrix thereof.

[2-4] Appellant's first contention on this appeal is that the evidence does not show that Berness and decedent were

legally married, because the certificate of the pastor who performed the ceremony indicates that it was performed prior to the application for a marriage license and the issuance of the same on August 14, 1907. But the difference in these dates created merely a conflict which the trial court has resolved in favor of the validity of the marriage, and which is amply sustained by the evidence. The presumption is that the public officials in Indiana performed their duty and that the license was issued prior to the marriage ceremony. Obviously the minister, through inadvertence, dated the certificate just one week before the date of the license. There is an abundance of evidence that such ceremony actually took place on August 15th instead of the 8th. And the evidence is also ample to overcome the presumption relied upon by appellant in her brief that Coon did not commit bigamy when he consummated his two subsequent marriages. See In re Estate of Smith, supra; In re Estate of Cooper, 97 Cal.App.2d 186, 191, 217 P.2d 499; Clendenning v. Parker, 69 Cal.App. 685, 687, 231 P. 765.

[5] Appellant next contends that Berness should have been denied a family allowance because she had not, during the years which had elapsed since her marriage to Coon applied for or claimed support by him and therefore had abandoned any rights which she may have had for support; that she is guilty of laches; and that she is estopped from asserting a right to family allowance, apparently because she had given no notice or warning to Loretta or Mathilda that she was the wife of decedent, and that they had thereby been "lulled into a sense of security." The evidence shows that she had no knowledge of these subsequent marriages, and could not be charged with any obligation to inform Loretta or Mathilda had she even known them or of them.

[6–10] There is, also, no evidence that Berness ever abandoned her husband. On the contrary, the record indicates that after she had returned to Indiana on a visit after having resided with him in California, he promised to but failed to send her money for her return, and discouraged her return by writing her of his lack of steady occupation or means. Separation alone does not constitute abandonment of a spouse or of a right to a family allowance, In re Estate of Cooper, supra; In re Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724; 11A Cal.Jur., sec. 376, p. 517; and by supporting herself and her child during the intervening years respondent did not abandon the right to support to which she was entitled, Civil Code, sec. 174, and which was a continuing right not lost by separation, Winslow v. Winslow, 82 Cal.App. 515, 518, 255 P. 880. As for laches, it does not appear that she was unduly slow in asserting her right to a family allowance. It was asserted some fourteen months after Coon's death. Also her delay would not affect her right to such an allowance. In re Estate of Fretwell, 154 Cal. 638, 98 P. 1058; In re Estate of Secord, 84 Cal.App.2d 783, 785, 192 P.2d 81.

[11] As for appellant's argument that the award of $100 per month for respondent is excessive in view of the value of the estate, and that the court abused its discretion in awarding that sum, it may be noted that appellant herself has on file a petition for a family allowance of $200 per month. That the estate is fairly substantial finds support in the evidence. Chas. Lindsay, decedent's nephew, testified that Coon purchased real property in Fair Oaks about May 1, 1947, paying $15,000 cash for same, and that he subsequently built a house on it for $4,000 cash. Also there is jewelry belonging to said estate of an admitted value of some $800, with other items of the value of $655 in dispute. Also it was shown that at the time of Coon's death he had $1,600 in a checking account, part of which is now in the estate account; also that there is some cash in the estate account from a savings account, the amount in total being over $1,700. There is also real estate in Carmichael title to which was taken in joint tenancy by Coon and Mathilda, and which has a possible value of $18,000. We are satisfied that the allowance was

reasonable and that there was no abuse of discretion on the part of the probate court, that the evidence supports the order of the court and that no reversible error appears.

The order appealed from is affirmed.

SCHOTTKY, J. pro tem. and PEEK, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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107 Cal.App 2d 361

SMITH et al. v. PHILIP MORRIS CO., Inc., Limited et al.

Civ. 18292.

District Court of Appeal, Second District, Division 3, California.

Nov. 7, 1951.

Action by Dorothy May Smith and Charles S. Smith against Philip Morris Co., Inc., Ltd., a corporation, Clemens F. Soeller, and others, for damages allegedly arising out of an automobile accident. The Superior Court of Los Angeles County, Robert H. Scott, J., rendered judgment for plaintiffs and entered orders denying motions for nonsuit and a new trial, and the main defendants appealed. The District Court of Appeal, Shinn, P. J., held that in action for injuries sustained when following truck collided with automobile which came to a stop without giving signal, evidence whether driver of automobile made a sudden stop and had opportunity to give signal, so as to be required under statute to give signal, was for court trying case without jury.

Judgment affirmed and attempted appeals from orders dismissed.

1. Automobiles 🔑172(6)

Under statute providing that no person shall stop or suddenly decrease speed of vehicle without first giving appropriate signal to following vehicle does not require motorist who does not stop or decrease his speed suddenly to give a signal to the following driver. Vehicle Code, § 544(c).

2. Automobiles 🔑245(44)

In action for injuries sustained when following truck collided with automobile which came to a stop without giving signal, evidence whether driver of automobile made a sudden stop and had opportunity to give signal, so as to be required under statute to give signal, was for court trying case without jury. Vehicle Code, § 544(c).

3. Damages 🔑185(1)

In action for damages sustained in automobile accident, medical testimony was sufficient to show that passenger's miscarriage resulted from the accident.

4. Damages 🔑131(5)

Five thousand dollars for injuries causing a miscarriage with its attending pain and suffering, mental and physical, was not excessive.

Elbert E. Hensley, Los Angeles, for appellants.

Dryer, Stephens & Lagerlof, Stanley C. Lagerlof and H. Melvin Swift, Jr., Los Angeles, for respondents.

SHINN, Presiding Justice.

In a trial without a jury plaintiffs, husband and wife, recovered judgment for $5,000 general damages and $550.10 special damages for injuries suffered by Mrs. Smith in an automobile accident. Philip Morris Co., Inc., Ltd., a corporation, and Clemens F. Soeller, respectively the owner and driver of a light panel truck which struck the car of plaintiffs, appeal.

The grounds of appeal are (1) insufficiency of the evidence, (2) the alleged miscarriage suffered by plaintiff wife was not proximately caused by the accident, (3) negligence of the husband, imputable to the wife, was the sole cause, or at least a proximate cause, of the accident, and (4) the damages were excessive.

According to plaintiffs' witnesses the Smith car, owned by Mrs. Smith and driven by her husband, was traveling north on Figueroa Street approaching 47th Street, in the lane next to the double lines in the center of the street of a six lane highway. Carolyn Allen, Mrs. Smith's daughter, was a passenger. The time was 7:45 a. m., traffic was heavy, there were five or six cars ahead of the Smith car, all traveling about 25 or 30 miles an hour. Mr. Smith observed the cars ahead of him slowing down and he slowed down also by taking his foot off the accelerator, but not by applying his brakes, until the car in front of him stopped, when he also stopped his car. He had been slowing down for a distance of 75 or 100 feet. After he came to a stop he saw in his rear view mirror defendants' truck approaching; he braced himself for an impact, set his brakes hard, his car was struck by defendants' truck and driven into the car which was about four feet ahead of him. His car was facing straight ahead, the left rear portion had been struck by the truck which stopped a little to the west, facing at an angle. Mr. Smith did not hold out his hand or give any signal of his intention to slow down or stop.

[1, 2] Appellants' argument of insufficiency of the evidence stresses the claimed contributory negligence of Mr. Smith. It proceeds from the fact that Mr. Smith did not give a signal preliminary to stopping his car. Section 544c of the Vehicle Code provides: "No persons shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal." Mr. Smith testified that he made a gradual stop "between 75 and 100 feet slowing to a stop," and that he did not stop suddenly. In this he was corroborated by the testimony of Carolyn Allen, who testified that immediately preceding the collision the Smith car was slowing down, not suddenly, but slowly. If Mr. Smith did not stop or decrease his speed suddenly he was not required by section 544c to give a signal to drivers who were following. Defendant Soeller testified that he was following about a car length behind and that Smith made a sudden stop. The conflict in the versions of the two drivers was one exclusively for the trial court. The court evidently believed Smith brought his car to a stop gradually. And again, if the court had believed that Smith suddenly stopped his car, there would be a question whether he had an opportunity to give a signal, and this would be a question of fact and not of law. If he made a gradual stop he had a right to believe that those who were following him would do likewise. The question of Mr. Smith's negligence was so clearly one of fact, and the finding in his favor so firmly supported by the evidence as to require no further discussion. If Mr. Smith was not guilty of negligence it was a reasonable conclusion that defendant Soeller was negligent in failing to observe the progress of the Smith car and to keep his own vehicle under control.

Two days after the accident, Mrs. Smith felt approaching illness and soon thereafter began to suffer from heavy dizziness, severe headaches and other bodily pains; she took to her bed, called a physician, was treated but did not get any better. Between two and three weeks after the accident she suffered a miscarriage. She testified that when the collision occurred the impact threw her back against the seat and forward violently. Her physician, who had attended her for several years and attended her after the accident, related her medical history, particularly described her condition and symptoms after the accident, testified that she suffered a miscarriage and expressed the opinion that the injuries described by her would cause a miscarriage. He also took into consideration his knowledge of her general condition.

[3] Another physician, testifying for the defendants, had examined Mrs. Smith and questioned her. He testified: "I do not feel that the amount of trauma that was introduced or described to me by the patient could have been the exciting cause as to this abortion." When questioned as to whether in his opinion it was a contributing factor, he answered: "It was, Yes." There was sufficient medical testimony to prove that the miscarriage resulted from the accident.

[4] An award of $5,000 for injuries causing a miscarriage, with its attendant pain and suffering, mental and physical, is not excessive. The point is not debatable. Easton v. United Trade School Con. Co.,

1916, 173 Cal. 199, 159 P. 597, L.R.A.1917A, 394; Flanton v. Greenfield, 1942, 56 Cal. App.2d 253, 132 P.2d 64.

The judgment is affirmed. The attempted appeals from orders denying motions for nonsuit and a new trial are dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

107 Cal.App.2d 495

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 18671.

District Court of Appeal, Second District, Division 2, California.

Nov. 14, 1951.

Hearing Denied Jan. 10, 1952.

Action by Koninklijke Luchtvaart Maatschappij, a foreign corporation, against Superior Court of the State of California in and for the County of Los Angeles, for a writ prohibiting the superior court from taking further proceedings in actions there pending against petitioner. The District Court of Appeal, Wilson, J., held that judicial trend is toward putting corporations upon same footing as natural persons in regard to jurisdiction of suits by or against them, and mere fact that cause of action arose, or transaction giving rise to it occurred beyond territorial limits of state of suit, does not prevent effective service of process upon actual agent of foreign corporation, but service upon agent of corporation present by doing business is sufficient to confer jurisdiction in transitory cause regardless of whether subject matter is related to any business conducted by corporation within state.

Petition denied, alternative writ discharged.

1. Corporations 🔑502, 665(1)

Judicial trend is toward putting corporations upon same footing as natural persons in regard to jurisdiction of suits by or against them, and mere fact that cause of action arose, or transaction giving rise to it occurred beyond territorial limits of state of suit, does not prevent effective service of process upon an actual agent of foreign corporation, but service upon actual agent of foreign corporation which is present by doing of business is sufficient to confer jurisdiction of transitory action regardless of whether subject matter of action is related to any business conducted by corporation in state.

2. Corporations 🔑665(1)

A foreign corporation which is within state not occasionally or casually, but with fair measure of permanence and continuity, whether its business be interstate or local, is present within state and subject to jurisdiction of courts.

3. Corporations 🔑642(4½)

Solicitation, by foreign corporation without more, may constitute doing business within state and service of process upon corporation's agent is warranted when solicitation is regular, continuous and substantial course of business.

4. Corporations 🔑665(1)

Corporation engaged solely in interstate or foreign commerce which had never qualified to do business within state, but which maintained offices and employees for purpose of administering contracts made in state, and which accepted delivery of airplanes within state, maintained bank account and owned automobiles therein, was present within state and amenable to suit in transitory action regardless of whether subject matter thereof was related to any business conducted by it in state, and service upon actual agent of such corporation was sufficient to confer jurisdiction.

Guthrie, Darling & Shattuck and Milo V. Olson, all of Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, John B. Anson, Deputy County Counsel, Los Angeles, for respondent.

Benjamin D. Mathon, Raoul D. Magana and Kaplan, Livingston, Goodwin & Berkowitz, Warren M. Goodwin, all of Los Angeles, for Real Parties in Interest.

WILSON, Justice.

This proceeding arises on the petition of Koninklijke Luchtvaart Maatschappij, hereinafter referred to as KLM, a foreign corporation, for a writ of prohibition to restrain the superior court from taking further proceedings in five actions for damages for wrongful death brought against petitioner, following the denial of its motion by special appearance to quash service of summons.

The decedent in each of the actions was either a passenger or a member of the crew of a private airplane owned by the Superior Oil Company which crashed in taking off from an airfield in London, England, causing the death of the person of whom the plaintiffs claim to be the surviving heirs. It is alleged in each complaint that KLM negligently performed its contract with the Superior Oil Company to maintain, repair and inspect the aircraft at London, England, the proximate result of which was that the airplane crashed.

The only question to be determined is whether jurisdiction may be maintained over a foreign corporation engaged solely in interstate or foreign commerce in the State of California when the subject matter of the action is wholly unrelated to any of the business conducted by such corporation in this State.

KLM is a corporation organized under the laws of the Kingdom of The Netherlands and it has never qualified to do business in California. It operates an intercontinental commercial airline with routes between the continent of Europe and New York and between the Netherlands West Indies and Miami, Florida. It purchases from California manufacturers airplanes in excess of $1,000,000 a year, the contracts for which are executed in The Netherlands. It has maintained a technical office in Los Angeles since 1938, where approximately 24 persons are employed for the purpose of administering its contracts for the purchase of airplanes and airplane parts. It maintains a checking account at a local bank from which it pays its employees. It owns four automobiles which are maintained for the use of technical workers in connection with their duties of visiting various aircraft plants. When flight personnel arrive from Amsterdam for the purpose of accepting delivery of an airplane manufactured by a local airplane factory the office makes arrangements for the accommodations of such personnel. The office is listed in the directory of the building and the rent is paid locally on a month-to-month basis. In addition to the technical office KLM maintains a ticket office in Los Angeles where it employs three or four employees whose duties are to sell tickets on the various intercontinental airlines of KLM. No intrastate tickets are sold and no intrastate passengers are carried. Service of process was made upon the corporation's technical representative for administration and finance, who is in charge of the technical office, and upon his assistant who is in charge of personnel in the same office.

In support of its contention that the subject matter of the action must have some connection with the business conducted by the foreign corporation in the state in order to confer jurisdiction of the defendant, petitioner cites Miner v. United Air Lines Transport Corp., D.C., 16 F.Supp. 930; Dunn v. Cedar Rapids Engineering Co., 9 Cir., 152 F.2d 733; Winfield v. United Fruit Co., 135 Cal.App.Supp. 791, 24 P.2d 247; and Fry v. Denver & R. G. R. Co., D.C., 226 F. 893.

In each of the first two cited cases service was made upon the foreign corporation's statutory agent appointed pursuant to section 405 of the Civil Code.[1] In the Miner case the court cited Missouri Pacific Railroad Co. v. Clarendon Co., 257 U.S. 533, 535, 42 S.Ct. 210, 66 L.Ed. 354; Morris & Co. v. Skandinavia Insurance Co., 279 U.S. 405, 49 S.Ct. 360, 73 L.Ed. 762; and Mitchell Furniture Co. v. Selden Breck Co., 257 U.S. 213, 42 S.Ct. 84, 85, 66 L.Ed. 201. In the latter case the court stated "The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the State. Of course when a foreign corporation appoints one as required by statute it takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court. * * * Unless the state law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere, at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence." Since the highest court in California had not construed the statute as authorizing service upon the statutory agent of a foreign corporation defendant where the suit is founded upon a cause of action in no way connected with business transacted within the state, the court held that the decisions rendered by the United States Supreme Court "require in this instance that the California law authorizing service of process upon a foreign corporation doing business within the state be construed so as to exclude from the operation thereof suits founded upon causes of action not arising in the business done by such foreign corporation in this state." [16 F.Supp. 931.] In the Dunn case the court cites and follows the holding in the Miner case. In the instant matter it is admitted that petitioner has never qualified to do business in California and service was not upon a statutory agent. Petitioner does not urge that service of process was not made upon a proper officer of the corporation.

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[1] This section was repealed by Stats.1947, ch. 1038, and is now contained in the Corporations Code, secs. 6201–6203, 6400, 6401, 6403.

In the Winfield case [135 Cal.App.Supp. 791, 24 P.2d 250] the plaintiff was a merchant seaman who was injured on defendant's ship while on the high seas. Defendant maintained freight terminals, a ticket office, paid members of the crew from a commercial bank account maintained in this state and performed various other acts in connection with its business in the State of California. Plaintiff's contract of employment was made here and the voyage would terminate in California. The court found that the tort arose in connection with defendant's domestic activities and that "as far as any state jurisdiction was concerned, California was the only state with respect to which both parties dealt."

Fry v. Denver & R. G. R. Co., decided in 1915, followed the holdings in Old Wayne Mutual Life Association v. McDonough, 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345, and Simon v. Southern Railway Co., 236 U.S. 115, 35 S.Ct. 255, 59 L.Ed. 492. The court regarded those cases as establishing the broad rule that "it is not enough * * * that the foreign corporation be doing business in the state where sued, but it must appear that the cause of action arose from the business there done", 226 F. at page 895, and that the rule was applicable whether service was on an actual agent or on a designated state official. The courts have repeatedly cited and distinguished the Simon and Old Wayne cases, frequently upon the ground that jurisdiction in each was obtained by service of process upon an agent designated by state statute and not upon an officer or bona fide agent of the defendant company. The decision in the Fry case was criticized in Gold Issue Min. & Mill. Co. v. Pennsylvania Fire Ins. Co., 1916, 267 Mo. 524, 184 S.W. 999, affirmed in 243 U.S. 93, 37 S.Ct. 344, 61 L.Ed. 610, the court stating at page 1019 of 184 S.W.: "The opinion seems to proceed upon the theory that a suit cannot be maintained in a state without the transaction out of which it arose occurred in the state where the suit was brought. The Old Wayne and Simon Cases are cited in support thereof, regardless of the statute under which process was had. If I correctly understand the opinion, then I have no hesitancy in saying that the court does not understand those cases. Instead of those cases supporting the views there expressed, they hold directly to the contrary."

[1] The judicial trend is toward putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them. Barrow S. S. Co. v. Kane, 170 U.S. 100, 106, 18 S.Ct. 526, 42 L.Ed. 964; Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738, 743. The weight of modern authority is to the effect that the mere fact that the cause of action arose, or the transaction giving rise

to it occurred beyond the territorial limits of the state of suit does not prevent effective service of process upon an actual agent of a foreign corporation. See annotation in 30 A.L.R., p. 255 and cases cited at page 258 et seq.

Lipe v. Carolina C. & O. R. Co., 123 S.C. 515, 116 S.E. 101, 30 A.L.R. 248, was an action for wrongful death of plaintiff's intestate, who was fatally injured in North Carolina while in the employ of defendant as a conductor. Defendant was a Virginia corporation and service of process was made upon its agent in South Carolina. Defendant contended that it was not authorized or licensed to do business in South Carolina and had not consented to subject itself to the jurisdiction of the state courts and since the cause of action owed its origin to business transacted in North Carolina and had no relation to any business transacted in South Carolina, the service was invalid. The court distinguished the Old Wayne and Simon cases, supra, and stated 123 S.C. 515, 116 S.E. at page 103: "But we are concerned here, not with the constructive presence of the defendant corporation, but with its actual presence in the state; not with the effect of service of process upon constructive agents, but upon actual agents within the jurisdiction of the court issuing the process. The circuit court has found, as matter of fact, that the defendant was actually doing business within the state, and that the parties upon whom process was served were actually its agents and employees in the carrying on of such business. In that state of the facts it is wholly immaterial whether the defendant had complied with statutory requirements as to designating an agent upon whom process could be served or had conformed to other statutory or constitutional provisions as to doing business in the state. If it was actually doing business within the state its presence within the jurisdiction was as real as that of a domestic corporation doing a similar business. * * * The fact that it is doing business appearing, jurisdiction of the person of a foreign corporation is acquired in the same manner as jurisdiction of the person of a domestic corporation * * *. The test * * * lies, as we think, not in the express or implied consent of a foreign corporation to a state's jurisdiction, but in whether it is actually present within the jurisdiction and subject thereto; that is, doing business therein through agents in fact, who may be reached by the personal service of process within the state."

In West Publishing Co. v. Superior Court of San Francisco, 20 Cal.2d 720, 726, 128 P.2d 777, 780, the court stated: "Whatever the form of a particular statute authorizing service of process upon the agent of a foreign corporation which has not complied with the qualifying laws of a state, it is a fundamental requisite under the federal Constitution that the corporation shall be 'doing business' in the jurisdiction where the service is made to sustain its validity." The court pointed out that formerly the theory upon which the courts of a state assumed jurisdiction of a foreign corporation carrying on business within its borders was that of implied consent to such jurisdiction but that the "consent" theory was abandoned in favor of the "corporate presence" theory, the latter doctrine being summarized by Mr. Justice Brandeis in Philadelphia & Reading R. Co. v. McKibbin, 243 U.S. 264, 265, 37 S.Ct. 280, 61 L.Ed. 710, as follows: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there."

[2-4] Petitioner's activities within this state are sufficient to render it amenable to suit. If a corporation is here "not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts". West Publishing Co. v. Superior Court of San Francisco, supra; [20 Cal.2d 720, 128 P.2d 780.] Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, 917. In the more recent decisions, solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business. Frene v. Louisville Cement

Co., 77 U.S.App.D.C. 129, 134 F.2d 511, 516, 146 A.L.R. 926; Perkins v. Louisville & N. R. Co., D.C., 94 F.Supp. 946, 949. Petitioner maintains two offices in this state, in one of which it has three or four employees engaged in the solicitation of business; the other office, which it has maintained continuously since 1938, employs approximately 24 persons for the purpose of administering its contracts for the purchase of airplanes and airplane parts, such contracts being in excess of $1,000,000 a year. It accepts delivery of the planes in this state. It maintains a bank account and owns four automobiles. Since this is a transitory action, the court has jurisdiction hereof and since petitioner is doing business in the state and amenable to process it is immaterial that the subject matter is wholly unrelated to any of the business conducted by the petitioner in this state.

Petition denied. Alternative writ discharged.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

107 Cal.App.2d 334

PEOPLE v. COHEN et al.

Cr. 4682.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1951.

Rehearing Denied Nov. 15, 1951.

Hearing Denied Dec. 6, 1951.

Bernard Cohen and others were convicted in the Superior Court, County of Los Angeles, Philip H. Richards, J., of feloniously engaging in bookmaking, and the named defendant appealed. The District Court of Appeals, Moore, P. J., held that the evidence was sufficient to sustain the conviction.

Judgment, and order denying motion for new trial, affirmed.

1. Gaming 🔑98(3)

Conviction for feloniously engaging in bookmaking was sustained by evidence. Pen.Code, § 337a, subd. 1.

2. Criminal Law 🔑1159(3)

Judgment of trial court will not be reversed by a contrast of evidence for and against conviction, as that court is the forum in which the fact issues are to be tried and so long as some substantial evidence to support implied finding exists, there can be no reversal.

3. Criminal Law 🔑1159(2)

Before a judgment of the trial court can be set aside on appeal, it must be made clearly to appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion in the court below.

4. Criminal Law 🔑1144(13)

On appeal from conviction for bookmaking, it would be presumed that evidence offered in behalf of defendant had been weighed along with that against him, or had been rejected by trial court as wholly worthless, and in either event, the determination of trial court would be final. Pen.Code, § 337a, subd. 1.

5. Criminal Law 🔑622(2)

Where defendant was jointly accused with others of feloniously engaging in bookmaking, he was not entitled to a separate trial, notwithstanding fact that the codefendants were accused of violating different subdivisions of the same statute. Pen.Code, § 337a, subds. 1, 2.

6. Criminal Law 🔑622(1)

A person jointly accused with others does not have right to a separate trial, but has merely right to ask for it, and court is vested with discretion to grant or deny such request.

7. Criminal Law 🔑622(1)

The request for a severance of trials made by person accused jointly with others may be properly denied where there is a common element of substantial importance in the commission of crimes, and a severance will not be granted merely because damaging testimony or confession of a codefendant might be admitted.

8. Criminal Law 🔑1137(5)

Where, in prosecution for bookmaking, after a motion by a codefendant to strike testimony as to a telephone conversation, appellant had asked that it be allowed to remain in record, denial of motion to strike such conversation would not be disturbed on appeal. Pen.Code, § 337a, subd. 1.

9. Gaming 🔑97(1)

In prosecution for bookmaking, after proof of defendant's participation in bookmaking and his presence near scene of activities of bookmakers, evidence of defendant's possession of a substantial amount of money was admissible. Pen.Code, § 337a, subd. 1.

10. Gaming 🔑96

In prosecution for bookmaking, after proof of defendant's participation in bookmaking and his presence near scene of activities of bookmakers, it could be fairly inferred that a substantial amount of money in defendant's possession was that which he and his agent had collected from bettors or which he had assembled to pay them. Pen. Code, § 337a, subd. 1.

11. Criminal Law 🔑412(1)

In bookmaking prosecution, evidence that amounts shown on betting markers found at bookmakers' rendezvous, near which defendant was arrested, were recapitulated on "owe sheets" and that some of entries on owe sheet had been made by defendant, established corpus delecti, and therefore evidence of defendant's extrajudicial statements were properly admitted. Pen.Code, § 337a, subd. 1.

12. Gaming 🔑97(2)

From the presence of scratch sheets, owe sheets and betting markers at any place, it is a fair inference that bookmaking has been carried on there, and therefore, in prosecution for bookmaking, evidence of betting markers and owe sheets taken from bookmaking premises was admissible where there was evidence to show defendant's connection with such paraphernalia. Pen. Code, § 337a, subd. 1.

13. Gaming 🔑97(2)

In prosecution for bookmaking, paper, in handwriting of defendant and containing names of bettors and amounts of debts or net winnings, was admissible in evidence to show that defendant was either the owner of the book or was in the owner's employ. Pen.Code, § 337a, subd. 1.

14. Gaming 🔑97(2)

In prosecution for bookmaking, defendant's check, payable to betting agent, was properly admitted in evidence as tending to connect defendant with agent, whose "owe sheet" had been written by defendant. Pen.Code, § 337a, subd. 1.

15. Gaming 🔑97(2)

In prosecution for bookmaking, list consisting of names of people to whom defendant owed money and people who owed him money, and figures indicating amounts owed, was admissible to establish defendant's participation in bookmaking, where there was evidence from which it could be inferred that list was part of bookmaker's bookkeeping system. Pen.Code, § 337a, subd. 1.

16. Criminal Law 🔑1169(1)

In prosecution for bookmaking, admission in evidence of real estate saleslady's card found in possession of defendant was harmless. Pen.Code, § 337a, subd. 1.

17. Gaming 🔑97(2)

In prosecution for bookmaking, there was no error in court's admission of copies of California Digest containing names and index numbers of all horses running at various tracks for particular date, notwithstanding fact that they were not connected with defendant by his possession of them, in view of fact that the index numbers for horses listed in Digest had been used on betting markers, which evidence showed defendant had participated in making. Pen.Code, § 337a, subd. 1.

18. Gaming 🔑97(2)

In prosecution for bookmaking, a copy of a newspaper of a certain date was admissible in evidence as basis for inference that data on betting markers were not meaningless but were part of a system used by bookmakers. Pen.Code, § 337a, subd. 1.

19. Criminal Law 🔑1169(1)

In prosecution for bookmaking, admission in evidence of leather case for carrying cards found in possession of defendant was harmless, even if handwriting on some of the cards was not that of defendant. Pen.Code, § 337a, subd. 1.

◆

Murray M. Chotiner, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of feloniously engaging in bookmaking upon the result of a trial and contest of speed and power of endurance between horses, a crime denounced by section 337a subdivision 1, of the Penal Code.[1] He demands a reversal upon the asserted insufficiency of the evidence and errors of law occurring at the trial. He was accused jointly with three others with whose fortunes the result of this appeal is not concerned.

Evidence Sufficient

About seven o'clock on the morning of October 12, 1950, police officers Duncan and Brooks stationed themselves in a position to observe the premises numbered 1003 on a popular boulevard of Los Angeles. Half an hour later defendant Rose unlocked the front door of those premises, entered and sat at a desk for 10 minutes. On emerging from 1003 he was placed under arrest. In his shirt pocket were found four slips of paper, received in evidence as exhibit 1. The officer took from Rose a key with which he entered the building. He found in the desk drawer one envelope marked "Cecil" containing eleven slips of paper (exhibit 2), three envelopes (exhibits 3a, 3b and 3c) each marked "King," each holding slips of paper. Leaving all envelopes where they were, Duncan removed Rose to officer Brooks on a neighboring street and returned to the boulevard where he observed defendants Frink and Richards enter 1003. He entered to find Richards holding the "King" envelopes. He searched Mrs. Frink from whom he took a key and a check (exhibit 4). Having removed Frink and Richards to Brooks and the police car, Duncan resumed his watch over the premises and was soon rewarded by the approach of a black sedan moving southward on the boulevard. As it passed the premises under surveilance it slowed down perceptibly as its two occupants both looked toward 1003. They proceeded two blocks, made a U-turn, again passed 1003, retarded their speed, continued looking at the premises, turned at the next corner and repeated the circuit. Officer Brooks rejoined his companion and the two officers together stopped the sedan in which appellant and a companion were passengers and placed them under arrest. Brooks promptly took a yellow sheet from appellant's hands and several pieces of paper from his pockets. The yellow sheet was subsequently marked exhibit 6.

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[1] Penal Code, section 337a. "Every person,

"1. Who engages in pool-selling or book-making, with or without writing, at any time or place; or

"2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or inclosure, of any kind, or any part thereof with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

"3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

"4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

"5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, inclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivisions 1, 2, 3 or 4, of this section; or

"6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or best, or between men, beasts, or mechanical apparatus,

"Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

"This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive."

One of the slips (exhibit 1) taken from Rose was an "owe sheet." It contained the names of betters and the amounts of the debt of each to agent Cecil and the sums owed by him to the listed betters. One of the betting markers showed the wagers recorded, the amounts won and lost, and that "Leroy" owed agent Cecil $12.75. The second betting marker showed bets that had been placed on certain horses designated by numbers. The amount wagered on that marker was $198 and the amount won by the listed horses was $401.15. The subtraction of the wagers from the winnings gave $203.15 owed to cash by Cecil. The third marker contained similar notations. All bore date October 11, 1950.[2] By "spot checking" the markers and the owe sheet with California Digest of October 11, 1950, it was revealed by aid of the testimony of the expert witness that the horses listed in the markers had run on that day. Each was stamp-dated "October 11"; some bore the number of the horses that ran on that day. Some showed the amount of each wager and the totals of the winnings and losses and the net sum due by the agent to his principal.

The top sheet in exhibit 3a was a recapitulation written on adding-machine tape whose figures corresponded with those on one card written with pencil by appellant. Also included in the same packet were many yellow sheets. Each was a professional type betting marker. Each bore the name of a better and the initial of the agent; each contained the number of the horse; the sum wagered to win or to place, the amount won and the loss to be collected from or to be paid to the agent whose initial is on the marker.

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[2] "*Bookmaking in Southern California.* "The following was established by expert testimony: Bookmaking paraphernalia consists of owe sheets, betting markers, top sheets, run-down sheets or California Digest, telephones, pencils, scratch paper and racks to hold the markers. The owner of a book is in contact with many agents of individual betters. The agent is the base of the pyramidal scheme. The agent's name is put at the top of the dated marker, the better's name on the left at the top. In the first column is a space for the index numbers of the horses which appear on the California Digest. The next column is for the possible parlay with the serial number of the horse. In the next three columns the bets are recorded. In the last two columns are entered the winnings or losses incurred by the bookmaker in favor of or against the better. These are recorded at the 'phone spot' or office by a clerk. At the end of the day these sheets are all taken from the phone spot to an accounting spot designated by the owner where the recapitulation of all the sheets is made. Each sheet is totaled by the owner of the book or his accountant on a 'top sheet.' At the bottom of each top sheet is the letter C meaning to collect from, or P meaning to pay so much to the better."

Another envelope taken from the desk contained many professional type markers dated "10–10" and a top sheet. Below the double line of the top sheet were memoranda in the hand writing of appellant. Another envelope contained betting markers dated October 9 showing the wagers, betters and agent and a top sheet with a list of bets, betters, losses and winnings of each and the initial of the agent. The writing on the latter sheet below the top double line was that of appellant. A spot comparison of the documents in exhibits 3a and 3b with the California Digest disclosed that the horses whose numbers were on the betting markers ran on October 10 and 11, 1950. And the sport section of a metropolitan daily published in Los Angeles established that the horses identified by the California Digest had paid through the parimutuel machines at the tracks indicated by the Digest the identical winnings shown on the markers of those dates.

The yellow sheet with pencil markings was taken by officer Brooks from appellant at the time of his arrest. It was accompanied by two tapes from an adding machine and two other yellow sheets and a white sheet with writing. At the trial they were marked exhibit 7. Also taken from appellant was an exemplar of his own handwriting, at the trial marked exhibit 10. The first white tape in exhibit 7 carried the name "Cecil, October 11" and printed numbers whose aggregate sum, $114.90, followed. Other printed numbers were followed by their aggregate amount, 22760, under which was written in pencil 11490, and beneath it appears in writing P11270, the difference of the two former numbers. The figures preceded by "C" on the bottoms of the betting markers in exhibits 1 and 2 are the identical figures found in the first group on tape number 1 in exhibit 7 while the figures preceded by "P" on the bottom of the betting markers in exhibits 1 and 2 are the same as the second group of figures added on tape number 1 of exhibit 7.

Tape number 2 in exhibit 7 contains printed figures with names written to the left of them. Each name or initial on tape number 2 and its figures are found on exhibit 6. The yellow sheet No. 1 in exhibit 7 has names with figures opposite. Some of the same names are found in exhibit 6 but the figures opposite them are different. Yellow sheet No. 2 in exhibit 7 was patterned after yellow sheet No. 1 although its names and figures were different from those in sheet No. 1. The testimony of the witness Sloan established that the pencil writing on the two yellow sheets is that of appellant.

Also in exhibit 7 is a large white sheet bearing a list of names with figures opposite them including the name "King." By a comparison of these names and figures it is found that they appear in the same relation to each other on exhibit 6 and the writing on the white sheet is that of appellant.

[1] It is thus established that appellant was engaged in bookmaking, denounced by section 337a, Penal Code. If he was not a bookmaker, why was the list of betters and winners written by his hand in the books taken from the possession of bookmakers? If he was not a bookmaker, why was he searching for someone before 10 o'clock in the morning at 1003, a rendezvous for bookmakers? Inside those premises two bookmakers were arrested. In their possession were betting markers and owe sheets and the writing of appellant. If he had been innocently requested by another person in Nevada to deliver the lists to 1003 as he testified, he would have stopped in front of that location and delivered the package instead of driving twice around the block watching eagerly for a friend to emerge from the building.

His possession of $4,900 at the time of his arrest is a potent link in the chain of circumstances to prove his vocation. A person of ordinarily honest habits in importing so large a sum from Nevada to California would have made use of bank exchange. While the denials and explanations given by appellant from the witness stand might have warranted acquittal of the charge, the trial judge did not choose to believe him but proceeded to rely upon the inferences reasonably drawn from the circumstances established and from his testimony that within the two preceding days he had by gambling in Nevada increased

$500 to about $4,000; his method of transporting such moneys to California; that he had written in Las Vegas the list of figures on exhibits 7, 3a, 3b and 3c at the dictation of his friend Fisher with whom he traveled to Los Angeles; his manner of approaching 1003; the possession by his codefendants of betting markers written by his hand; facts that the groups of papers, the betting markers and owe sheet taken from appellant corresponded with the names, initials and figures on the owe sheets and markers taken from the desk at 1003, and from the possession of the other defendants and that the owe sheets taken from Rose and the tapes taken from appellant both had the handwriting of appellant. These facts together with the conduct of appellant on the witness stand warrant the inference that on October 12, 1950 a book of bets was made or being made and that appellant was a participant in the inglorious enterprise.

The handwriting on the owe sheets attached to exhibits 3a, 3b, 3c, 7 and 10 is all or in part that of appellant. At the time of his arrest he had a tape with figures stamped on it. They are the same figures as those preceded by C or P on the markers taken from Rose. Some of these papers were written by appellant. The name Cecil and King and the letter K were found on some of the papers in appellant's possession.

[2-4] The judgment of the trial court will not be reversed by a contrast of the evidence for and against a conviction. That court is still the forum in which the facts of an issue are tried and so long as some substantial evidence to support the implied finding exists, there can be no reversal. Before a judgment of the trial court can be set aside on appeal "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion * * * in the court below." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. The evidence offered in behalf of appellant is presumed to have been weighed along with that against him or it was rejected by the court as wholly worthless. In either event, the determination of the trial court is final. People v. Von Benson, 38 Cal.App.2d 431, 434, 101 P.2d 527.

The trial court had the power and authority to determine that the narrative of appellant was fabricated and that the facts proved by the state warrant the finding of appellant's guilt. People v. Froehlich, 65 Cal.App. 502, 506, 224 P. 471; People v. Ross, 100 Cal.App.2d 116, 123, 223 P.2d 85.

Denying a Severance

[5-7] There was no error in denying appellant's motion for a separate trial. He contends that because his codefendants were accused of violating subdivision 2 of section 337a he would be handicapped by the necessity of being present during the entire trial. A person jointly accused with the others does not have a right to a separate trial. He has merely the right to ask for it. The court is vested with discretion to grant or deny the request. People v. Burton, 91 Cal.App.2d 695, 714, 205 P.2d 1065. A severance may be properly denied where there is a common element of substantial importance in the commission of the crimes. It will not be granted because damaging testimony or confession of a codefendant might be admitted. Moreover, had appellant been granted a separate trial, almost all of the evidence of the activities of the codefendants at premises 1003 would have been admissible since the documents in his handwriting were found there showing the same figures as those on the documents found on his person.

Telephone Conversation Harmless

[8] Officer Duncan testified to having answered the telephone at 1003 when the voice asked: "What in the hell is going on in there?" Officer, "Nothing. Do you have anything for me?" Voice, "No." After a motion by a codefendant to strike the conversation, appellant asked that it be allowed to remain in the record. Therefore, the testimony having been invited by appellant the denial of the motion will not be disturbed on appeal. People v. Redman, 39 Cal.App. 566, 569, 179 P. 725.

Appellant Had $4,900

[9, 10] There was no error in overruling a general objection to the testimony of the officer that he found on appellant at the time of arrest $4,900. The expert proof showed that the taking of wagers on horse races and the making of books involves the collection of moneys and that at the end of a day's work the moneys and the owe sheets are taken to "a drop spot" where an accounting is made and winnings are paid. No person astute enough to attempt to engage in a criminal enterprise would deposit his moneys in a bank and disburse it to the successful betters by check. Holding such funds in the form of legal tender expedites the consummation of the business at hand and renders difficult detection by the authorities. After proof of appellant's participation in the bookmaking and his presence near the scene of the activities of bookmakers it was not error to admit evidence of his possession of $4,900. It was a fair inference that the money he had was that which he and his agents had collected from betters or which he had assembled to pay them. People v. Carroll, 79 Cal. App.2d 146, 148, 179 P.2d 75.

Evidence of Conversations With Appellant

[11, 12] Appellant contends that the corpus delicti was not established and therefore evidence of his extra-judicial statements was improperly admitted. But such betting markers and owe sheets were found at 1003 as are commonly used by bookmakers, dated the 9th, 10th and 11th of October; they tended to prove that wagers had been laid on horse races and recorded on the markers by agents "Cecil" and "K" and that recapitulations of the amounts on the markers were shown on the "owe sheets" and some of the entries had been made by appellant; that other papers showed names and figures written on cards similar to the owe sheets found at 1003. Such evidence established the corpus delicti. From the presence of scratch sheets, owe sheets and betting markers at any place, it is a fair inference that bookmaking has been carried on there. While there was no evidence that scratch sheets were found at 1003, it was proved that certain numbers on the markers represented specific horses running in the races as designated in California Digest and that such publication is distributed only to bookmakers and others interested. There was no error in admitting the conversations with appellant.

Other Documents

Documents not written by appellant but found in the premises 1003 with papers in appellant's handwriting tend to prove that bookmaking was being carried on. From such proof the facts at issue herein were logically inferable. Code Civ.Proc. sec. 1870, subd. 15. The presence of any bookmaking paraphernalia or owe sheets or betting markers at 1003 tended to prove the crime. People v. Sam Lung, 70 Cal. 515, 517, 11 P. 673; People v. Hatfield, 77 Cal. App. 212, 217, 246 P. 95; People v. Grayson, 83 Cal.App.2d 516, 520, 189 P.2d 285. Especially is this true where there is evidence of the accused's connection with it. People v. Partee, 70 Cal.App.2d 736, 739, 161 P.2d 586.

Appellant deems himself to be aggrieved by the court's refusal to exclude exhibits 1, 2, 3, 4, 6, 7, 8, 11, 12, 13 and 14. His assignment of error with respect to those documents is without merit. Exhibits 1 and 2 taken from 1003 consisted of betting markers and owe sheets dated October 11 bearing the name Cecil, the letters C and P. At the time of appellant's arrest he carried on his person a paper tape dated October 11 bearing the name "Cecil" and the same figures found on exhibits 1 and 2. Also the figures preceded by "C" on his papers had been added with the same sum as shown on exhibits 1 and 2 and those sums had been subtracted from the total of "C" numbers leaving the same result "P–11270" on exhibit 7. From the fact that appellant carried in his pocket duplicates of betting markers and owe sheets taken from the codefendants it was a fair inference that appellant was connected with the parties who carried exhibits 1 and 2. Therefore, the admission of exhibits 1 and 2 was a correct ruling. People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17.

[13] Neither was there error in admitting the other exhibits specified for similar reasons. Inasmuch as the paper containing the names of the betters and the amounts of their debts or net winnings on the owe sheet were stapled to the markers in each of the envelopes in exhibit 3 and were in the handwriting of appellant, it was clearly to be inferred that appellant was either the owner of the book or was in the latter's employ, proving his guilt. People v. Greco, 47 Cal.App.2d 628, 633, 118 P.2d 886. The exclusion of exhibits 3a, 3b and 3c would have been error.

[14] There was no error in admitting exhibit 4, a check payable to "Mrs. King," taken from defendant Frink by the officers. On each envelope in exhibit 3 was written the name "King." The name so appearing on the packet containing markers and owe sheets indicates according to the expert that King was the agent and his initial "K" appears on the owe sheet with the names of his betters, and the amounts of their net winnings or net losses. The check was properly admitted as tending to connect the agent whose owe sheet had been written by appellant with the latter.

[15] Exhibit 6 was properly admitted. It contains a list of names and figures. "Cecil" is one of the names. The betting markers each contained the name "Cecil" which indicated that the bets were made with him. Appellant's only explanation of exhibits 6 and 7 was that they were his and the people listed "were people that he owed money and people that owed him money." He refused to tell who they were "because he was afraid it would be held against him." Considering his answer to the officer concerning the lists he carried and the fact that they included "Cecil, King" and "K" it is fairly inferable that his documents were a part of the bookkeeping system of the bookmaker for whom Cecil and King worked as agents. Not only did the papers appellant carried furnish proof of bookmaking and selling, but their contents and their being on his person, in his handwriting, establish his participation in the making and the sales and were therefore properly admitted.

[16] Exhibit 8 is a harmless, meaningless card of a real estate saleslady.

[17] Exhibits 11, 12 and 13 are copies of California Digest. While they were not connected with appellant by his possession of them, they were pertinent to the issues in that the paper is bookmaking paraphernalia. It is delivered surreptitiously to bookmakers only and "people interested in bookmaking." It is a "rundown sheet" carrying the names and "index numbers of all horses running at various tracks throughout the United States for the particular date." The paper is used for the purpose of comparing betting markers with the information carried by the Digest which shows the horses that actually ran on the date of the publication. The index numbers for horses listed in the Digest were used by the agents in making up betting markers. From the fact that appellant wrote on the owe sheets attached to the betting markers in evidence the court inferred his participation in the making of the markers.

[18] Exhibit 13 is a copy of the Los Angeles Times of October 12, 1950. It was used by the expert witness to compare the names of the horses run on October 11, 1950, appearing in the Times with those listed in the California Digest. Its columns indicate that horses named in the Digest with their index numbers on the markers in exhibit 2a had run at tracks and in the races specified by the Digest. Also, the Times published "pay-offs" which corresponded with the payoffs indicated on the markers. It was proper evidence upon which to base an inference that the data on the betting markers were not meaningless, but were part of a system used by bookmakers generally. People v. Vertlieb, 22 Cal.2d 193, 196, 137 P.2d 437; see People v. Newman, 24 Cal.2d 168, 174–176, 148 P.2d 4, 152 A.L.R. 365.

[19] Exhibit 14 is a leather case for carrying cards. If the handwriting on some of the cards is not that of appellant, then the exhibit was harmless.

The judgment and the order denying appellant's motion for a new trial are affirmed.

McCOMB, J., concurs.

LEVINE et al. v. E. A. JOHNSON & CO. et al.

Civ. 18543.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1951.

Rehearing Denied, Nov. 28, 1951.

Hearing Denied Jan. 3, 1952.

Sid B. Levine and others, co-partners, doing business under the firm name and style of Industrial Manufacturers, Ltd., a limited co-partnership, brought action against E. A. Johnson & Co., and others, to enjoin defendants from using or divulging any of plaintiffs' trade secrets, or other confidential information relative to plaintiffs' manufacturing process used in building cooler tanks. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered a judgment adverse to the plaintiffs, and they appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained finding that defendants did not wrongfully appropriate or use plaintiffs' trade secrets.

Judgment affirmed.

1. Injunction ⟹128

In action by manufacturers of cooling tanks to enjoin former employees and an associate of one such employee from using or divulging any of trade secrets of plaintiffs or other confidential information relative to manufacturing process used for the cooling towers, evidence sustained finding that defendants did not wrongfully appropriate any trade secrets belonging to plaintiffs.

2. Appeal and Error ⟹1011(1)

Findings of trial court on conflicting evidence could not be disturbed by the District Court of Appeal on appeal.

3. Injunction ⟹56

Equity will not by injunction deprive former employees of the right to pursue a gainful and lawful occupation in the field for which they are equipped.

4. Master and Servant ⟹60

A former employee may compete fairly with his former employer for the patronage of former customers.

5. Injunction ⟹56

Injunction is not available to an employer to restrain a former employee from using alleged trade secrets, if alleged trade secrets are not in truth secrets.

◆

Harry C. Cogen, Los Angeles, for appellants.

Walter H. Young, Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellants are members of a limited copartnership doing business under the names of Industrial Manufacturers, Ltd., and Santa Fe Tank and Tower Co., Division of Industrial Manufacturers, Ltd., and are engaged in the manufacture of wood tanks, cooling towers and other industrial wood specialties. The Santa Fe Tank and Tower Company, herein referred to as Santa Fe, is a sizable concern with a large plant in Vernon and branch offices in a number of key cities throughout the United States. Together with their corporate predecessors appellants have been engaged in such operations for approximately forty years. They instituted this unfair competition action to enjoin several former employees and an associate of one such employee from using or divulging any of plaintiffs' trade secrets or other confidential information relative to plaintiffs' manufacturing processes.

At the outset of the litigation a temporary restraining order and injunction was granted appellants, but following trial of the action judgment was rendered in favor of defendants and the preliminary injunction was dissolved. Plaintiffs appeal from this judgment contending that the evidence establishes that defendants, particularly Eskil Johnson and his son Edward, are conducting a competing enterprise, manufacturing tanks and cooling towers utilizing confidential trade secrets, knowledge of which was obtained by the senior Johnson during his previous employment with Santa Fe.

Eskil Johnson was in the employ of appellants and their predecessors for some thirty-five years. During the major portion of such period he held the position of field superintendent. In this capacity he supervised most of appellants' construction jobs and had complete access to their blueprints and other engineering data. Shortly after voluntarily terminating his employment with plaintiffs in October, 1943, Eskil began operating his own concern with his son Edward as a partner. This firm commenced production on a small scale, working primarily out of the Johnsons' residence.

By this action appellants demand an injunction against respondents' manufacturing and selling an atmospheric cooling tower very similar in design and construction to one produced for many years by Santa Fe and known as its "N" type tower. Such a tower was constructed in November, 1948, by the Johnsons for the County of Los Angeles. Respondents admitted that on some occasions they had used this same nomenclature in describing the tower they had erected for the county. In proof of their claim that respondents have wrongfully made use of appellants' trade secrets and information, appellants introduced evidence that respondents had in their possession a set of drawings of the "N" tower. Such drawings were removed from the Santa Fe plant by one Rikala, employed there as a layout[1] man from April, 1948, to April, 1949. He testified that such plans were carried home by oversight one evening when he left his work in a hurry; that he had never returned them because he considered they were worthless and obsolete, and because there were numerous other copies thereof scattered about the shack which he had used as an office. In February, 1949, Rikala contacted the Johnsons seeking employment with them and brought along the drawings as a sample of the type of layout work he could handle. These plans were left with the respondents though Rikala was not hired.

One Niemi, a former draftsman of appellants, also solicited the Johnsons for employment. He brought certain of appellants' prints to illustrate his work there. These drawings also were left with the Johnsons. Their dates show that they were used on constructions long since completed. They were produced in quantity and were given to the workmen whereby to cut timbers. They showed a print of a mechanical draft tower and exposed the method used by appellants to facilitate and expedite the cutting of lumber used in construction. They were so numerous that they frequently accumulated in such great volume that it became necessary to commit them to the flames. The drawings could be readily duplicated by taking the measurements of a cooling tower already completed.

Respondents' possession of this material became known to appellants when Rikala approached Coles, another Santa Fe draftsman, and suggested that he too seek employment with the Johnson firm. Coles relayed this information to his employers who agreed that Coles should pretend interest in any offer of the Johnsons whereby to attempt to ascertain their purposes. Within a few days the younger Johnson contacted Coles and the two discussed employment. At this meeting, after Coles had learned of the plans the Johnsons had received from Rikala and Niemi, and had made a list of all such plans, designs and drawings as were then in respondents' possession, he was offered employment by the Johnson firm.

Appellants argue that the above evidence of three former employees having engaged in acts of unfair competition, the soliciting of another to leave his employment and go to work for the competing concern, the removal of important blueprints containing confidential material of appellants' manufacturing processes and the production by respondents of a cooling tower identical in design and construction to appellants' "N" tower establishes without dispute a case requiring injunctive relief; that the only thing lacking is a confession by the defendants! But they overlook other evidence.

Although the inferences suggested by appellants might readily have been drawn from the above-recited evidence of appellants, yet this is not the only reasonable deduction to be fairly derived from the total testimony and documentary evidence introduced. A close inspection and analysis reveals substantial proof that respondents did not in their operations appropriate or use a knowledge of respondents' methods, formulas, charts or processes obtained during their association with appellants.

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[1] A layout man is one who orders from appellants' plant the necessary items to be used in the construction of a cooling tower as shown by the blueprints.

The evidence was sufficient to sustain the judgment. The drawings found in respondents' possession were valueless. The prints were of old plans on completed jobs. Some were merely drawings of a piece of 2 x 4 lumber with one end cut at an angle. Dimensions shown on the prints were not necessarily standard but varied with each new construction. In addition, the record discloses that such prints were usually burned as rubbish after the tower had been completed; that the prints were permitted to accumulate around appellants' shack; that workmen used them as napkins and that they were made up in hundreds of copies. Any drawing of appellants could have been duplicated by taking the dimensions of its completed tower. While appellants argue that such measurements would be without value because of shrinkage in the tower after its use, other testimony established that the shrinkage rates of lumber are readily available.

Both Johnsons testified that they never examined the drawings brought to them and did not utilize any of them. The "N" type tower was constructed by them prior to the time appellants' prints were delivered to Johnson by Rikala and Niemi. Most of the specifications for this tower were determined and supplied by the County. In any event, the prints were effectually ignored by all parties after Rikala showed them. At the time of trial respondents offered to return all of such drawings to Santa Fe.

Edward Johnson denied any attempts to procure information on Santa Fe's operations from Coles. In contradiction of Coles he testified that he did not solicit Coles to get blueprints or mailing lists from appellants. Moreover, Johnson readily informed Coles of the presence of the various drawings and informed the latter of the visits by Niemi and Rikala.

At the time of trial respondents had constructed only one "N" tower and about 6 spray-type towers. For the construction of the tower for Los Angeles County respondents were the only bidders. Performance ratings therefor were done by county engineers. Eskil Johnson testified that there were blueprints for this construction but that it was not necessary for him to refer to them. He had built so many towers over the years and his experience had been so diversified that he was able to cut and fit various tower parts without drawings.

The Johnsons further testified that information as to the "banding" (a process which appellants contend is their own trade secret) of their towers was obtained from various sources, namely, from Eskil's long experience in the business, from other tower manufacturers and from published engineering data. Although the confidential nature of such information has been stressed by appellants, there is no proof that respondents' information came from Santa Fe's records.

Appellants have also consumed many pages of argument in describing the construction and operation of cooling towers and in demonstrating that there are numerous trade secrets in their business, the result of long trial and error over the years. This is true to some extent. However, the general nature and construction of such towers is not exceedingly complex. In general they work on the principle of distributing heated water at the top of the tower by trays, troughs or sprays. As it falls through space it strikes various decks built in a gridiron fashion. Such falling breaks up the water into smaller droplets which are cooled by the air passing through the tower. Basically it is a theory of cooling by evaporation. Louvers are placed on the sides of the tower to prevent water from spilling out but at the same time to permit air to pass through. Expert testimony by appellants' witness, Mr. Lambeth, established that there is ample available information from which engineers can design, rate and size cooling towers. A consultant, without practical experience, it was testified, can rate the performance of such a tower which would be economically competitive.

[1, 2] It is thus demonstrated that there is conflicting evidence on the matter of the culpability of respondents' conduct in carrying on their competing enterprise. Therefore, on familiar principles of appellate procedure, the determination of the trial court cannot be disturbed. We heartily endorse the observations of the trial judge, to wit, that while appellants introduced substantial evidence to show that the business of constructing towers is extremely complicated and difficult and is dependent upon formulas developed by technically skilled engineers through long periods of trial and error, yet Eskil's knowledge was of a highly practical nature and by reason of his forty years of daily experience he was able to design his own plans which he utilized in constructing his towers. Eskil Johnson had played a large part in the development of the entire field. He could construct such towers "almost instinctively" without blueprints of any sort. He was not concerned, for example, with precisely exact angles for the setting of the tower louvers as were appellants. He cut and fit most of such parts in the field. From years of building and from repairing and moving such towers for many people, Mr. Johnson had a wealth of general experience which was the primary asset of the new concern and not the fruits of piracy of secret information belonging to appellants.

[3, 4] In the absence of uncontradicted evidence of respondents' having utilized appellants' confidential processes and trade secrets the demands of appellants were properly rejected. To grant the relief prayed for by appellants would virtually operate to deprive respondents of their right to pursue a gainful and lawful occupation in the field for which they are equipped by virtue of Eskil Johnson's almost half century of service in his field. This, equity cannot do. Every person is as free to pursue any calling he may choose as to possess any property he owns. He may compete fairly with his former employer for the patronage of former customers. Continental Car-Na-Var Corporation v. Moseley, 24 Cal.2d 104, 110, 148 P.2d 9.

[5] Injunction is not available to an employer to restrain a former employee if the alleged secrets are not in truth secrets. Scavengers' Protective Association v. Serv-U-Garbage Company, 218 Cal. 568, 24 P.2d 489. It follows, therefore, from a review of all the evidence that, whether the processes asserted by appellants to be their own or whether they were invented by respondent Eskil Johnson, respondents will not be disturbed in their use of them.

Judgment affirmed.

McCOMB, J., concurs.

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107 Cal.App.2d 537

POPE v. POPE.

Civ. 14723.

District Court of Appeal, First District,
Division 1, California.
Nov. 15, 1951.

W. K. Pope, also known as W. Kenneth Pope, brought an action against Grace Shields Pope for divorce and defendant filed a cross-complaint and the defendant wife was granted a divorce and community property was apportioned and defendant was awarded alimony and plaintiff appealed from portion of interlocutory and final judgments apportioning community property and awarding defendant alimony. The Superior Court, City and County of San Francisco, Edward P. Murphy, J., allowed defendant $15,000 for counsel fees and appeal and plaintiff appealed. In accord with an order of the superior court it was ordered herein on November 19, 1951, that Bank of California N. A. and Mattie Harvey Pope, as executors of the estate of W. Kenneth Pope, deceased, be substituted as parties plaintiff and appellant in place of W. Kenneth Pope, deceased. The District Court of Appeal, Peters, P. J., held that allowance of counsel fees was not excessive under the evidence.

Order affirmed.

1. Divorce 🔑182

A necessitous wife, in a divorce action, is entitled to an award for counsel fees to defend an appeal taken by her husband.

2. Divorce 🔑182

Where wife is unable to pay for counsel fees to defend appeal taken by her husband from judgment and divorce action, amount of counsel fees to be awarded to wife in defending appeal rests in sound discretion of trial court and such allowance will be set aside only for abuse of discretion.

3. Divorce 🔑182

In determining amount of reasonable counsel fees which should be allowed the necessitous wife in defending husband's appeal from judgment in divorce action, trial court may consider nature of litigation, its complexity, nature and extent of contest, amount involved, financial circumstances of parties, skill required, professional standing and reputation of husband's attorneys and of attorneys selected by wife, and trial court is not required to disregard entirely financial status of husband and his ability to pay.

4. Divorce 🔑182

Allowance of reasonable counsel fees made to necessitous wife to defend husband's appeal from judgment and divorce action must give her power to hire counsel of standing equal to standing husband's attorney in order to equalize contest and to protect her rights.

5. Divorce 🔑182

$15,000 counsel fees awarded to necessitous wife in defending husband's appeal from portions of interlocutory and final judgment apportioning community property and awarding wife $100,000 as her share of community property and $2,000 a month alimony terminable on her death or remarriage was not excessive under evidence.

J. W. Lenahan, Burlingame, for appellant.

John D. Costello, M. Mitchell Bourquin, San Francisco, for respondent.

PETERS, Presiding Justice.

In 1947, after thirteen years of marriage, appellant filed suit for divorce. His wife, the respondent, cross-complained, first for separate maintenance, and later for a divorce. After a long and spirited trial, the wife was granted a divorce on the grounds of the cruelty and the habitual intemperance of her husband. In addition, the trial court awarded the wife $3,072.12 costs, $2,000 a month alimony terminable only on her death or remarriage, and $100,000 as her share of the community property. The husband thereupon appealed from those portions of the interlocutory and final judgments apportioning the community property, and awarding her alimony. Thereupon, the wife's present counsel were brought into the case, and moved for counsel fees in the amount of $20,000 to enable the wife adequately to defend the appeal. The trial court, after a hearing, allowed the wife $15,000 for counsel fees on the appeal. The husband appeals, contending that the amount awarded was excessive.

The defense of the appeal was successfully handled by the attorneys here involved, and resulted in an affirmance of the judgment, except as to a minor portion thereof relating to certain personal possessions. Pope v. Pope, 102 Cal.App. 2d 353, 227 P.2d 867.

Appellant husband seeks to minimize the complexity of his appeal in the divorce action, urging that, as far as respondent was concerned, only simple matters were involved that required no particular legal ability or skill to handle. Although he made no such admission in his briefs or argument on that appeal, but to the contrary strenuously urged the merits of his then contentions, the husband would now have us believe that his then appeal was practically frivolous.

We are well aware of the difficult problems facing the attorneys for the wife on that appeal. The trial court simply had found, without allocation, that the community property exceeded $150,000, and awarded a flat sum of $100,000 to the wife. It failed to designate which items of the

$1,700,000 of property in the possession of the husband made up the $150,000 of community property. One of the major contentions on that appeal was that these findings were unsupported by the evidence, and that whatever community property existed had been entirely consumed by the parties' living expenses. These parties had been married thirteen years. The husband's business transactions during this period had been extremely complicated. He had been evasive at the trial and his records, some of which he had destroyed, were incomplete. He had a present estate of $1,700,000. The wife's attorneys were faced with the difficult problem of justifying the finding segregating $150,000 of the property as being existing community property. To do this required a detailed knowledge of the law relating to community property, a precise knowledge of what appeared in the 750 page transcript, a practical and working knowledge of accounting, and a knowledge of corporate finance. The complexity of that appeal is demonstrated by the opinion of this court affirming the judgment. The opinion is twenty-two pages long, twenty pages exclusive of headnotes. Difficult legal and factual problems are there discussed. That appeal was not only not a simple one, but was complex and difficult. It was handled by the attorneys for the wife with painstaking care, and with ability and skill.

[1, 2] On the present appeal it is conceded that a necessitous wife, in a divorce action, is entitled to an award for counsel fees to defend an appeal taken by her husband. The facts that the wife was unable to pay for such services and that the husband had the financial ability to pay are also conceded. It is agreed that, under the law, the allowance of such fees and their amount rest in the sound discretion of the trial court, and that an allowance will be set aside only for an abuse of discretion. These concessions are in accordance with the law. Fallon v. Fallon, 86 Cal.App.2d 872, 195 P.2d 878; Busch v. Busch, 99 Cal.App. 198, 278 P. 456; Crocker v. Crocker First Nat. Bank, 60 Cal.App.2d 725, 141 P.2d 482; Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670. Appellant's contentions are that the award of $15,000 was grossly excessive, constituted an arbitrary abuse of discretion, and was predicated primarily upon his ability to pay. These contentions are without merit.

[3] In determining the amount of a reasonable fee the trial court is permitted to consider various factors: The nature of the litigation, its complexity, the nature and extent of the contest, the amount involved, the financial circumstances of the parties, the skill required, the professional standing and reputation of the husband's attorneys and of the attorneys selected by the wife, are some of the relevant matters to be considered. Warner v. Warner, 34 Cal.2d 838, 215 P.2d 20; Berry v. Chaplin, 74 Cal.App.2d 669, 169 P.2d 453; Deberry v. Cavalier, 113 Cal.App. 30, 297 P. 611; Tasker v. Cochrane, 94 Cal. App. 361, 271 P. 503.

[4] The trial court is not required to disregard entirely the financial status of the husband and his ability to pay in fixing the amount of fees. Heck v. Heck, 63 Cal. App.2d 470, 147 P.2d 110; Whiting v. Whiting, 62 Cal.App. 157, 216 P. 92; see annotation 35 A.L.R. 1099. Where the husband possesses great wealth he has the ability to secure the services of able counsel. The allowance to the wife must give her the power to hire counsel of equal standing in order to equalize the contest, and to protect her rights.

The nature of the litigation and its complexity have already been discussed. Something should be said about the amount involved. The divorce judgment awarded the wife $100,000 cash as her share of the community. In addition, it awarded to her $2,000 a month alimony, payable until her death or remarriage. Considering her then age and life expectancy, this alimony amounted prospectively to about $600,000 payable to her over a twenty-five year period. Thus, her attorneys were called upon to defend a judgment worth about $700,000 to the wife.

The husband cites some cases where the orders fixing attorneys' fees in divorce actions in amounts much less than the $15,000 here involved were either reduced or reversed. These cases are of little assistance, except in a most general way, in determining the propriety of the amount of the allowance in the present case. Obviously, the factors involved differ in each case. Certainly, neither the trial nor appellate courts should attempt to fix a flat fee identical in all cases. Such an approach would be unrealistic, unsound, and unjustified.

[5] When all of the relevant factors are considered, and keeping in mind that an abuse of discretion is never presumed but must be proved by the party asserting it, Berry v. Chaplin, 74 Cal.App.2d 669, 169 P.2d 453, it is quite apparent that appellant has fallen far short of showing an abuse of discretion in the present case.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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107 Cal.App.2d 328

PINTEL v. K. N. H. MOHAMED & BROS. et al.

Civ. 18609.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1951.

Hearing Denied Jan. 3, 1952.

Action by Joshua Pintel, doing business as California Trading Company, against K. N. H. Mohamed & Brothers, and others, for breach of contract. Ancillary to such action, plaintiff caused the attachment of a certain check and while it was in sheriff's custody, Mercantile Bank of India, filed a third party claim to the check. Following disposition of the claim and delivery action, the Superior Court, Los Angeles County, J. T. B. Warne, J., held that the Bank of India was entitled to the check and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that pursuant to the law of Ceylon the India Bank acquired title to check upon payment of the draft and no attachable interest remained in Mohamed at time of attachment.

Affirmed.

1. Attachment 🔑178

An attaching creditor who seeks to subject his debtor's property to the payment of a debt obtains a lien only upon the title or interest actually owned by the debtor at the time of the levy.

2. Bills and Notes 🔑180, 204

Validity and effect of a transfer of a negotiable instrument is determined by the law of the place where the instrument is at the time of its transfer.

3. Attachment 🔑1

Bills and Notes 🔑117

Where partnership, domiciled in Ceylon, drew money draft on California bank payable to a bank in India and the India bank forwarded it to California for collection where a creditor of partnership attached cashier's check issued on draft by drawee bank, law of Ceylon was determinative of whether attaching creditor or bank in India was entitled to check and pursuant to that law, the India bank acquired title to check upon payment of draft and no attachable interest remained in drawer.

4. Trial 🔑136(4)

Where foreign law is determinative of issues before the court, question of foreign law is one of fact.

5. Banks and Banking 🔑127

Where partnership deposited draft with bank and was credited with full amount called for by the paper, partnership's subsequent withdrawal from bank of sums in excess of amount of draft vested bank with complete ownership of the paper.

6. Banks and Banking 🔑127

When an endorsed check is deposited and bank in ordinary course of business gives the depositor credit therefor, title to check immediately passes to bank.

7. Bills and Notes 🔑453

Where bank acquires title to money draft upon payment of full amount of draft to drawer, question as to bank's status as holder in due course arises only in event that drawee bank in an action by holder seeks to raise defenses available against the drawer.

8. Attachment ⚿63

Where partnership, domiciled in Ceylon, drew a money draft on California bank payable to a bank in India and the India bank forwarded it to California for collection, question as to India bank's status as holder in due course was immaterial in determining whether cashier's check issued on draft by drawee bank was subject to attachment by creditor of partnership.

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Samuel Reisman, Los Angeles, for appellant.

O'Melveny & Myers, Ernest M. Clark, Jr., and James W. Beebe, all of Los Angeles, for third party claimant, and respondent.

MOORE, Presiding Justice.

Appellant Pintel doing business as California Trading Company sued defendants, a partnership with domicile in Ceylon herein referred to as Mohamed, for breach of contract. Ancillary to his action he caused the attachment of a certain check in the possession of the California Bank at Los Angeles. While it was in the custody of the sheriff, respondent, Mercantile Bank of India, filed a third party claim, Code Civ. Proc. sec. 689, to the check and the proceeds to be derived therefrom. Following a trial of the claim and delivery action, the court below determined respondent to be owner of the check and entitled to its possession. Plaintiff appeals from the judgment entered.

The controversy had its genesis in an irrevocable letter of credit issued April 23, 1949, by the Citizens National Trust & Savings Bank of Los Angeles. It was addressed to Mohamed in the distant island of Ceylon. Under its terms, Citizens Bank made available to the drafts of Mohamed the sum of $23,400 on condition that the drafts be presented with certain documents including three sets of a bill of lading made out to the order of Citizens Bank. By the terms of the letter of credit, Citizens Bank agreed with the drawers, endorsers and bona fide holders of any drafts drawn thereunder that such instruments would be honored on presentation to the bank on or before July 31, 1949.

On May 27, 1949, Mohamed drew their draft for $22,848 on Citizens Bank payable to the order of the Mercantile Bank of India, which draft, together with the documents designated by the letter of credit, was delivered to Mercantile Bank on June 8, 1949. At the time of presenting the draft to Mercantile Bank, there was existing an agreement between Mohamed and the Mercantile Bank whereby the former agreed to hold Mercantile Bank harmless and free from any loss or damage which the bank might sustain in consequence of negotiating bills drawn by Mohamed under letters of credit.

Upon receiving the draft, respondent bank credited the Mohamed account with its amount. On June 11 and 20 Mohamed withdrew a total of 82,000 rupees—a sum in excess of the draft. At that time, respondent had no knowledge of plaintiff's claim to the draft or the moneys payable thereon, and forwarded the Mohamed draft to the Bank of Montreal in San Francisco for collection. The latter forwarded it to the California Bank in Los Angeles—which institution presented it to the Citizens Bank for payment. It was promptly paid by a cashier's check. Immediately after the California Bank received this check appellant caused it to be attached. Code Civ.Proc. sec. 537, which was followed by the third party claim of Mercantile Bank and the judgment in its favor.

Reversal is urged upon the grounds that (1) Mercantile Bank could not have obtained title to the draft in question since the letter of credit required that the bills of lading be made payable to Citizens Bank; (2) the draft could not be separated from the terms of such letter of credit and bill of lading, and (3) therefore title to the draft could be acquired only by negotiation or transfer from Citizens Bank. Appellant thus argues that respondent could not be a holder of the draft in due course since it had knowledge of the entire transaction.

[1] The determinative issue presented is whether, at the time of the attachment, Mo-

hamed had any interest whatsoever in the check issued by Citizens Bank pursuant to the Mohamed draft, or did Mercantile Bank own such check. If the latter did, to the extent of its interest it must necessarily prevail over a subsequent attaching creditor of its transferor. This follows from the universal rule that an attaching creditor who seeks to subject his debtor's property to the payment of the debt obtains a lien only upon the title or interest actually owned by the debtor at the time of the levy. Kinnison v. Guaranty Liquidating Corp., 18 Cal.2d 256, 259, 115 P.2d 450.

[2–4] With the issue thus resolved, the law of Ceylon is determinative of whether title had already passed to Mercantile Bank or whether any interest still remained in Mohamed. This follows from the doctrine that the validity and effect of a transfer of a negotiable instrument is determined by the law of the place where the instrument is at the time of its transfer. Rest. Conflict of Laws, sec. 349. Expert testimony established that under Ceylon's law respondent bank acquired title to the draft and thus to the proceeds derived therefrom. The question of foreign law is one of fact, Wickersham v. Johnston, 104 Cal. 407, 411, 38 P. 89, and the trial court having accepted the witness' opinion, it follows that no attachable interest remained in Mohamed and appellant could obtain no lien upon the check. It could not be otherwise under the laws prevailing in the United States or under any rational hypothesis.

[5, 6] When Mohamed deposited their draft with Mercantile Bank, they were paid the full amount called for by the paper. They withdrew sums in excess of the amount of the draft. Such transaction vested Mercantile Bank with complete ownership of the paper. Burton v. U. S., 196 U. S. 283, 300, 25 S.Ct. 243, 49 L.Ed. 482; Cragie v. Hadley, 99 N.Y. 131, 1 N.E. 537; 7 Am.Jur. p. 326, sec. 455. In California when an endorsed check is deposited and the bank in the ordinary course of business gives the depositor credit therefor, title to the check immediately passes to the bank. Newmark Grain Company v. Merchants' National Bank of Los Angeles, 166 Cal. 203, 208, 135 P. 958; Plumas County Bank v. Bank of Rideout, Smith & Co., 165 Cal. 126, 136, 131 P. 360, 47 L.R.A.,N.S., 552; Powell v. Bank of America, 53 Cal.App.2d 458, 465, 128 P.2d 123.

[7, 8] Appellant's argument that Mercantile Bank cannot be a holder in due course is beside the point. Upon payment to Mohamed of the full amount of the draft by Mercantile Bank, the latter became sole owner of such instrument. The question as to its status as holder in due course is only of concern when and if the drawee bank in an action by a holder were seeking to raise defenses available against the drawer.

In support of his demand for a reversal, appellant cites Lamborn v. Lake Shore Banking & Trust Co., 196 App.Div. 504, 188 N.Y.S. 162. That action was brought upon a letter of credit against the bank of its issuance. It was held that the drawer of a draft pursuant to the letter of credit could not recover from the bank because the drawer had not strictly observed the terms and conditions under which the credit was made available. Such holding, though correct, is not applicable to the case at bar since Citizens Bank herein paid Mohamed's draft in compliance with its letter of credit. Neither does Eriksson v. Refiners Export Company, 264 App.Div. 525, 35 N.Y.S.2d 829, alter the situation. The letter of credit therein involved was special in form, providing that the credit issued thereunder could not be transferred except with the express authority of the principal. No such limitation appears in the Citizen Bank's letter of credit. On the contrary, it appears to have been contemplated that title to the draft could be passed from Mohamed to others since the letter of credit agreed with drawers, endorsers and bona fide holders of drafts drawn pursuant to the bank's authority to honor such drafts on due presentment.

Judgment affirmed.

McCOMB, J., concurs.

107 Cal.App.2d 558

PEOPLE v. BOWEN.

Cr. 836.

District Court of Appeal,
Fourth District, California.
Nov. 15, 1951.

Charles H. Bowen was convicted in the Superior Court, Fresno County, George M. DeWolf, J., on a charge of making, drawing, uttering and delivering a check with intent to defraud without sufficient funds in bank, and he appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to sustain conviction, that there was no error in permitting prosecution to reopen its case and that alleged misconduct of district attorney was not prejudicial.

Judgment affirmed.

1. False Pretenses ⚷49(1)

Evidence that defendant's wife presented in payment for groceries a check signed by defendant and drawn on bank in which defendant had never had an account or credit arrangement sustained conviction for delivering check with intent to defraud with knowledge of insufficiency of funds to meet check.

2. Criminal Law ⚷686(1)

In prosecution for drawing check without sufficient funds in bank court acted properly within its discretion in permitting prosecution to reopen its case to present proof, which had been overlooked, that defendant had written the check.

3. Criminal Law ⚷706

In prosecution for writing check without sufficient funds, alleged display by district attorney in presence of jury of other checks did not constitute misconduct where it appeared that jury was excused during discussion with respect to admissibility of another check which was later admitted.

4. Criminal Law ⚷730(10)

Statement by district attorney in argument that defendant did not take stand to give his story because he could have been impeached was not prejudicial error where court promptly reprimanded district attorney and instructed jury to disregard statement.

◆

A. D. Christensen, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with making, drawing, uttering and delivering a check with intent to defraud, knowing that he did not have sufficient funds or credit with the bank to meet the check. He was also charged with four priors, the first for forgery in 1941, and the other three on bad check charges committed in 1944, 1946 and 1947, respectively. He pleaded not guilty, but admitted the four prior convictions. A jury found him guilty, and he appeals from the judgment.

On December 19, 1950, the appellant's wife purchased groceries at a Safeway store in Fresno, paying for them with a check drawn on a branch of the Security First National Bank which was located across the street from the store. The check was dated December 19, 1950, was payable to her, and was signed by the appellant. The store manager deposited the check in the bank the next day and the bank returned it on the morning of December 21, for the reason that there was no such account in the bank. When interviewed on that day by the store manager the appellant promised to get and pay the money that day or the next. He failed to do so and the manager swore out a complaint on December 27.

[1] The appellant first contends that the evidence is insufficient to support the judgment. It is argued that the evidence fails to show that he wrote this check; that it came into the hands of this store; that he intended to defraud the store or the bank; or that he did not have an arrangement for credit with this bank on December 20, the day the check was presented to the bank.

A deputy sheriff testified that the appellant told him that he had written this check and appellant's counsel, in his argument to the jury, stated that there was no question that the appellant had written it, arguing that a wrong blank must have been used by mistake, and that there had been no intent to defraud. The manager of the store identified the check and testified that on December 19, the appellant's wife asked him to o.k. this check as she wanted to buy groceries; that the check was drawn on the bank across the street and he o.k'd it by initialing it; that he deposited the check in the bank on December 20, and that the bank returned it to him the next day with an attached notation to the effect that there was "no such account." The manager of this bank testified that Charles H. Bowen had no checking account on that bank on December 19, 1950, or before or after that date; that he had made no credit arrangement with that bank on December 19, 1950, or previous to that time; and that he had never, at any time, had an account or any credit arrangement at that bank. With respect to the intent to defraud, the evidence clearly discloses that the check was drawn by the appellant with full knowledge that he had no account in or credit arrangement with this bank; that he delivered it to his wife to purchase groceries; and that the appellant failed to keep his promise to make the check good. There was also evidence, introduced on the question of intent, that on December 21, 1950, the appellant passed another check drawn on the same bank at a cleaning establishment, which check was returned for the same reason. The appellant did not take the stand and offered no evidence in his own behalf. While an attempt was made, on cross-examination, to create the impression that a check on the wrong bank had been used by mistake, there was no sufficient evidence to support such a theory, and for obvious reasons it was not accepted by the jury. The verdict and judgment are amply supported by the evidence.

[2] It is next contended that the court erred in permitting the prosecution to reopen its case for the purpose of taking further testimony. After the prosecution rested, the appellant moved for an advisory verdict on several grounds. In considering this motion it was discovered that proof of the fact that the appellant had written this check had been overlooked. The court granted the prosecution's motion to reopen its case and a witness was then called, and the error was remedied. The matter was well within the discretion of the trial court, People v. Berryman, 6 Cal. 2d 331, 57 P.2d 136, and no new issue was brought into the case which could have surprised or prejudiced the appellant. No good reason appears why a reversal should be had for the purpose of correcting an error which could be, and was, corrected at the trial.

[3] The appellant makes two claims of prejudicial misconduct on the part of the district attorney, one during the presentation of evidence and one during his argument to the jury. It is first contended that he wrongfully inflamed the minds of the jury by trying to get certain checks in evidence, knowing that he was unable to prove that they had been returned because of insufficient funds. While the appellant admits that the record does not disclose the acts of which he complains, it is argued that the district attorney displayed certain checks in the presence of the jury; that it was apparent to appellant's counsel that the prosecution was getting ready to introduce checks which were inadmissible; and that counsel was thus required to ask to have the jury excused. The first thing disclosed by the record in this connection is that appellant's counsel asked to have the jury excused, stating that "he has presented to me a document which he says he intends to offer, which I feel, on a legal point, is not admissible." The jury was excused and a discussion took place between court and counsel with respect to "another check" which the prosecution desired to introduce for the purpose of showing intent. This check was later admitted in evidence for that purpose, being the one given to a cleaning establishment above referred to. Neither misconduct nor prejudice appears.

[4] In the other instance the district attorney referred in his argument to the fact that the appellant had not taken the stand and said: "Bowen did not give you his story. He did not because I could have impeached him, or at least I could have asked him—." At that point appellant's counsel objected. The court promptly reprimanded the district attorney and instructed the jury to disregard the statement. While the statement should not have been made its effect was nullified by the prompt action of the court, and it cannot be held that sufficient prejudice appears to require a reversal.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

107 Cal.App.2d 304

MILLER v. BROWN.

Civ. 18319.

District Court of Appeal, Second District, Division 1, California.

Nov. 7, 1951.

Action by Albert E. Miller against Henry M. Brown on two counts, one for alleged breach of an oral contract and the second for recovery for work and labor. From a judgment of the Superior Court of Santa Barbara County, Atwell Westwick, J., entered on an order sustaining a demurrer to plaintiff's amended complaint, plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem., held that both counts were demurrable as being uncertain and ambiguous and plaintiff's failure to amend authorized the judgment.

Affirmed.

1. Pleading 🔑207

In action on contract, a count alleging that by terms of contract plaintiff was to furnish his work and labor in raising gladiola plants on defendant's land and defendant was to furnish his work and labor in raising of plants and was to furnish any necessary hired help needed, and other details of contract, though not subject to demurrer for failure to state a cause of action, was so contradictory as to be subject to special demurrer for uncertainty and ambiguity.

2. Limitation of Actions 🔑180(3)

Work and Labor 🔑22

A common count for work and labor performed need not set forth date when defendant became indebted but if it does set forth a date which is beyond the applicable statute of limitations it is demurrable.

3. Work and Labor 🔑22

A common count for work and labor, set forth in the accepted form, is not subject to general demurrer as not stating a cause of action.

4. Pleading 🔑207

A common count for work and labor set forth in the accepted form is not subject to a special demurrer because the cause of action is not stated with sufficient certainty.

5. Limitation of Actions 🔑180(3)

A common count for work and labor set forth in the accepted form is not subject to special demurrer because of statute of limitations, unless it affirmatively appears on face of complaint that the cause is barred.

6. Limitation of Actions 🔑180(3)

Where common count for work and labor performed stated that "within two years last past, to-wit, from June, 1946, to June, 1948, defendant became indebted unto plaintiff", special demurrer for uncertainty and ambiguity would lie to ferret out the true date of the indebtedness.

7. Pleading 🔑225(1)

In action on contract and on common count for work and labor, where plaintiff, after special demurrer to his complaint was sustained on ground of ambiguity and uncertainty, failed to ask permission to interlineate proper date of indebtedness or to file an amended complaint, judgment on the demurrer was proper.

◆

James B. Parish, Santa Barbara, for appellant.

Schramm, Raddue & Parma, Santa Barbara, for respondent.

HANSON, Justice pro tem.

The appeal is taken from a judgment entered on an order sustaining a demurrer to the sixth amended complaint after the plaintiff had refused to avail himself of the right to amend. The sixth amended complaint was set forth in two counts: The first was for damages for breach of an alleged oral contract; the second sought a recovery for work and labor alleged to have been rendered pursuant to an entirely separate oral contract.

The defendant filed a general and special demurrer to each of the counts of the complaint. In ruling that the entire complaint was demurrable the trial court did not state whether its decision was based on the general, the special or both types of demurrer.

[1] We do not think the first count was demurrable for failing to state a cause of action, but we do think it was uncertain and ambiguous and accordingly, that the special demurrer was properly sustained on those grounds.

The first count of the sixth amended complaint alleged that an oral contract was entered into between the plaintiff and the defendant on or about September 15, 1947, by the terms of which the parties entered into a joint venture to plant, cultivate, harvest and sell gladiolas from 200,000 bulbs to be furnished by plaintiff which were to be grown on lands owned by the defendant. It was further alleged that the venture was to begin with the 1947 gladiola growing season and end with the close of the 1948 season; that title to the bulbs was at all times to be retained by plaintiff; *that plaintiff was to furnish his work and labor in the planting, care and cultivation of the growing plants;* supervise any hired help which defendant might furnish; that plaintiff was to furnish a garden tractor and tools for furrowing that portion of the land on which the bulbs were planted; that he likewise was to harvest and market the flowers; collect the sales price and divide the sale proceeds equally between plaintiff and defendant. It is next alleged that the defendant was to furnish the water necessary to irrigate the flowers; *to furnish his own labor in the planting, care and cultivation of the bulbs and in addition any necessary hired help which was needed to plant, care for and cultivate the bulbs;* and that the defendant was also to assist the plaintiff in cutting and marketing the flowers.

Without further detailing the allegations of the first count of the sixth amended complaint, it is enough to say that our recital of its allegations discloses one contradiction after another as to the terms of the contract and as a consequence the complaint is ambiguous and uncertain. As these contradictions were challenged by the special demurrer for uncertainty and ambiguity the court rightly sustained the special demurrer to count one.

The second count avers so far as is here material that "within Two Years last past, to-wit, from June, 1946 to June, 1948, Defendant herein became indebted unto Plaintiff in the sum of Three Thousand and No/100 ($3,000.00) Dollars for work and labor performed personally for Defendant by Plaintiff, at the special oral instance and request of Defendant, and that although demand has been made on Defendant for payment thereof, no part of the said Three Thousand and No/100 ($3,000.00) Dollars has been paid."

To this count respondent filed a demurrer stating that the facts alleged were insufficient to constitute a cause of action and that the said count was uncertain in that it could not be ascertained when defendant is alleged to have become indebted unto plaintiff. This second count, so appellant argues, was not generally or specially demurrable because it is a common count; that while there is a surplusage of allegations over and above those required for the statement of a common count, such should be ignored; and that the allegations properly interpreted must be taken to mean that the work and labor were rendered within two years (the period of limitations) of the date the original complaint was filed on June 10, 1948, i. e., on or subsequent to June 10, 1946, and not on any day in June, 1946, prior to the 10th day of that month.

[2–6] It is true, as appellant contends, that in this state it is not necessary in a common count to set forth the date when the defendant became indebted, Evans v. Zeigler, 91 Cal.App.2d 226, 230, 204 P.2d 902, but it is also true that if the common count does set forth a date which is beyond the applicable statute of limitations it is demurrable. While a cause of action set forth in the accepted form of a common count is not subject to a general demurrer on the theory it does not sufficiently state a cause of action, Pleasant v. Samuels, 114 Cal. 34, 45 P. 998, and is not subject to a special demurrer predicated on the ground that the cause of action is not stated with sufficient certainty, it nevertheless is not true, as appellant contends, that a special demurrer never lies to a common count. The case of Pike v. Zadig, 171 Cal. 273, 152 P. 923, upon which appellant relies does not sustain him. If, in the case before us plaintiff had alleged in his second count that defendant had become indebted to him prior to June 10, 1946, it is plain that a demurrer based upon the statute of limitations would have to be sustained. In the case before us the language of count 2 is that "within Two Years last past, to-wit, from June, 1946 to June, 1948, Defendant became indebted * * *." The general language "within two years last past" is necessarily controlled by the specific language, i. e., "from June, 1946 to June, 1948." For aught that appears the defendant may have become indebted prior or subsequent to June 10, 1946. Hence, a demurrer on the ground that the cause of action was barred by the statute of limitations could not be sustained as it must affirmatively appear on the face of the complaint that it is barred and not merely that it may be barred. Pike v. Zadig, 171 Cal. 273, 152 P. 923. But it does not follow that a special demurrer for uncertainty or ambiguity would not lie to ferret out what is the true date within the ambiguous dates alleged by plaintiff. We think such a special demurrer lay and that the court properly sustained it.

[7] When the court made its order the plaintiff could have asked permission, then and there, to interlineate the proper date or he could have filed an amended complaint setting forth the date or, if he chose, eliminate any reference to dates by stating his cause in an apt common count without dates as he did in his fifth amended complaint. All this he could have done, but he declined to do so. We here quote him as follows: "Appellant could have filed an amended Complaint for the seventh time but just does not believe the law of this state sustains the holding of the Court."

In short appellant chose to prolong the litigation by standing on his supposed rights. Having elected to state that the defendant became indebted between June, 1946, and June, 1948, we see no good reason why he should have been unwilling to state the date unless perchance the date was prior to June 10, 1946. If it was he had no rights and has lost none by this decision.

The judgment should be and it is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

107 Cal.App.2d 554

RIDENOUR v. SCARCELLA et al.

Civ. 4404.

District Court of Appeal, Fourth District, California.

Nov. 15, 1951.

Personal injury action by Mary Esther Ridenour against Frank Joseph Scarcella and others. The Superior Court of Orange County, Robert Gardner, J., entered an order granting a new trial on ground of insufficiency of evidence to support the jury's verdict and the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the order was not an abuse of discretion where in the situation disclosed by the conflicting evidence in respect to the collision between the automobile in which plaintiff was a guest and the defendants' truck, the question of negligence was peculiarly one of fact rather than one of law.

Order affirmed.

1. Appeal and Error ⟹977(3)
New Trial ⟹6

The granting of a new trial rests largely within the discretion of trial judge, and order granting new trial will not be reversed unless an abuse of that discretion clearly appears.

2. Appeal and Error ⟹1015(1)

An order granting new trial on ground of insufficiency of evidence will be reversed only where it appears, as a matter of law, that there is no substantial evidence which would support a contrary judgment.

3. New Trial ⟹71

In action for injuries sustained when guest in following automobile collided with defendants' truck, which had been traveling in right lane of four lane highway, and which had stopped and had pulled into the next lane to go around an automobile stopped in right lane for purpose of backing into parking place on shoulder, and which was alongside stopped automobile and parallel to it when following automobile collided with rear end of truck, order granting new trial on ground of insufficiency of evidence was not abuse of discretion, where in the situation disclosed by the conflicting evidence the question of negligence was peculiarly one of fact rather than one of law.

◆

Robert E. Krause, Allen R. Steele, Long Beach, for appellant.

Blodget & Blodget, Santa Ana, for respondents.

BARNARD, Presiding Justice.

The plaintiff appeals from an order granting a new trial on the ground of insufficiency of the evidence to support the jury's verdict in favor of the defendants.

The plaintiff was injured on July 23, 1949, in a collision between a Ford car, in which she was riding as a guest, and a 10-wheel truck driven by one of the defendants. The accident occurred on a four-lane highway about a quarter of a mile northerly from Huntington Beach. The highway was level and dry, the evening was clear, and the visibility was good. A line of cars was parked solidly on the westerly shoulder, nearest the ocean, except for one parking place. The truck was traveling southerly towards San Diego in the right-hand lane of traffic when a gray car in front of it stopped for the purpose of backing into this parking place. The driver of the truck stopped behind the gray car and sounded his horn. When the gray car did not move, the driver of the truck looked to his rear and seeing no other car coming gave a left signal with his mechanical arm and pulled over into the inside of the two southbound lanes for the purpose of passing the stopped car. When the truck was alongside the stopped car and parallel to it, the car in which the plaintiff was riding, which was proceeding southerly towards San Diego, collided with it. The right front end of the Ford came in contact with the left rear end of the truck, with resulting injuries to the plaintiff.

[1, 2] It is well settled that the granting of a new trial rests largely within the discretion of the trial judge, and that such an order will not be reversed unless an abuse of that discretion clearly appears. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 153 P.2d 338. An order granting a new trial on the ground of insufficiency of the evidence will be reversed only where it appears, as a matter of law, that there is no substantial evidence which would support a contrary judgment. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465. The plaintiff, while conceding these rules, contends that the evidence here was insufficient, as a matter of law, to support a verdict in favor of the defendants, and that an abuse of discretion clearly appears. In support of this contention, it is argued that the "great preponderance and overwhelming weight of the evidence justified the verdict"; that the evidence conclusively shows the negligence of the defendants; and that there was little or no conflict in the evidence relating to the ques-

tions of liability and damages "except as to the testimony of Frank Scarcella, the driver of the truck."

There was not only a conflict between the testimony of the driver of the truck and that given by plaintiff's witnesses, but there was a conflict between portions of the testimony of plaintiff's own witnesses. There was a conflict between the testimony of the plaintiff and that of the driver of the car in which she was riding; also between the testimony of that driver and that of other witnesses; and the testimony of the plaintiff's main witness, aside from the driver of her car, was more favorable to the defendants than otherwise. The evidence was also conflicting with respect to the extent and permanence of plaintiff's injuries.

The driver of the truck testified that the gray car stopped in front of him; that he stopped and blew his horn twice; that the other car did not move; that he looked to the rear and saw no cars coming; that he lifted his mechanical signal for a left turn, shifted to a low gear and pulled over into the inside lane; that as he got past the stopped car he changed to a higher gear and then saw lights in back of him; and that he was just deciding to pull to the right into the outside lane again when the impact occurred.

The driver of the car in which plaintiff was riding testified that he was proceeding toward San Diego and was traveling in the inside lane; that when he first saw the truck start to turn into his lane of traffic "I thought the best chance was to get around it because it was real close"; that he saw the gray car stopped in the right lane and decided that he could not go to the right of the truck; that he then crossed the double line, getting three-fourths of his car in a northbound lane with the idea of passing to the left of the truck; that to avoid on-coming traffic in the northbound lanes he came back into his own lane; and that he did not apply his brakes until after he came back into his own lane. The evidence indicates that after he did apply his brakes his car skidded 27 feet with locked wheels.

A witness for the plaintiff, who was sitting in a car on the right shoulder about six or seven car-lengths north of the point of impact, testified that he saw the gray car prepare to back up into the parking place; that the truck came up and stopped behind the gray car; that the truck then started to pull around the gray car, its acceleration being slow; that just about the time the truck was alongside of the gray car "I noticed another car coming up the highway, it seemed to me at high rate of speed"; that this on-coming car hit the back of the truck; and that at that time the truck was parallel to and alongside the gray car.

[3] In the situation disclosed by the evidence the question of negligence is peculiarly one of fact rather than one of law. This truck would necessarily start slowly from a complete stop. It had safely made a turn to its left and another to the right, and had traveled far enough in the inner lane to get up even with the stopped gray car according to plaintiff's evidence, or ahead of that car according to the evidence for the defendants. During all of this time the truck was visible to the driver of the other car, if he was looking, as there were no cars in between to obstruct his vision. After he did see the truck and after deciding that he could not go around to the right because the gray car was in that lane he traveled a considerable distance, going across the double line and back again, before deciding to apply his brakes. When this was done he skidded sufficiently to leave rubber marks on the pavement for 27 feet before he ran into the truck. The evidence was conflicting at best, and to say that there was some substantial evidence which would have supported a judgment for the defendants is rather an understatement. A factual question was presented to the court, on the motion for a new trial, and no abuse of discretion appears.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

107 Cal.App.2d 451

SMITH et al. v. WHEELER et al.

Civ. 4173.

District Court of Appeal, Fourth District,
California.

Nov. 8, 1951.

Chester Smith and others sued H. Dale Wheeler and others for a declaration as to lands entitled to be irrigated from a creek, to which all of plaintiff's lands are riparian, and an injunction against unlawful diversion of water therefrom. From a judgment of the Superior Court of Orange County, Franklin G. West, J., for plaintiffs, defendants appealed. The District Court of Appeal, Griffin, J., held that plaintiffs were entitled to the relief prayed, in view of the trial court's findings, supported by evidence, that defendants' mesa lands were not riparian to the creek, that there was not sufficient water therein to irrigate more than the lands riparian thereto, that defendants' taking of water therefrom for irrigation of such mesa lands would cause orange groves on plaintiffs' lands to wither and dry up, and that plaintiffs would suffer great and irreparable damage if defendants continued to take water from the creek during certain months.

Judgment modified and affirmed as modified.

1. Appeal and Error 🔑1011(1)

The trial court was judge of weight of conflicting evidence on question whether certain mesa lands were riparian to creek, as required to entitle owner to take water therefrom for irrigation purposes, so as to render such court's contrary finding conclusive on appeal.

2. Waters and Water Courses 🔑40

Riparian rights are not determined by past geologic formations, but from present natural topography.

3. Waters and Water Courses 🔑87

Owners of lands riparian to creek were entitled to injunction against use of subsurface water from creek for irrigation of others' nonriparian mesa lands as against contention that such use did not damage riparian owners, in view of Superior Court's findings, supported by evidence that there was not sufficient water in creek to irrigate more than lands riparian thereto, that use of water therefrom for irrigation of such mesa lands would cause orange groves on riparian lands to wither and dry up, and that owners of mesa lands expected to and would irrigate much more of such lands with waters from creek, unless enjoined.

4. Injunction 🔑11

A prohibitory injunction will issue when damage is threatened.

5. Waters and Water Courses 🔑87

In action for injunction against diversion of water from creek, to which plaintiffs' lands were riparian, for irrigation of defendants' nonriparian mesa lands, burden was on defendants to prove existence of surplus water in creek for irrigation of more than riparian lands, as alleged by them.

6. Waters and Water Courses 🔑87

Evidence supported trial court's finding that if owners of mesa lands, not riparian to creek, continued to take water therefrom for irrigation of such lands during certain months, owners of lower riparian lands would suffer great and irreparable damage because of reduction in supply of water for their well in creek, so as to entitle them to injunction against such taking.

7. Waters and Water Courses 🔑87

A judgment permanently enjoining owners of mesa lands, not riparian to creek, from taking water therefrom for irrigation of such lands during certain months, on ground that such taking would cause lower riparian owners great and irreparable damage, should be amended by adding provision reserving to court continued jurisdiction to change or modify its findings, orders and judgment as occasion may require, in view of reasonable possibility of future surplus waters, not devoted to beneficial use by riparian owners, in creek, and increased or decreased arid condition reasonably warranting different time limitation for pumping water onto such mesa lands.

◆

Head, Jacobs & Corfman, Santa Ana, for appellants.

Forgy, Reinhaus & Forgy, Arthur M. Bradley, Santa Ana, for respondents.

GRIFFIN, Justice.

This is an action for declaratory relief and an injunction. The gravamen of the complaint is that all of the land of the plaintiffs is riparian to Trabuco Creek and the larger portion of defendants' land is not riparian to that creek and is irrigated with water from that creek to the damage of plaintiffs' riparian land. The complaint asked for a declaration as to lands entitled to be irrigated from the Trabuco Creek and for an injunction prohibiting unlawful diversion. Plaintiffs and respondents are the lower riparian owners, and their property lies contiguous to and westerly of the property owned by defendants and appellants. These ranches are planted to orange trees. The waters used to irrigate them are pumped from wells which the respective parties have dug in Trabuco Creek. The only water involved in this case is the subsurface water running along and over the bedrock of Trabuco Creek in its stream channel extending from East to the West. This channel is 800 to 1,200 feet wide and extends along the northerly side of the lands owned by the parties to this action. The stream channel extends between the mesa and the high land bounding it on its northerly and southerly sides. The northerly boundary line of appellants' property is near the northerly bluff of the channel. The channel of Trabuco Creek extends from the upper narrows of Trabuco Canyon where it then debouches from said canyon at a point approximately one-half to three-fourths mile easterly from the land of the appellants and extends westerly several miles to the lower narrows in its course towards the ocean. The creek varies in width from about 100 yards to three-fourths of a mile. The northerly and southerly borders of the creek are distinctly marked by high bluffs and at various places by outcropping sandstone.

Underlying the channel of Trabuco Creek is a layer of sandstone practically impervious to water and constituting the bedrock. This bedrock sandstone is not level and is beneath the surface of the channel several feet under the gravel and varies in depth toward the center and northerly border of the channel. The bedrock is irregular and contains channels in and along which the subsurface water runs in dry years when there is not enough water to supply all the wells. The wells constructed in various parts of the channel, at times, develop a substantial supply of water, and at other times there is little or no water.

Several wells were dug by the respondents in Trabuco Creek. Three wells were dug by appellants therein. There is one well of respondents which they claim was affected by the pumping of water from the well of the appellants. The well of respondents, which is claimed to be affected, lies about 500 feet north of the south border of Trabuco Creek, and the well from which appellants obtain their water lies approximately 300 feet north of the south border of Trabuco Creek. Respondents' well is approximately 880 feet west of appellants' well.

Commencing with the month of August, regardless of the year, there is a depletion of water and not enough to irrigate the lands riparian to Trabuco Creek.

At the southerly boundary of appellants' property is what is described as "Tijeras" mesa and canyon. Except at times when there is heavy rainfall or floods, this mesa and canyon have neither surplus nor subsurface water. Along the boundary of appellants' property and at the southeasterly portion thereof, this so-called Tijeras Mesa is practically flat, and along the southerly boundary it is slightly depressed southerly toward Tijeras Canyon.

Near the center of the Wheeler Ranch there is a slight rise or crest which runs in an easterly-westerly direction, and the drop from this crest to Tijeras Canyon is approximately four feet. This crest runs through the property of the appellants and separates the drainage between Trabuco Creek and Tijeras Creek, and is described in the findings of fact as the limit of the water shed of Trabuco Creek. There are about 20 acres of the Wheeler Ranch extending from this crest to Tijeras Canyon, which are planted to orange trees. The whole tract of appellants' land contains about 160 acres.

The court determined that the land of the appellants which sloped toward Trabuco Creek was in the watershed of that creek and that all of the balance of the land of the appellants sloped toward Tijeras Creek or canyon and drained into it and was riparian to and in the watershed of said Tijeras Creek. The court described this line in its findings and judgment and stated that there was a well defined summit division point between the watersheds and it determined the riparian rights in Trabuco Creek in accordance with this division point or line. The court found, among other things, that all of the land of the appellants, with the exception of approximately 10 acres, was in the watershed of a stream known as Tijeras Creek; that Tijeras Creek arises easterly of the lands of the appellants and flows in a general southerly and southwesterly direction and joins with Trabuco Creek at a point approximately eight miles southwesterly of the land of the respondents; and that there was a well-defined watershed of the Tijeras Creek which joins the watershed of Trabuco Creek. In the court's finding it specifically described this line. It then found that the appellants had improved approximately 20 acres of their land which lies in the Tijeras watershed and that they would, unless enjoined, improve much more land in the Tijeras watershed and irrigate from Trabuco Creek. Judgment was rendered in favor of respondents and an injunction was granted restraining appellants from the use of water on their so-called mesa acreage from August 15 to November 15 of each year. Appellants appeal and question the sufficiency of the evidence to support these findings.

The reporter's transcript contains over 1100 pages of testimony. It is sufficient to say that the evidence clearly shows that the slope of the terrain on the mesa south of the described summit point or line, which included the 20 acres here mentioned, did slope toward the Tijeras Creek and that the terrain north of that line sloped toward the Trabuco Creek. Counsel for appellants does not concede this fact but argues that notwithstanding this evidence, it is shown that appellants' entire property is within the watershed of Trabuco Creek because, according to some of the evidence, there is an underground watershed underlying the entire Wheeler Ranch at or beyond the depression which is called the Tijeras, which underground watershed is of a sandstone formation or bedrock, and is in the form of a spoon, and that the surface of said bedrock continues into Trabuco Creek; that through this underground watershed irrigation water taken from Trabuco Creek, if not consumed, would return to Trabuco Creek above the land or wells of respondents, even though some of the irrigation water actually drained into Tijeras. In other words, it is his contention that all water taken by appellants from Trabuco Creek for irrigation purposes, which was not consumed, would return to Trabuco Creek above the lands of respondents, and that the court erred in finding that the mesa lands here in question were not riparian to the Trabuco Creek.

[1,2] There are two answers to this last contention. First, there is conflicting evidence on this question and the trial court was the judge of its weight and found against appellants' contention in this respect; second, in Rancho Santa Margarita v. Vail, 11 Cal.2d 501, at pages 548–549, 81 P.2d 533, at page 557, where a similar argument was made, the court said: "In past ages this mesa land may have been delta land, and may have been riparian to the river, but riparian rights are not determined by past geologic formations but from the *present natural topography.*" (Italics ours.)

Certain exceptions are made to this rule, particularly as to so-called "delta" land near the outlet of a stream. The exceptions, however, do not ordinarily apply to mesa land which in past geologic ages may have been delta land. Bathgate v. Irvine, 126 Cal. 135, 143, 58 P. 442; Half Moon Bay Land Co. v. Cowell, 173 Cal. 543, 160 P. 675.

[3–5] The next argument is that the use of subsurface water from Trabuco Creek by appellants for irrigation purposes did not damage respondents and that accordingly an injunction cannot be obtained against one taking underground percolating water unless such taking is injurious to the complaining party, citing Rancho Santa Margarita v. Vail, supra, 11 Cal.2d at page 558, 81 P.2d 533; and Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236. The court found that during the months in question there was not sufficient water in Trabuco Creek to irrigate more than the lands riparian to that creek, and if appellants are permitted to take water from it for the purpose of conveying it to property outside that watershed it will cause the orange groves on respondents' lands, which are riparian to that creek, to wither and dry up, and will cause respondents great and irreparable damage.

Appellants contend that the only damage claimed by respondents was that in the year 1947 the crop of oranges on the Smith Ranch was puffy and some of them split and that this damage suffered by respondents was by their own act in choosing not to use irrigation water, due to the high cost of pumping. They cite in their briefs only a portion of the evidence on that subject. There is sufficient evidence supporting the court's finding in this respect. In addition, the court found that appellants expect to and will improve much more land in the Tijeras watershed, and unless enjoined will irrigate it from the waters of the Trabuco Creek. Prohibitory injunction will issue when damage is threatened. Island Reclamation District No. 776 v. Floribel Alfalfa Syndicate, 167 Cal. 467, 140 P. 4. The burden of proving the existence of a surplus is on the appellants. Allen v. California Water & Telephone Co., 29 Cal.2d 466, 481, 176 P.2d 8; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486.

[6] The next contention is that it cannot be determined, from the evidence, whether the pumping from appellants' well affected the water supply in respondents' well. It is argued that since the experts testified to the effect that the bed of Trabuco Creek probably has under the layer of gravel little ridges and shallow channels, and that in the winter and early spring while the water table is high the little ridges between the channels would be covered and the water would move forward as a single body of water, but as the level of the water in the stream falls there would be a series of splitting and reuniting of channels of the stream, it was necessary that the court should make a determination as to what course the individual channels in the sandstone took; that under the evidence and findings it cannot be determined whether or not the channels supplying respondents' well were the same channels supplying appellants' well.

The evidence clearly shows that the operation of appellants' well has had a drastic effect on the reduction in supply of water for respondents' well, and that each party depended upon the same supply of water; that when the pump on appellants' well was not operating the water rose as much as two feet in respondents' well, and that when it was pumping in appellants' well, on occasions, respondents were forced to stop pumping from their well because the pump would "break suction" (i. e., pump air part of the time) and as a result of spasmodic irrigation, the oranges would "split" and that last year respondents' fruit was "very bad" because the grove "got so dry" and that respondents judged they lost between one-fourth and one-third of their fruit crop. The court's finding that if appellants continued to take water out of the Trabuco Creek watershed during the months mentioned respondents would suffer great and irreparable damage, is sufficiently supported.

[7] The final argument of appellants is that the order here entered permanently requires appellants to refrain from pumping water from the Trabuco Creek onto the Tijeras watershed properties of appellants between August 15th and November 15th of each year hereafter, and that since it might reasonably develop that there may be, in the future, surplus waters in that creek, not devoted to a beneficial use by respondents, or other riparian owners, and since arid conditions might increase or decrease and a different limited time for pumping from appellants' wells onto the acreage here involved might be more reasonable, the court should retain its jurisdiction in this case so as to change or modify orders or decrees as occasion may arise, either on its own motion or on motion of any party.

We are in accord with this policy as expressed in Allen v. California Water & Telephone Co., supra, 29 Cal.2d at page 491, 176 P.2d 8; and Peabody v. City of Vallejo, supra, 2 Cal.2d at page 383, 40 P.2d 486.

The judgment should be and is therefore amended by adding to its provisions as a final paragraph: "The court reserves its continuing jurisdiction to change or modify its findings, orders, and judgment, as occasion may require." As thus modified and amended the judgment is affirmed. Respondents to recover costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

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107 Cal.App.2d 313

GLOGAU v. HAGAN et al.

Civ. 18386.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1951.

Rehearing Denied Nov. 30, 1951.

Hearing Denied Jan. 3, 1952.

Jeanette Glogau sued Evert L. Hagan and another on an assigned claim for attorney's fees. The Superior Court, Los Angeles County, Wm. S. Baird, J., Wm. B. McKesson, J., and Harold B. Landreth, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that no error was presented by assignments dealing with denial of jury trial.

Affirmed.

See also, 103 Cal.App.2d 828, 230 P.2d 392.

1. Appeal and Error 🔑907(3)

Where appeal is on judgment roll and no evidence is presented for review on merits, all presumptions and intendments favor correctness of judgment.

2. Appeal and Error 🔑544(3)

Scope of appeal is not widened by including in record numerous documents not pertinent to narrow issues presented by appeal on judgment roll.

3. Appeal and Error 🔑259

Where no exception to order denying motion requesting jury trial was noted at time of ruling, or taken later, order was not reviewable. Code Civ.Proc. §§ 631, subd. 4,646; Const. art. 1, § 7.

4. Appeal and Error 🔑233(2)

Where, after denial of jury trial, motion was not renewed before trial judge, failure to renew foreclosed subsequent reversal of order of denial. Code Civ.Proc. §§ 631, subd. 4,646; Const. art. 1, § 7.

5. Jury 🔑28(5)

If party goes to trial without apprising court of his demand for jury trial he is deemed to have waived such right. Code Civ.Proc. §§ 631, subd. 4,646; Const. art. 1, § 7.

6. Appeal and Error 🔑907(3)

Where, on appeal from judgment for plaintiff in action on assigned claim for attorney's fees, record disclosed no actual request for jury at opening of trial, defendant would be presumed to have waived his claim for jury. Code Civ.Proc. §§ 631, subd. 4,646; Const. art. 1, § 7.

7. Appeal and Error 🔑907(3)

On appeal on judgment roll from judgment for plaintiff in action on assigned claim for attorney's fees, where error was assigned with regard to trial court's denial of jury trial, in face of such collateral attack on judgment and order denying jury trial, every condition of fact consistent with validity of judgment order, not affirmatively contradicted by judgment roll, would be presumed to have existed. Code Civ.Proc. §§ 631, subd. 4,646; Const. art. 1, § 7.

8. Attorney and Client 🔑104
Jury 🔑25(6)

Where attorney for defendant in action on assigned claim for attorney's fees was served with notice of setting and did not demand jury within five days after receipt of such notice, he thereby waived jury trial for defendant, since service on defendant's attorney was service on his client. Code Civ.Proc. § 1011.

9. Jury 🔑10

In enacting statute providing that jury may be waived by failing to timely assert demand therefor, legislature exercised rights vested in it by Constitution to determine such acts or omissions as should deprive litigant in civil action of jury trial. Code Civ.Proc. §§ 631, subd. 4,646; Const. art. 1, § 7.

10. Jury 🔑28(17)

The Code of Civil Procedure section authorizing trial court, in its discretion, to allow trial by jury, even though there has been waiver of such trial, does not compel court to do so, and in considering motion calling for exercise of such discretion, court has to regard not only rights of litigants but also likelihood that shifting of trial from nonjury calendar to jury calendar will affect public interest. Code Civ. Proc. § 631.

11. Appeal and Error 🔑969

Where, in trial of action on assigned claim for attorney's fees, court in exercise of its discretion had denied several motions of defendants to be relieved of their neglect with regard to demanding jury trial, no relief could be obtained on appeal unless it were established that defendants had made timely application to be relieved from neglect and that the trial court had grossly abused its discretion.

12. Appeal and Error 🔑969

On appeal on judgment roll from judgment for plaintiff in action on assigned claim for attorney's fees wherein defendants assigned error with regard to denial of jury trial, defendants failed to establish that they had made timely application to be relieved from their neglect in failing to make timely demand for jury trial and that trial court had grossly abused its discretion in denying application to be relieved from neglect. Code Civ.Proc. § 631.

13. Appeal and Error 🔑1031(1)

On appeal by defendants from judgment for plaintiff in action on assigned claim for attorney's fees, prejudice could not be presumed from fact that defendants had not tried their case to a jury, and on contrary it would be presumed that they had enjoyed benefits of a fair and impartial trial as contemplated by Constitution and statutes. Code Civ.Proc. §§ 631, subd. 4,646; Const. art. 1, § 7.

14. Appeal and Error 🔑195

Where, on appeal from judgment for plaintiff in action on assigned claim for attorney's fees, it was clear from record that demand or motion of defendants for leave to file proposed amended answer and counterclaim had never been presented, action upon it could not be cause for reversing judgment.

15. Appeal and Error 🔑253

Where, in action on assigned claim for attorney's fees, defendants did not take exception to ruling of trial court rejecting proposed cross-complaint, contention that defendants had been wrongfully denied a right to file cross-complaint could not be sustained on appeal.

16. Appeal and Error 🔑253

Exception to rejection of proposed cross-complaint is not exception deemed by statute to have been taken. Code Civ. Proc. § 647.

17. Pleading 🔑140

A defendant may file a cross-complaint at time of answer, but if he seeks to file it at a later time he may do so only by permission of court, and rule as to filing a counterclaim is substantially the same.

18. Appeal and Error 🔑959(1)

To defeat trial court's ruling in denying permission for late filing of cross-complaint or counterclaim, it must be shown that trial court abused its discretion.

19. Pleading 🔑140

Where, in action on assigned claim for attorney's fees, answers had been on file 11 months before defendants' motion was made, trial court did not abuse its discretion in refusing to allow defendant to file his cross-complaint since such dereliction was sufficient cause for denying motion.

20. Pleading 🔑147

Fact that proposed cross-complaint, in action on assigned claim for attorney's fees, was demurrable was ample ground for rejecting it.

21. Abatement and Revival 🔑8(1)

Pendency of suit involving same matters alleged in proposed cross-complaint is justification for rejecting latter.

22. Pleading 🔑385

In action on assigned claim for attorney's fees, motion to preclude evidence concerning plaintiff's accounts, after latter had allegedly failed to furnish a proper bill of particulars, was addressed to discretion of court. Code Civ.Proc. § 454.

23. Pleading 🔑323(4)

Determination of whether bill of particulars furnished by adversary is a compliance with statute rests in sound discretion of court. Code Civ.Proc. § 454.

24. Pleading 🔑385

In action on assigned claim for attorney's fees, where defendants failed to obtain, prior to trial, order precluding introduction of evidence because of alleged failure of plaintiff to furnish proper bill of particulars, trial court properly denied motion at trial to preclude such evidence. Code Civ.Proc. § 454.

25. Appeal and Error 🔑907(3)

On appeal from judgment for plaintiff in action on assigned claim for attorney's fees, in absence of record before District Court of Appeal, it would be presumed that no objection had been made to evidence and for that reason trial court's ruling on defendants' motion to exclude evidence because of alleged failure of plaintiff to furnish proper bill of particulars would not be reviewable. Code Civ.Proc. § 454.

26. Appeal and Error 🔑907(3)

On appeal from judgment for plaintiff in action on assigned claim for attorney's fees, where defendants assigned error because trial court had allegedly received in evidence, over objection, purported time sheet summaries, in absence of anything in record to sustain contention, District Court of Appeal would presume that objections had not been made to introduction of summaries. Rules on Appeal, rule 52.

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Jesse A. Hamilton, Los Angeles, for appellants.

Norman Newmark and Abraham Gottfried, Los Angeles, for respondent.

MOORE, Presiding Justice.

[1, 2] This appeal is on the judgment roll. Having no evidence for review on the merits, all presumptions and intendments favor the correctness of the judgment. Rounds v. Dippolito, 94 Cal.App.2d 412, 417, 210 P.2d 893. By including in the record numerous documents not pertinent to the narrow issues thus presented, the scope of the appeal is not thereby widened. Hunt v. Plavsa, 103 Cal.App.2d 222, 229 P. 2d 482.

Plaintiff as assignee of Abraham Gottfried sued for $15,000 on account of legal services alleged to have been rendered to appellants. Judgment was ultimately entered for the sum of $4,100 against J. A. Hagan and Evert L. Hagan. Since the filing of this appeal, J. A. Hagan deceased and Evert as the administrator of the estate of his brother was duly substituted as a party appellant. Inasmuch as the claims were reassigned to Gottfried, he is the actual respondent. The denial of recovery on some claims and awarding judgment on others and the reasons therefor have no place in this discussion. The appeal is based upon asserted technical denials of alleged lawful rights in the course of the litigation. Only the merits of such claims can be of interest now.

No Error in Denying a Jury Trial

The first assignment is that the court erred in denying J. A. Hagan a jury trial. In support thereof they cite the State Constitution, Art. I, sec. 7; Platt v. Havens, 119 Cal. 244, 51 P. 342; Parker v. James Granger, Inc., 4 Cal.2d 668, 679, 52 P.2d 226. They argue that neither a "Memorandum for Setting" nor a Notice of Setting was served upon J. A. Hagan as required by section 631, Code of Civil Procedure, subdivision 4, and Rule 1 of the Rules of the Judicial Council.

[3–8] The answer thereto is fourfold. (1) The order denying the motion requesting a jury trial is not reviewable since no exception was taken to the ruling. Where no exception is taken to the ruling *in limine* denying a jury trial as provided by section 646 of the Code of Civil Procedure it cannot be reversed on appeal. Snidow v. Hill, 100 Cal.App.2d 31, 36, 222 P.2d 958. Since no exception was noted at the time of the ruling or taken later, the order denying J. A. Hagan's motion cannot be disturbed. (2) After such denial of a jury trial, the motion was not renewed before the trial judge. Such failure to renew foreclosed J. A. Hagan of thereafter urging a reversal of the order of denial. Ferrea v. Chabot, 121 Cal. 233, 236, 53 P. 689, 1092. If a party goes to a trial without apprising the court of his demand for a jury trial he is deemed to have waived such right. City of Los Angeles v. Zeller, 176 Cal. 194, 199, 167 P. 849. (3) Since the record discloses no actual request for a jury at the opening of the trial, J. A. Hagan is presumed to have waived his claim for a jury. On this collateral attack of the judgment and the order denying a jury trial, every condition of facts consistent with their validity, not affirmatively contradicted by the judgment roll is presumed to have existed. Phelan v. Superior Court, 35 Cal.2d 363, 373, 217 P.2d 951. (4) That J. A. Hagan was served with "Memorandum for Setting" or a "Notice of Setting" card cannot be denied. At the time of service Evert Hagan was counsel of record for his brother as well as for himself.[1] Since Evert as attorney was served with the notice of setting and did not demand a jury within five days after receipt of such notice he thereby waived a jury trial for both defendants. Service on Evert was service on his client. Code Civ.Proc. sec. 1011. On June 15, 1948, attorney Peck was substituted as counsel for J. A. Hagan. Nine days later Mr. Peck filed a "Notice of Motion for Jury Trial." No mention was made in connection with such notice that J. A. Hagan had not been served with the "Memorandum for Setting" or the "Notice of Setting" card, but in his affidavit Peck declared that his client "had not demanded a trial by jury within the time prescribed by section 631 of the Code of Civil Procedure." Eight months thereafter both appellants admitted they had been served with notice of trial but did not request a jury, and contended that they were entitled to delay their demand until served with Notice of Trial.

Since J. A. Hagan had actual notice of the setting and failed to appear and demand a jury as required by the statute, Code Civ. Proc. sec. 631, and since he failed at the commencement of the trial to renew his demand, City of Los Angeles v. Zeller, supra, appellants fail to establish a right to reversal.

No Abuse of Discretion

Having failed to obtain a jury trial by virtue of their own inaction, appellants point to several "further" motions they made to obtain a jury trial and assert that with reference to them the trial court abused its discretion. Those motions and their filing dates are as follows: (1) October 18, 1948, "Notice of Motion to Reconsider Motion for Jury Trial," (2) February 28, 1949, "Notice of Motion to Transfer Cause for Jury Trial Calendar," (3) February 28, 1949, "Demand for Jury Trial."

As to motion 1: In fact it antedated a similar motion which was denied November 4, 1948. It was denied without prejudice and on October 29, 1948, appellants filed anew the same identical motion and then stipulated that it might be denied.

[9] As to "further" motions, (2 and 3), no such fact was presented in support of either as would compel a court to throw discretion to the winds and grant the motions. All three motions appealed to the discretion of the court. The Constitution vested the legislature with power to determine such acts or omissions as shall deprive a litigant in a civil action of a jury trial. This was done by the enactment of the statute. Code Civ.Proc. sec. 631; Harmon v. Hopkins, 116 Cal.App. 184, 186, 2 P.2d 540. That section, subdivision 4, provides that a jury may be waived by failing to assert a demand therefor when "the cause

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[1] The record shows that Evert Hagan was substituted as attorney for his brother on February 3, 1948, and that he was served with the "Memorandum for Setting" on the same day.

is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation".

[10] While section 631(4), Code of Civil Procedure, authorizes the court "in its discretion" to allow a trial by jury, even though there has been a waiver of such trial, such provision does not compel a court to do so. In considering such a motion the court has to regard not only the rights of the litigants but also the likelihood that the shifting of a trial from a nonjury calendar to a jury calendar will affect the public interest. Mathews v. Hornbeck, 80 Cal.App. 704, 708, 252 P. 667.

[11, 12] Where a party litigant has notice of the setting and does not announce his demand for a jury trial but relies upon a written notice filed with the clerk prior to the setting day, to comply with such writing and grant a jury trial "would revive that uncertainty as to what constitutes a waiver of jury trial" which existed prior to the statute and it would hamper the courts in their efforts to expedite the administration of justice. Stern v. Hillman, 115 Cal.App. 156, 159, 300 P. 972, 973. The court below having in the exercise of its discretion denied the several motions of appellants to be relieved of their neglect, no relief can be obtained on appeal unless it is established that appellants made timely application to be relieved from neglect and the trial court grossly abused its discretion. Keller v. Keller, 91 Cal.App.2d 39, 41, 204 P.2d 361; Harmon v. Hopkins, supra, 116 Cal.App. 188, 2 P.2d 540; Stern v. Hillman, supra; Ferrea v. Chabot, supra; Bennett v. Hillman, 37 Cal.App. 586, 589, 174 P. 362. This they have not done.

[13] Furthermore, prejudice cannot be presumed from the fact that appellants did not try their case to a jury. On the contrary, it is presumed that they enjoyed the benefits of a fair and impartial trial as contemplated by the Constitution and the statutes. Harmon v. Hopkins, supra, 116 Cal.App. at page 188, 2 P.2d 540.

Other Assignments

Appellants contend that they were prejudiced by the court's refusal to allow J. A. Hagan to file a cross-complaint. The action herein was filed November 13, 1947. June 29, 1948, J. A. Hagan sued respondent in a separate action, alleging the latter's negligence in handling three specified lawsuits, the prosecution of which constituted the basis of respondent's recovery in the instant action. Respondent's demurrer to J. A. Hagan's complaint was sustained and the judgment of dismissal became final. Appellants answered respondent's suit in January, 1948. In the following March, Evert filed his proposed cross-complaint herein alleging the negligence of respondent in his handling of five actions of appellants against five separate defendants. Respondent's demurred to Evert's cross-complaint was sustained. Nothing daunted, Evert returned in *propria persona* with his first amended cross-complaint with its eight causes of action based upon respondent's alleged negligence in handling the same five cases for J. A. Hagan and alleging their transfer to Evert. Respondent's demurrers to Evert's amended cross-complaint and to his second amended cross-complaint were both sustained without leave to amend. Simultaneously with Evert's last filing, J. A. Hagan filed his "second amended cross complaint" without leave. Respondent's motion to strike it was granted.

After respondent's demurrer had been sustained to J. A. Hagan's independent action he amended and a demurrer to his amended pleading was sustained without leave to amend. The judgment of dismissal became final September 29, 1948.

Six months after his second amended cross-complaint had been stricken, J. A. Hagan on November 3, 1948, moved the court for leave to file a cross-complaint herein for malpractice, based upon respondent's alleged negligence in his handling of two specified actions. The motion was denied December 7, 1948, and the trial was continued to March 21, 1949. There is no showing that the court's denial of J. A. Hagan's motion was error.

On March 17, 1949, J. A. Hagan moved for leave to file an amended answer and counterclaim for the sum of $35,000. That motion was ordered off calendar.

[14] When the trial was called on March 21, J. A. Hagan did not appear and his motion was never presented; neither was Evert's motion to file his amended answer ever made. At the conclusion of the trial the court found that "J. A. Hagan is the alter ego of Evert Hagan." From the record it is clear that the demand or motion of J. A. Hagan for leave to file his proposed amended answer and counterclaim was never presented and action upon it could therefore not be cause for reversing the judgment herein.

[15, 16] The contention that J. A. Hagan was wrongfully denied the right to file a cross-complaint cannot be sustained for the additional reason that he did not take exception to the ruling of the court. Estate of Magerl, 201 Cal. 162, 167, 256 P. 204. Exception must be taken at the time a decision is made rejecting a proposed cross-complaint. Such rejection is not one of the matters deemed to have been excepted to under section 647, Code of Civil Procedure.

[17, 18] In any case, there was no abuse of discretion in the court's refusal to allow J. A. Hagan to file his cross-complaint. A defendant may file a cross-complaint at the time of answering. But if he seeks to file it at a later time he may do so only by permission of the court. Gallo v. Boyle Manufacturing Company, Inc., 30 Cal.App.2d 653, 655, 86 P.2d 1067. The rule as to filing a counterclaim is substantially the same. Estate of Walters, 89 Cal.App.2d 797, 799, 202 P.2d 89; Anderson v. Permenter, 78 Cal.App.2d 378, 380, 177 P.2d 818. To defeat the court's ruling in either instance it must be shown that the court abused its discretion. Bank of America Nat. & Savings Ass'n v. Goldstein, 25 Cal. App.2d 37, 46, 76 P.2d 545; Manha v. Union Fertilizer Company, 151 Cal. 581, 91 P. 393; Scholle v. Finnell, 167 Cal. 90, 102, 138 P. 746.

[19–21] That the court's discretion was wisely exercised is disclosed by the facts. (1) When the motion was made the answers had been on file eleven months. Such dereliction of defendants was sufficient cause for denying the motion. Davies v. Symmes, 49 Cal.App.2d 433, 439, 122 P. 2d 102. (2) The cross-complaint was demurrable. This was ample ground for rejecting it. Pollard v. Forest Lawn Memorial Park Association, 15 Cal.App.2d 77, 82, 59 P.2d 203. (3) A prior action based upon the causes alleged in the cross-complaint was still pending. The pendency of a suit involving the same matters alleged in a proposed cross-complaint is justification for rejecting the latter. Hilton v. Reed, 46 Cal. App.2d 449, 454, 116 P.2d 98. (4) When J. A. Hagan presented his cross-complaint the causes therein alleged had been assigned to Evert and he was then the owner thereof. Staley v. McClurken, 35 Cal.App. 2d 622, 625, 96 P.2d 805.

[22–25] The contention is made that the court erred in denying appellants' motion to preclude evidence concerning respondent's accounts after the latter had "failed to furnish a proper bill of particulars." Such a motion is addressed to the discretion of the court. McCarthy v. Mt. Tecarte, etc., 110 Cal. 687, 692, 43 P. 391. Silva v. Bair, 141 Cal. 599, 602, 75 P. 162. The determination of whether a bill of particulars furnished by an adversary is a compliance with the statute rests in the sound discretion of the court. Code Civ.Proc. sec. 454. The requirement is that within ten days after a demand by the adverse party for the "items of an account" the pleader must deliver a "copy of the account". By reason of appellants' failure to obtain an order prior to the trial precluding the introduction of evidence by respondent, the court properly denied the motion at the trial. McCarthy v. Mt. Tecarte, supra. Not only was appellants' motion to exclude addressed to the sound discretion of the court, but since there is no record before this court it is presumed that no objection was made to the evidence and for that reason it is not reviewable. Parker v. Shell Oil Co., 29 Cal.2d 503, 513, 175 P.2d 838.

[26] Appellants urge that the court below erred "when it received into evidence, over objection, alleged summaries of purported time sheets." How can such assignment be reviewed in the absence of a reporter's transcript? There is nothing to

show here that the summaries are not the original time sheets or that they are inconsistent with testimony at the trial. Assuming the record to be complete, Rule 52, Rules on Appeal, this court must presume that objections were not made to the introduction of the summaries. Phelan v. Superior Court, 35 Cal.2d 363, 373, 217 P.2d 951.

The judgment is affirmed.

McCOMB, J., concurs.

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107 Cal.App.2d 346

Ex parte MOREHEAD.

Cr. 4734.

District Court of Appeal, Second District,
Division 2, California.
Nov. 7, 1951.

Ralph B. Morehead was convicted in the municipal court on seven counts of misdemeanor involving sexual offenses, and the municipal court suspended further proceedings and certified matter to the superior court for proceedings under the sexual psychopath act. The superior court increased bail, and the prisoner was remanded to custody of the sheriff, and the prisoner brought a proceeding for a writ of habeas corpus. The District Court of Appeal, Moore, P. J., held that the superior court had authority to fix bail, and that bail of $7500 was not excessive in view of the prisoner's previous record.

Writ discharged and prisoner remanded to custody of sheriff.

1. Bail 🔑42

A person is entitled as a matter of right to be released on bail pending a determination of whether or not he is a sexual psychopath. Welfare and Institutions Code, § 5501 et seq.

2. Criminal Law 🔑625

Where municipal court has, from evidence adduced upon trial of a misdemeanor, concluded that there is probable cause for believing defendant to be a sexual psychopath and adjourns further proceedings and certifies prisoner to the superior court, municipal court's powers to proceed further in the matter are exhausted and it will regain jurisdiction only upon determination by superior court that defendant is not a sexual psychopath or has recovered from his sexual psychopathy. Welfare and Institutions Code, § 5502.

3. Criminal Law 🔑625

A sexual psychopath proceeding is not regarded as a criminal action. Welfare and Institutions Code, § 5501 et seq.

4. Bail 🔑47

Where defendant was convicted in municipal court for misdemeanors involving sexual offenses and municipal court suspended further proceedings and certified the matter to superior court for proceedings under sexual psychopath act, and defendant appealed convictions and was released upon bail by municipal court, superior court had authority to fix bail, since municipal court no longer had jurisdiction after it certified defendant to superior court. Penal Code, §§ 311, subd. 1, 647a, subd. 1, 647, subd. 5, 807, 1268; Welfare and Institutions Code §§ 5501, 5502.

5. Bail 🔑51

Criminal Law 🔑1148

Fixing of amount of bail is largely within discretion of trial court, and appellate court will not interfere unless an abuse of discretion is manifest, and reduction will be ordered only when it is apparent per se that the amount fixed is unreasonably great and clearly disproportionate to the offense involved. Const. art. 1, § 6.

6. Bail 🔑51

Discretion that trial court can exercise in fixing of bail must be the exercise of a sound legal discretion, determined upon seriousness of offense charged, defendant's previous record, and probability of his appearing for trial if at large. Penal Code, § 1275; Const. art. 1, § 6.

7. Bail 🔑52

Where defendant was convicted in municipal court on seven counts of misdemeanors involving sexual offenses and the matter was suspended and certified to superior court for proceedings under sexual psychopath act, bail fixed by superior court of $7500 was not excessive in view of defendant's previous record showing that he had been successively adjudged guilty of burglary, grand larceny, violation of Dyer Act and of first degree murder and in view of fact that he had once escaped from prison and was on parole from a prison term at the time of commission of the misdemeanors. Welfare and Institutions Code, § 5501 et seq.; 18 U.S.C.A. §§ 2311–2313; Const. art. 1, § 6.

8. Criminal Law ⟹981(1)

Under statute providing that when a person is convicted of a criminal offense, the trial judge may adjourn the proceeding and certify person for hearing and examination by superior court to determine whether person is a sexual psychopath, word "convicted" means verdict and ascertainment of guilt by trial court, and does not necessarily mean final determination of guilt after appeal has been taken, or judgment based upon a verdict, and superior court had jurisdiction to proceed with sexual psychopath hearing upon certification by the municipal court notwithstanding pending appeal from conviction for misdemeanors. Welfare and Institutions Code, § 5501(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Convicted".

9. Criminal Law ⟹981(1)

Where municipal court certifies a person convicted of a criminal offense for hearing and examination by superior court to determine whether he is sexual psychopath, superior court has discretion to continue the psychopath proceeding until defendant's appeal from conviction in municipal court has become final. Welfare and Institutions Code, § 5501(a).

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William W. Larsen, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Deputy Dist. Atty., Ralph F. Bagley, Deputy Dist. Atty., all of Los Angeles, for respondent.

MOORE, Presiding Judge.

Petitioner was convicted in the municipal court on seven counts of misdemeanor three counts of indecent exposure, Penal Code, sec. 311(1); three of child molestation, Penal Code, sec. 647a(1); and one count of lewd and dissolute conduct, Penal Code, sec. 647, subd. 5. His motions for a new trial were denied. The court thereupon suspended further proceedings and certified the matter to the superior court for proceedings under the sexual psychopath act, Welfare and Institutions Code, sec. 5501 et seq. Petitioner having appealed from such misdemeanor convictions, he was permitted to go at large on posting bail in the sum of $500. His appeal is now pending. When he appeared in the superior court, two psychiatrists were appointed to examine him, a hearing was set for October 29 and his bail was increased to $7500. Having been remanded to the custody of the sheriff, the prisoner upon instituting this proceeding for a writ of habeas corpus was released on bail in the sum of $1000 pending a hearing upon the writ. He demands his release from custody on the ground that the superior court had no authority to increase bail as previously fixed by the municipal court, and if such authority does exist, $7500 bail is excessive and contrary to constitutional inhibitions.

[1] This court recently determined that as a matter of right a person is entitled to be released on bail pending a determination of whether or not he is a sexual psychopath. In re Keddy, 105 Cal.App.2d 215, 233 P.2d 159. The question now to be answered is whether the superior court has the authority to fix such bail.

[2] From an examination of the sexual psychopath laws and the Penal Code provisions concerning bail the conclusion is unavoidable that such power does exist. Although the sexual psychopath act has no provision with reference to bail it does set forth a definite procedure for the disposition of a person accused of being a sexual psychopath when a municipal court has, from evidence adduced upon the trial of a misdemeanor, concluded that there is probable cause for believing the defend-

ant to be a sexual psychopath, it adjourns further proceedings and certifies the prisoner to the superior court. For the present, its powers to proceed further are exhausted. The defendant then stands before the superior court for examination and hearing. Only upon a determination by the superior court that the accused is not a sexual psychopath or has recovered from his sexual psychopathy does the court in which the case originated regain jurisdiction in the matter. Welfare and Institutions Code, sec. 5502.

[3, 4] It follows that the municipal court would not be the "competent court" referred to in Penal Code section 1268[1] as "a *competent court or magistrate*" by reason of the fact that its jurisdiction over the accused person is suspended upon the certification. Neither is the municipal court judge when trying the misdemeanor acting as a "magistrate" under Penal Code section 1268. As a judge of the municipal court he is a trial judge deliberating as a court. Welfare and Institutions Code, sec. 5501. He is not acting as a magistrate under Penal Code, section 807, inasmuch as a sexual psychopath proceeding is not regarded as a criminal action. In re Keddy, supra, 233 P.2d 159; see People v. Crespi, 115 Cal. 50, 54, 46 P. 863.

[5, 6] The remaining question is whether the bail as fixed at $7500 is so excessive as to be in contravention of Article I, section 6 of the Constitution of California, providing in part that "Excessive bail shall not be required * * *." The fixing of the amount of bail is largely within the discretion of the trial court and the appellate courts will not interfere unless an abuse of this discretion is manifest. Only when it is apparent *per se* that the amount fixed is "unreasonably great and clearly disproportionate to the offense involved" will we order a reduction. In re Tsuji Horiuchi, 105 Cal. App. 714, 715, 288 P. 708, 709. Of course, "discretion" under this rule does not mean a completely unbridled discretion, but rather it contemplates the exercise of a sound legal discretion. A number of factors must be considered such as the seriousness of the offense charged, the defendant's previous record and the probability of his appearing for the trial if at large. Penal Code, sec. 1275; In re Tsuji Horiuchi, supra, 105 Cal. App. at pages 715–716, 288 P. 708.

[7] Although in the instant matter the sum of $7500 at first blush appears to be excessive bail for one accused of a psychopathic malady based upon misdemeanor convictions only, it is clear from petitioner's record that the court did not abuse its discretion. Beginning with the year 1922 petitioner has been successively adjudged guilty of burglary, grand larceny, violation of the Dyer act[2] and of first degree murder. While serving time in Utah for a Dyer act violation, he escaped from prison. He was on parole from a prison term imposed for the murder conviction at the time of his commission of the misdemeanors culminating in the sexual psychopath certification. In view of such a consistent pattern of behavior, it cannot be said that the court below acted otherwise than with propriety and wisdom.

Petitioner demands that the sexual psychopath proceedings be stayed pending the outcome of his appeal from the misdemeanor convictions. Although the point is not made clear in his brief, apparently he contends that the superior court lacks jurisdiction to proceed to a final determination in the sexual psychopath proceeding until petitioner's conviction is affirmed on appeal.

[8] The answer to such contention depends upon the interpretation to be given the word "convicted" in Welfare and Institutions Code, section 5501(a) which provides that "When a person is *convicted* of any criminal offense * * * the trial judge * * * may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court * * * to determine whether the

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[1] Penal Code, section 1268. "Admission to bail is the order of a competent court or magistrate that the defendant be discharged from actual custody upon bail."

[2] 1948 Revised Criminal Code, 18 U.S.C.A. §§ 2311–2313.

person is a sexual psychopath * * *." The meaning of the term "convicted" is definitely fixed. It does not necessarily mean a final determination of guilt after an appeal has been taken. It does not mean the judgment based upon the verdict. It is the verdict itself. It is the ascertainment of guilt by the trial court. People v. Clapp, 67 Cal.App.2d 197, 200, 153 P.2d 758. Accordingly, in the absence of an expression of a contrary legislative intent it must necessarily follow that immediately upon the trial court's determination of guilt the superior court had jurisdiction to proceed with the sexual psychopath hearing upon certification by the municipal court.

[9] It may not be amiss to observe that notwithstanding such jurisdiction in the superior court, it has the discretion in a proper case to continue a sex psychopath proceeding until the appeal from the municipal court has become final.

It is ordered that the writ be and is discharged and the petitioner is remanded to the custody of the sheriff.

McCOMB, J., concurs.

* * *

107 Cal.App.2d 436

DAVIS et al. v. BASALT ROCK CO., Inc.

Civ. 7912.

Sac. 6138.

District Court of Appeal, Third District, California.

Nov. 8, 1951.

Hearing Denied Jan. 3, 1952.

Action by Alice M. Davis, individually and as administratrix of the estate of J. E. Davis, deceased, and another against the Basalt Rock Company, Inc., a corporation, to have the respective rights and obligations of the parties to a written contract declared for damages for past breaches. From a judgment of the Superior Court, Napa County, Benjamin C. Jones, J., for defendant, plaintiffs appealed. The District Court of Appeal, Van Dyke, J., held that the trial court's interpretation of the contract was reasonable and supported by the evidence and that the defendant had not breached the contract as interpreted.

Affirmed.

1. Evidence 🔑458

In action on contract whereby plaintiff assigned option rights to property in return for which defendant grantee was to sell pumicite and vesicular basalt to plaintiff at a certain price in a certain mixture and in quantities as plaintiff might desire, contract was sufficiently ambiguous to justify introduction of facts and circumstances surrounding execution of the contract.

2. Appeal and Error 🔑1008(3)

Where evidence of facts and circumstances surrounding execution of contract were admitted to explain ambiguities and evidence reasonably supported trial court's interpretation of contract, reviewing court was bound by trial court's reasonable interpretation.

3. Sales 🔑72(1)

Under contract whereby defendant was to supply from its mines pumicite and vesicular basalt to plaintiffs for manufacture of plaster, defendant was only bound to supply materials of a grade produced for its own purposes and by its customary process and was not required to selectively work its mine to get pure material or to dry the material.

4. Sales 🔑68

Under contract whereby defendant, who was engaged in the mining of pumicite and vesicular basalt, was to supply plaintiffs with a blend of materials which blend the plaintiffs were free to change, within limits, as their formula for plaster mixture was varied, plaintiffs were to supply any materials other than pumicite and vesicular basalt at own expense and were to pay defendant for mixing of such other materials into the blend.

5. Sales 🔑76

Under contract whereby defendant was to supply pumicite and vesicular basalt to plaintiffs at a certain price based on a blend set forth in a formula with permitted variations, defendant was only bound to sell at that price when sold in that mixture and purchases otherwise made were to be paid for at a reasonable market price at time of purchase.

6. Sales ⚿83

Under contract whereby defendant was to supply plaintiffs with materials at a certain price per ton in bulk or in sacks or in other containers furnished by plaintiffs, plaintiffs were entitled to delivery only in sacks containing 80 or 100 pounds customarily used when the contract was made, and not in one pound packages.

7. Sales ⚿86

Where buyer, under a contract for materials, contracted to convey to another the right to purchase any materials which buyer was authorized to purchase under the contract and that right was conditioned on payment to buyer by the other, from time to time as the other made purchases, sums equal to 40 per cent of payments made to seller under the contract, no assignment of the contract was made and the other did not, by reason of his contract, obtain any right to compel the seller to sell and deliver materials to him.

8. Assignments ⚿18

Generally, unless by law or contract prohibited, contracts are assignable, but whether they are or not is determined by consideration of the contract and the various obligations and rights of parties thereto which inquiry is not foreclosed by recital of assignability in contract itself.

9. Sales ⚿86

A contract to supply materials the blend of which could be modified by buyer from time to time within certain limits and providing for credit to the buyer was not assignable by its nature, notwithstanding the contract contained a clause that it should inure to the benefit of the assigns of all parties.

10. Trusts ⚿110

In action on contract where it was found that defendant had not breached its contract to supply plaintiffs with materials from its mine, plaintiffs were not entitled to have the mining property held in trust for their benefit.

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Gardiner & Riede, San Rafael, for appellants.

Riggins, Rossi, King & Kongsgaard, Napa, King & Ghidella, Napa, for respondent.

VAN DYKE, Justice.

[1, 2] This is an action whereby plaintiffs and appellants sought to have declared the respective rights and obligations of the parties to a written contract. By additional counts contained in the complaint, and based upon their construction of the contract, they further sought to recover damages for past breaches by defendant and respondent. Throughout the trial plaintiffs and appellants claimed that the contract was uncertain and ambiguous. They sought to introduce, and were by the trial court permitted to introduce, evidence of the facts and circumstances attending the execution of the contract as an aid to its interpretation. We think the contract was sufficiently ambiguous to justify the introduction of such evidence. The result is that this Court upon appeal is bound by the interpretation of the trial court where it is reasonable and is supported by the evidence introduced. Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17; Crillo v. Curtola, 91 Cal.App.2d 263, 272, 204 P.2d 941; Nuland v. Pruyn, 99 Cal.App.2d 603, 609, 222 P.2d 261.

The contract was executed on May 6, 1938, between Soule Steel Company, J. E. Davis and Alice Maud Davis, his wife, as first parties, and defendant and respondent Basalt Rock Company, Incorporated, as second party. We shall refer to the parties as Soule, Davis and Basalt. It recited that Soule and Davis were the owners of an option to purchase certain real property in Napa County which would expire unless exercised before noon of the following day, May 7, 1938; that Soule and Davis would assign their option rights to Basalt which would in time exercise the option and purchase the real property at the option price of $7,500. Basalt agreed that over a period of 50 years it would sell to Soule and Davis or either of them "as they or either of them may require, such amounts of Pumicite and Vesicular Basalt of any size for plastering purposes and Pumicite and Vesicular Basalt for any other purposes of a size up to a maximum of three-sixteenths inch (3/16) mesh." The agreed price for the material to be sold was $2.50 per ton in bulk or in sacks or in other containers furnished by the purchasers, the price being declared to be "based on a blend of Pumicite and Vesicular Basalt in accordance with the formula attached." The buyers were permitted variations in the formula both as to sizes and as to the percentages of materials in the blend. The buyers could also require still greater variation and could change the materials in the mixture provided they paid the additional cost of production. The contract declared that "all references to Pumicite are intended to refer to the Pumicite contained on the real property hereinabove mentioned, but Pumicite of equal quality may be substituted therefor"; that references to vesicular basalt were intended to refer to the vesicular basalt contained on Basalt's real property located near Napa, permission being given to substitute other vesicular basalt of equal quality. It is not necessary at this point to further detail the contractual provisions.

It appeared from the evidence and the court found that the real property to be purchased by Basalt, commonly known as the King Deposit, was composed in greater part of fragmentary pumice. Specifically the court found that "contained in said real property is a deposit of an agglomerate of fragmental volcanic debris and pyroclastic material, consisting in large part of fragments of pumice, subordinate portion of fragments of nonpumiceous lavas varying in size from fine sand up to fragments several feet in diameter, and a mineral cementing the aforesaid fragments together containing silica, ferric oxide, alumina, lime, magnesia and moisture" and "that the pumice in said material has been referred to by all persons involved herein as pumicite and is herein referred to as pumicite" and "that said deposit contains approximately four million tons of said material above the present floor level of the quarry and extends to unknown depths". Basalt had for years prior to the date of the contract been engaged in the extensive production of aggregates, including materials for concrete mix. It had a number of properties from which such material was taken and owned land from which it procured a vesicular basalt referred to in the contract. It had conducted many experiments through the years concerning the materials it was producing and had use for the material contained in the King Deposit. Soule and Davis on the other hand had likewise been experimenting for some time, endeavoring to fix upon a method of producing from the vesicular pumice and basalt found in the Napa region a light-weight plaster mix. Basalt was not particularly interested in plaster such as Soule and Davis were endeavoring to produce and they in turn were not interested especially in concrete mix or building block material produced and sold by Basalt. They had not completed their determinations as to a proper formula for plaster mix, but believed themselves close to that result. The formula referred to in the contract was not even ready when the contract was signed, but was completed and attached to the contract about a week thereafter. It read as follows:

"*By Volume*

40% pumicite—Minus 10 mesh and Plus 20 mesh
20% Vesicular Basalt—same mesh as above
20% Antigorite
20% River Sand"

Geologists testified that pumice might be called a volcanic glass froth so permeated by vesicles of various sizes down to microscopic sizes as to render the mass in many instances light enough to float in water, and that vesicular basalt possessed the same sort of vesicles but was generally heavier than pumice; that the chief use of pumice was as an abrasive. Antigorite was defined as a laminated stone.

[3] Appellants contended that under the contract they were entitled to purchase pumice from the subject land which had been selectively mined so as to be free from any other substance such as the non-pumiceous lavas and the cementing material above referred to; that Basalt was obligated to so purify and process the material in the deposit as to produce a first quality pure pumice with like requirements as to the vesicular basalt from Basalt's own land and that it was further obligated to furnish to them at the contract price the materials referred to in the formula "selectively mined, mixed and dried all at its cost and expense." The issue as to drying arose because it appeared that in the natural state the material in the deposits contained a great deal of water which appellants contended must be eliminated.

With respect to the salient features of the contract the trial court found that the parties intended to agree and did agree that appellants could purchase under said contract materials of the sizes and grades specified "of the same quality and with the same degree or percentage of purity as may from time to time be produced by Basalt Rock Company for its own purposes and by its own customary processes" from the deposits referred to and that particularly the products from the King Deposit with respect to the content of pumice therein should have "at least the degree or percentage of purity prevailing generally in said deposit"; that respondent was not required by the contract to selectively mine the material from the deposit so that the pumice would be free from igneous rock and other foreign matters, but that it should furnish the materials in the deposit produced and processed by it in its usual manner; that as to the vesicular basalt called for appellants were not entitled to receive pure vesicular basalt rock but were entitled to have it processed and delivered to them from the respondent's deposit referred to in the contract as it was found in nature in that deposit.

We think the foregoing interpretations were reasonable and are supported by the evidence. Thus it was shown and the court found, although upon conflicting evidence, that it was when the contract was made and had been at all times thereafter commercially impossible to selectively mine the material in either deposit as demanded by appellants so as to produce either pure pumice or pure vesicular basalt; that Davis was thoroughly familiar with the characteristics of the King deposit; that it was shown that with respect to the water the deposits in their natural state by reason of their physical structure, principally the capillary nature of the vesicles contained in the material, were extremely wet and that it was commercially impossible to dry the same and in fact that such processing as was practicable in producing material of the mesh required necessitated washing, that is, handling by a wet process rather than a dry process; that such processing as was adopted by respondent was best adapted to remove impurities and produced as good a material as could be practically produced from the property. Also upon this matter of the purity of the pumice the court had the benefit of the acts of the parties through the years before any dispute arose. During this period Davis, who alone placed orders for material did not complain that the material from the King deposit processed, as the court found was intended, did not meet the contract requirements. Having in mind the rules of construction, we think the interpretation now being discussed is sufficiently supported by the language of the contract and the foregoing evidence to be binding here. We have not attempted to state all of the testimony upon which the court undoubtedly relied in arriving at its conclusions, but when the situation of the parties, as we have stated it from the record and the evidence adverted to are all considered the court, we think, arrived at a reasonable construction.

[4] Contrary to the contentions of appellants, the trial court found, with respect to price, that appellants were entitled to buy pumice and vesicular basalt at the contract price of $2.50 per ton, provided they were bought in a blend of the ingredients stated in the formula, and pro-

vided that the formula ingredients, other than pumice and vesicular basalt, be supplied by appellants to be mixed by respondent, the mixing, however, to be at appellants' cost and with machinery supplied by them. Appellants contended upon this matter that they were entitled to buy pure pumice at $2.50 per ton, pure vesicular basalt at the same price and that the additional formula ingredients, if demanded by them, must be furnished by respondent thoroughly mixed and blended at its cost. The trial court, as appears from its memorandum opinion, reasoned that the statement in the contract that the price was "based on a blend of pumicite and vesicular basalt in accordance with the formula" meant that the stated price was not the price of the finished blend with all materials and processing to be furnished and done by respondent, but was the price of the pumice and of the vesicular basalt. The contract, as hereinbefore quoted, specifically bound respondent to sell to appellants amounts of pumicite and vesicular basalt required by them and that the price to be paid was $2.50 per ton. Then the contract proceeded to place a limitation upon the foregoing language by providing that "this price is based on a blend of Pumicite and Vesicular Basalt in accordance with the formula attached hereto." When all of the language concerning what is agreed to be sold and the price therefor is considered, along with the evidence as to the circumstances and the conditions attending the execution of the contract, we think the court's interpretation finds adequate support. It was known that a formula would be attached to the contract which might call for whatever admixtures, in addition to pumice and vesicular basalt, the appellants might require, and it would be unreasonable to suppose that respondent, when it executed the contract, was agreeing that this formula could or would contain any additions to materials which it was specifically agreeing to furnish, however great the cost thereof and however great the proportion thereof to other materials required by the formula. In effect, appellants contend that at that moment respondent signed a blank check to be filled in by appellants, and appellants' attorney, who testified as to the discussions that took place when the contract was being negotiated, took the advanced and bold position at the trial by way, we think, of illustration that this formula could have been written so that instead of 20% antigorite it might have called for 20% of gold dust, all to be furnished, mixed and blended at the cost of respondent. It appeared that no one had discussed just what these admixtures would be as per formula; that antigorite was unknown as an element of plaster mix; that no one was in the business of supplying it for any purpose; that even appellants were at that time uncertain as to what admixtures they would require; and it is reasonable, therefore, to conclude that the parties were so contracting that appellants might call for any additional ingredients they might please, but such additional ingredients were to be furnished by them and mixed and blended at their cost and expense with the materials, that is, the pumice and vesicular basalt, specifically agreed to be furnished and sold to them by respondent.

[5] The trial court construed the contract as fixing the price only for the pumice and the vesicular basalt when sold in the admixture specified in the formula or within the permitted variations from that formula and further declared that the contract specified no price for either pumice or vesicular basalt if purchased without the addition of river sand and antigorite as stated in the formula. What has heretofore been said applies to this conclusion of the court and we think the construction was both reasonable and supported by the evidence and the inferences permissible therefrom. The contract expressly states that the price of $2.50 per ton for pumice and vesicular basalt, which the respondent agrees to sell, is based on the blend set forth in the formula, which is to say that it is confined thereto. Purchases of pumice and basalt otherwise made would have to be paid for at the reasonable market price at the time of purchase.

[6] The appellants contend that under the contract they are entitled to have the

material purchased by them delivered to them in such containers, sacks or packages as they desire and furnish for that purpose, and in line with this contention it appears that orders had been received that some material be delivered in one pound packages. The trial court found that they were entitled to have deliveries made in such containers as were customarily used at the time the contract was made, and from the evidence found that these containers were generally cloth, burlap or gunny sacks containing 80 to 100 pounds each. The construction contended for by appellants is unreasonable and we think the one made by the court is both reasonable and in accordance with the evidence.

[7] The trial court found that the contract had not to any extent been assigned to appellant Schwartz and further that it was not assignable. Schwartz was one of the plaintiffs before the trial court and is one of the appellants here. Some time before the action was brought he and J. E. Davis, now deceased, entered into a contract which appellants now claim to have been an assignment. It does not in express language purport to be such and the trial court found that it was not. On the contrary, it purports to give to Schwartz the right to purchase under the contract any materials which Davis was thereby authorized to purchase. This right was agreed to be conditioned upon the payment by Schwartz to Davis of sums of money from time to time as he made purchases, equal to 40% of payments made by him or his customers to respondent. We think the trial court correctly held that this was not an assignment. Respondent had agreed to sell the material to Soule and Davis. To permit them to bind the respondent to sell to others upon the same terms would make the contract unduly burdensome. For instance, there was the right on the part of Soule and Davis to vary the formula within certain limits whenever they placed an order. It is easy to see what would happen to respondent if they in turn would authorize a thousand customers of theirs to order material, each one wanting a different formula followed. The trial court correctly held that Schwartz did not obtain by reason of the contract between himself and Davis any right to compel respondent to sell or deliver material to him.

[8, 9] The trial court further held that the contract was of such nature that it was not assignable, notwithstanding it contained a clause stating that it should "inure to the benefit of and be binding upon the heirs, administrators, executors, successors and assigns of all the parties hereto." Generally, unless by law or contract prohibited, contracts are assignable. But whether they are or not is to be determined by consideration of the contract and the various obligations and rights of the parties thereto. This inquiry is not foreclosed as a matter of law by a recital of assignability such as is contained in the contract before us. As was said in Montgomery v. De Picot, 153 Cal. 509, 96 P. 305, 307, where the agreement was for a conveyance by defendant therein of property to the second part to the contracts whose assignee the plaintiff was: "These, however, are general provisions of the contract, and are not conclusive upon the subject of assignability. The use of such language in a contract is not in every case absolutely determinative of its character. * * * Notwithstanding its use the intention of the parties must be gathered from a consideration of the terms and entire tenor of the contract, and if upon such consideration it appears that the contract calls for the performance of an obligation purely personal in its nature, the rule in general is that the obligation, if personal, cannot be assigned without the consent of the party to be benefited."

We think the trial court correctly reasoned that under the peculiar provisions of this contract and in view of the unusual conditions that existed when it was executed it was never the intention of any of the parties that respondent should be burdened by having to perform it with any one other than the parties with whom it made it. We have referred to some of these conditions and will not restate them here. Additionally it was shown by the evidence that when the contract was made Soule and Davis believed that they would be able, through perfecting a formula not then perfected, to establish a business of selling a light-weight plaster mix. The idea was not a new one; a number of others had attempted to accomplish this with no general success. There was grave doubt as to whether it could be achieved and particularly was there grave doubt as to whether it could be done with the pumiceous material contained in the King deposit. Respondent might well be willing to go along with Soule and Davis, permitting them to change their formula as experience might dictate in the effort to produce a better mix, but this they might well be unwilling to do with successors by assignment. As the trial court said: "The reading of it indicates that it was not intended to create anything more than a personal obligation to Soule and Davis. Fundamentally it is based upon the personal requirements of these parties in the use of Pumicite in the plastering field. The terms of the agreement itself demonstrate that the burden of meeting the demands of Soule and Davis would be one kind of a burden upon the defendant, and that the demands and requirements of multitudinous assignees with other purposes in view would be quite another. That such was not intended to be contracted for by the defendant is obvious. The variations in the formula permitted by the contract are so wide that about the only controlling factor was the extent and character of the plastering business of Davis and Soule. The defendant was definitely willing to meet the requirements of this business, but it just as definitely appears that it did not intend to obligate itself to meet the requirements and demands of any one whom Davis and Soule might select. The requirements of the latter might be such as to compel the defendant to devote its entire resources to this end to the exclusion of its own business, making out of itself an adjunct of the assignee. No such intention can be read into the contract."

There are also provisions in the contract for the extension of credit to Soule and Davis in that they are permitted to buy and pay on the 10th of the month following delivery; also permitting them to make such changes in their formula as they desired, provided that any machinery for producing it especially required by reason of such changes in formula would be supplied by them. We think it clear that the interrelations set up by this contract were such that the court was fully justified in declaring that the contract was personal and was not assignable.

[10] The other issues tendered by the pleadings depended in the main part upon the correctness of the trial court's interpretation of the contract and with that interpretation in mind the trial court found that respondent had not been guilty of breaching the contract and that, therefore, appellants were not entitled to damages as prayed for, that the consideration of the contract had not failed and that therefore appellants were not, as claimed, entitled to have the property declared to be held in trust for their benefit by respondent. These findings are supported by the construction of the contract and also by testimony that the respondent had lived up to its obligations as so construed.

We think that the court properly disposed of the issues presented and that the judgment ought to be and it is hereby affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting.

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107 Cal.App.2d 332

JOHNSTON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 18666.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1951.

Proceedings by Elwood B. Johnston for a writ of prohibition directed to the Superior Court of the State of California, in and for the County of Los Angeles, commanding that court to desist from taking further proceedings against petitioner for the payment of alimony and counsel fees and to refrain from further proceedings upon the application of petitioner's wife for an order that petitioner

pay fees and costs demanded to enable her to defend the petitioner's appeal from an order for alimony and attorney's fees. The District Court of Appeal, Per Curiam, held that the writ must be denied since the petitioner had a plain, speedy and adequate remedy at law, by appeal.

Order in accordance with opinion.

Prohibition 🔑3(5)

Husband would have plain, speedy and adequate remedy at law, by appeal from order granting wife's application for fees and costs to enable her to defend husband's appeal from alimony order, and such remedy would not be rendered inadequate by reason of husband's financial inability to furnish bonds to stay any order appealed from, and therefore, husband would not be entitled to writ of prohibition directing court not to proceed further upon wife's application.

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Edgar J. Melchione and Earl Oakley, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, John B. Anson, Deputy County Counsel, Los Angeles, for respondent.

Walley & Davis and Milton Davis, all of Los Angeles, for Lillian Grace Johnston.

PER CURIAM.

It appearing (1) that petitioner appealed from an order of respondent requiring petitioner to pay his former wife sums of money as alimony and attorney's fees; (2) that thereafter petitioner was ordered to show cause before respondent why he should not be required to pay his former wife $3500 for attorney's fees and $750 on account of costs in connection with such appeal; and (3) that respondent threatens to make the order demanded by the former wife which, if made, will cause petitioner irreparable damage; and

It appearing that petitioner demands that a writ of prohibition be directed to respondent commanding it to desist from taking further proceedings against petitioner for the payment of alimony and counsel fees and to refrain from further proceedings upon the application of the wife for an order that petitioner pay the fees and costs demanded to enable her to defend petitioner's appeal from the order for alimony and attorney's fees; and

It appearing that petitioner has a plain, speedy and adequate remedy at law by appeal, Phelan v. Superior Court, 35 Cal.2d 363, 370, 217 P.2d 951; Lindley v. Superior Court, 141 Cal. 220, 74 P. 765; Mitchell v. Superior Court, 98 Cal.App.2d 304, 219 P.2d 861, and that such remedy is not rendered inadequate by reason of petitioner's financial inability to furnish bond to stay any order appealed from, Dickerson v. Superior Court, 41 Cal.App. 534, 536, 183 P. 235;

It is ordered that the alternative writ issued be and it is dissolved and a peremptory writ is denied.

MOORE, P. J., and McCOMB, J., concur.

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107 Cal.App.2d 519

PEOPLE v. McKAY et al.

Cr. 4648.

District Court of Appeal, Second District,
Division 3, California.
Nov. 14, 1951.

Robert Fred McKay, and others, were charged with robbery and the named defendant was found guilty in the Superior Court, Los Angeles County, Edwin L. Jefferson, J., and he appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal Law 🔑351(2)

In prosecution for robbery, evidence that accused and a companion gave policeman false information concerning their reason for being in alley at time they were apprehended, that they had an automobile which accused admittedly owned, and that accused and companion were found together, was relevant and properly admitted.

2. Criminal Law ⚷349

In prosecution for robbery, evidence that a gun, owned by companion of accused, was found in booking tank at police station after accused and companion had been confined therein, was properly admitted.

3. Criminal Law ⚷351(2)

In prosecution for robbery, testimony as to statements made by accused following arrest concerning his probable return to the California Youth Authority tended to indicate a consciousness of guilt and was properly admitted.

4. Criminal Law ⚷407(1)

Refusal on part of accused robber to make any statement or denial when informed that he had been identified as one of the robbers tended to indicate a consciousness of guilt.

5. Robbery ⚷24(1)

Conviction of robbery was sustained by the evidence.

◆

Edmund I. Read, Wilmington, for appellant.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant McKay was accused of two offenses of robbery with codefendants McCabe and Henderson and one offense of robbery with his codefendant Henderson. It was alleged that the defendants had been armed with an automatic pistol, a deadly weapon. It was also alleged that appellant had suffered two prior convictions of robbery and one of violation of section 503, Vehicle Code, a felony. In a trial by jury McKay was found guilty of two offenses of first degree robbery and it was found that he was armed as alleged at the time of the commission of each offense. Motion for a new trial and application for probation were denied. Count III of the information was dismissed. He appeals from the judgments and from the order denying his motion for a new trial. The evidence is not challenged for legal insufficiency although it is argued that it raised a reasonable doubt of guilt.

The first count of the information charged the robbery of one Propker, proprietor of a liquor store. Propker testified that one man he identified as Henderson, who had pleaded guilty, pointed a revolver at him during the robbery; that McKay came in with Henderson and McCabe and inquired about some merchandise and stood by while the robbery took place and that McCabe watched the front entrance of the store. $200 was taken from the cash register. The offense charged in Count II was the robbery of another liquor store shortly before the robbery of Propker. The clerk in this store, Kay Choi, identified appellant and Henderson as the persons who robbed him and testified that Henderson held a gun on him while the two robbed him. He was ordered into another room where he went accompanied by appellant and where he remained until the two defendants left.

Some two weeks after the robberies appellant and Henderson were apprehended in an alley late at night. Two police officers questioned them as to what they were doing. Appellant said their car had run out of gas, that they were going to a restaurant and, after that, to a gas station for gas. They were observed to go to the restaurant and to return to their car with a gallon of gas. They were told that their gas guage had been checked and it showed that they had a quarter of a tank of gasoline. The car started immediately when the starter was operated at the request of the officers. Defendants were arrested and taken to the South Gate Police Station, where they were searched. No gun was found. Appellant was taken into the booking tank, Henderson into the interrogation room. Appellant was taken from the booking tank into the lieutenant's office. The tank was searched after he left it but nothing was found. Henderson was then placed in the booking tank where he remained about twenty-five minutes. No other prisoner had been there after appellant left.

Thereafter, a police sergeant entered the booking tank and found an automatic pistol which contained five cartridges in the clip and one in the chamber. Appellant admitted having seen the gun in a bookcase at Henderson's home. Later appellant was questioned at the University Station in Los Angeles in the presence of two Long Beach police officers, Inspector Wiggens and another officer, who had brought appellant to the station. Tidyman, a Los Angeles officer, testified that in the presence of appellant Wiggens stated that on the way up in the car appellant stated that "if something could be worked out where he could be returned to the California Youth Authority that he might be willing to talk then, but otherwise he couldn't afford to make any statements whatsoever"; that he, Tidyman, asked appellant if that was right and he said it was, that "he had to take his chance on beating it because he just couldn't afford to make any statement under the circumstances." The witness also testified that he told appellant that the police had positive identification of him as one of the robbers, that he asked appellant if he wished to make any statement and that appellant declined to do so.

[1] Appellant complains of error in the admission of evidence as to the circumstances of his arrest, in that it tended to prove that he and Henderson were preparing to commit some other crime such as burglary or robbery. We do not believe the evidence carried such an implication. The actions and statements of appellant and Henderson, as described, were perfectly normal except for the fact that they may not have been out of gas as appellant claimed. Evidence that they had a car, as the robbers did, that appellant admitted ownership of it, and that they were found together was relevant.

[2] It is also contended that appellant's objection to the testimony as to the finding of the gun should have been sustained. The ground of the objection appears to be that the testimony was obviously false inasmuch as Henderson and appellant had previously been searched and no gun had been found. Appellant argues that it was more reasonable to believe that some officer had taken the gun from Henderson's home and placed it in the booking room at the station. The gun belonged to Henderson, appellant knew this, and the gun, which was placed in evidence, was recognized by the witnesses as of the same general appearance as the one used by the robbers. We find no error in the admission of evidence as to the circumstances of appellant's arrest or the discovery of the gun.

[3, 4] The court did not err in overruling appellant's objection on the ground of hearsay to testimony as to appellant's statements concerning his being returned to the California Youth Authority. It did, as he claims, indicate forcibly that he had been in trouble before, but it also tended to indicate a consciousness of guilt, as did his refusal to make any statement or denial when informed that he had been identified as one of the robbers. People v. Hurst, 108 Cal.App. 24, 290 P. 887; People v. Yeager, 194 Cal. 452, 486, 229 P. 40.

[5] Although appellant presented a defense of alibi, he was positively identified by the victims of the robberies, as was Henderson. He was given a fair trial, and the verdicts have ample support in the evidence. Appellant's motion for a new trial was properly denied.

The judgments and order denying motion for a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

38 Cal.2d 42

In re TARRANT'S ESTATE.

BROWN et al. v. GREAT NORTHERN RY. CO. et al.

BROWN et al. v. McGRATH, U. S. Atty. Gen., et al.

L. A. 21772.

Supreme Court of California, in Bank.
Nov. 16, 1951.

Ben H. Brown, Public Administrator and administrator with the will annexed of William Tarrant, also known as William F. Tarrant, deceased, filed his first and final account and report and petitioned for instructions relative to residue of estate remaining after he had paid debts and provided for charges and expenses of administration. The Superior Court, Los Angeles County, John Gee Clark, J., entered a judgment of distribution whereby bequests to certain pension funds were declared invalid and the property so bequeathed was declared to escheat to the State of California for want of heirs, and the Great Northern Railway Company, Veterans Association Great Northern Railway Company, Canadian Pacific Railway Company Pension Fund, and United States of America Railroad Retirement Board, contestants, appealed, and were opposed by the Public Administrator, and the State of California, claimant, and John Tarrant, heir-at-law. The Supreme Court, Spence, J., held that the bequests were valid as being charitable trusts.

Judgment reversed with directions.

Prior opinion 232 P.2d 43.

1. Charities 🔑31

Courts look with favor upon all attempted charitable donations and will endeavor to carry them into effect if it can be done consistently with rules of law, and a bequest intended as a charity is not void.

2. Charities 🔑1

The scope of the word "charity" changes and enlarges with needs of men and must advance with progress of civilization so as to encompass varying wants of humanity coming within its spirit.

3. Charities 🔑31

Policy of law is to favor gifts for charitable purposes.

4. Charities 🔑31

A will providing charitable gifts will be liberally construed to accomplish intent of donor.

5. Charities 🔑20(1)

A charitable bequest may be made to a noncharitable institution so long as purpose of bequest remains charitable.

6. Charities 🔑10

A will made by an outsider to pension fund of railroad, used solely for benefit of retired employees of railroad, in which fund railroad did not have any direct beneficial interest, was valid as a charitable trust even if railroad would thereby be relieved of necessity of continuing to make voluntary contributions it had been making to fund to maintain sufficiency of fund. Probate Code, § 27.

7. Wills 🔑448

Speculation and conjecture as to testator's intention may not be followed by court in order to avoid a conclusion of intestacy.

8. Wills 🔑520

A testamentary bequest will not be permitted to fail because of misnomer, misdescription, or ambiguity of description.

9. Charities 🔑37

Where testator who bequeathed part of his estate to pension fund of a railroad which did not have a separate pension fund knew that there was some fund which was administered by some unit connected with railroad and in aid of railroad employees, and intended to identify his bequest with such fund, bequest would not be held invalid but would be given to such unit. Probate Code, § 27.

10. Charities 🔑10

Bequest to pension fund of Railroad Retirement Board, and unincorporated independent agency of federal government, was valid as a charitable trust. Probate Code, § 27.

11. Charities 🔑10

Fact that recipient of charitable bequest is already engaged in charitable project for use of which bequest was made would not render bequest noncharitable. Probate Code, § 27.

12. Appeal and Error ⚿1010(1)

Findings of trial court will not be disturbed on appeal if record discloses substantial evidence to support them.

◆

Ernest A. Tolin, U. S. Atty., Clyde C. Downing and James C. R. McCall, Asst. U. S. Attys., Los Angeles, Blek, Wilcox & Donahue, C. F. Wilcox and Elton D. Boone, Jr., Inglewood, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondents.

SPENCE, Justice.

This is an appeal from a judgment of distribution whereby bequests to certain pension funds were declared invalid and the property so bequeathed was held to escheat to the State of California for want of heirs. Probate Code, sec. 231. The appealing legatees contend that the respective bequests are charitable in purpose and should be so enforced by appropriate order. Their position is well taken in the light of the record and the applicable law determinative of the validity of charitable gifts.

William Tarrant died on January 13, 1946, a resident of the county of Los Angeles, this state. His last will was duly admitted to probate and the public administrator was appointed administrator with the will annexed. After paying all debts and providing for all charges and expenses of administration, the administrator filed his first and final account and report, and petitioned for instructions relative to the distribution of the residue of the estate ($6,213.59 in money). So presented for construction were the provisions of the will whereby the testator bequeathed his estate in equal one-third shares to (1) the "Pension Fund of the Canadian Pacific Railway Company of the Dominion of Canada, with General Offices at Montreal, Canada"; (2) the "Pension Fund of the Great Northern Railway Company, a corporation, with head offices at St. Paul, Minnesota"; and (3) the "Pension Fund of the Railroad Retirement Board with Headquarters at Washington, D. C., which fund is administered by the Treasury Department of the United States Government," with the added proviso that if the said Board could not accept, its one-third should go to the other "two Pension Boards * * * in equal parts." After a hearing, the probate court held that the bequests were non-charitable in nature, that the claimant legatees were ineligible to take by will under Probate Code, section 27, and that the property should escheat to the state. From the judgment accordingly entered, the legatees appeal, contending that the court misconstrued the purport of the bequests and erroneously applied the cited statute.

[1–4] "Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good." Estate of Hinckley, 58 Cal. 457, 513; Collier v. Lindley, 203 Cal. 641, 654, 266 P. 526; Estate of Bunn, 33 Cal.2d 897, 903, 206 P.2d 635; see 14 C.J.S., Charities, § 6a, p. 427. Since the enactment of the Statute of Charitable Uses in 1601 (43 Eliz. c. 4; 7 Pickering's Eng. Stats. p. 43), provisions for the "supportation, aid and help of young tradesmen, handicraftsmen and persons decayed" have been recognized as charitable in their design to "accomplish objects which are beneficial to the community." Rest., Trusts, sec. 368. The scope of the word "charity" changes and enlarges with the needs of men and must advance with the progress of civilization so as to encompass varying wants of humanity properly coming within its spirit. People ex rel. Attorney General v. Dashaway Association, 84 Cal. 114, 122, 24 P. 277, 12 L.R.A. 117; Rest., Trusts, sec. 374. It is the policy of the law to favor gifts for charitable purposes, and a will providing such gifts will be liberally construed in order to accomplish the intent of the donor. Estate of Yule, 57 Cal.App.2d 652, 654, 135 P.2d 386; see, also, 14 C.J.S., Charities, § 11, p. 437; Estate of McDole, 215 Cal. 328, 335, 10

P.2d 75; Estate of DeMars, 20 Cal.App.2d 514, 517, 67 P.2d 374. Consistent with these principles, the validity of the challenged bequests as charitable trusts appears beyond dispute.

The respective bequests present differing factual considerations as disclosed by the probate court's memorandum opinion on file herein, Rules on Appeal, Rule 5(a), 36 Cal. 2d 1, 5, and they will be discussed in the order above named. In voiding the bequests, the court relied on section 27 of the Probate Code, which at the time involved and as here pertinent provided: "A testamentary disposition may be made to the state * * * to unincorporated religious, benevolent or fraternal societies or associations * * * to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes * * * or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

First: The Canadian Pacific Railway Company is a profit corporation organized and existing under the laws of the Dominion of Canada. In addition to its regular operations as a railway company, it administers as trustee a pension fund in which are deposited three per cent deductions from the salaries of employees. However, the employee contributions are insufficient to maintain the fund so the company on a "voluntary" basis also makes contributions thereto, which it may "alter, suspend or discontinue from time to time" as it should see fit. The pension fund is used solely for the benefit of the company's retired employees and as trustees, the "company does not have any direct beneficial interest therein."

[5] The nature of the bequest is not necessarily determined by the status of the organization to which it is made, for "A charitable gift may be made to a non-charitable institution so long as *the purpose of the gift* remains charitable." Estate of Henderson, 17 Cal.2d 853, 859, 112 P.2d 605, 608; emphasis added. Manifestly, a bequest in aid of pension relief for retired, non-self-supporting railroad men and their dependents is a charitable use in the classic sense, and the fact that the benefits are confined to the employees of a particular railroad company does not prevent such bequest from being charitable. 3 Scott on Trusts, sec. 375.2, p. 2026. Nor does it matter that the contributing employees in receiving the benefits from the funds may be deemed a non-charitable group in the nature of a mutual benefit society, in that "each individual is providing only for his own welfare and does not intend to make a * * * contribution toward the assistance of others." Estate of Henderson, supra, 17 Cal.2d at page 860, 112 P.2d at page 609. The significant consideration here is the charitable purpose of the testator in making the bequest to the organization as an independent donor and without any benefit to himself. The distinction was so noted in the Estate of Henderson, supra, where a will left property to the Eastern Star Homes for the use of its inmates. Regardless of the merit of the argument that the Home was similar to a mutual benefit association, with contributions from the members offsetting reciprocal benefits to them so that it should not be considered a charity, it was said at page 860 of 17 Cal.2d, at page 609 of 112 P.2d: "If an *outsider,* however, receiving no benefits from the organization, makes a gift to it, that gift may well be a charitable one if the members of the organization are sufficiently numerous and it is organized for a purpose beneficial to society." (Emphasis added.)

[6] From its memorandum opinion, it appears that the probate court invalidated the bequest on the following premise: that the pension fund was maintained at a fixed level, that the testator's contribution would neither increase the benefits to the individual beneficiaries nor decrease the contributions from the employees, but would only serve to relieve the company from making such voluntary contributions as it would otherwise make in order to maintain the sufficiency of the fund, and that therefore the company would be the direct beneficiary of the testator's bounty contrary to the terms of section 27 of the Probate Code in prohibiting such a corporation from taking in a private capacity under the will of a

California citizen. But even assuming the propriety of the observations as to the benefit that the company might sustain if it should elect to reduce its future contributions to the pension fund—a conjecture based wholly on surmise and speculation—the charitable purpose of the testator as *one outsider* making a contribution to the fund without benefit to himself, in establishing the nature of his bequest, cannot be affected because *another outsider* may make a less contribution *pro tanto*. Rather within the contemplation of the law, the company, like the testator, occupies the status of an "outsider" contributing as a donor to the pension fund and without benefit to itself; and its status does not change to a beneficiary merely because of any *pro tanto* reduction it may make in its future contributions. All the gifts of the donors to such fund remain charitable regardless of what their effect may be on other possible "outside contributors." Accordingly, regardless of the ineligibility of the company to take a testamentary disposition for its own benefit under the will, Prob.Code, sec. 27, it may receive a bequest as trustee if such bequest is for a charitable purpose. Estate of Henderson, supra, 17 Cal.2d 853, 859, 112 P.2d 605; Estate of Yule, supra, 57 Cal.App.2d 652, 654, 135 P.2d 386. Such is the case here, and the probate court erred in failing to sustain the bequest in question.

Second: The Great Northern Railway Company does not have a separate pension fund. However, there is a non-profit Minnesota corporation called the Veterans Association of the Great Northern Railway Company. Among the purposes stated in its articles of incorporation are the cultivation of social relations and knowledge of railroading among its members; the creation and maintenance of mutual interest in the common welfare of its members and of the Great Northern Railway Company; the establishment and administration of a pension fund for the benefit of its members; and the acquisition of property by bequest. The funds of the association consist of membership dues and voluntary donations made by a number of officers of the Great Northern Railway Company. Except for the actual expenses of running the organization, all of the funds are used to aid needy members, their widows and families. In this regard, it is also the policy of the association to make supplementary donations to those members receiving small pensions from the Railroad Retirement Board so that they may have an adequate amount to take care of their everyday living expenses.

In his petition for instructions, the administrator alleged that the testator intended the fund administered by the Veterans Association of the Great Northern Railway Company to be the subject of this bequest. There was no contradiction or denial made of this allegation by any party to these proceedings, but the court concluded that the bequest was invalid because no separate pension fund existed for the Great Northern Railway Company, and it could not be inferred that the testator intended a bequest to the Veterans Association of that company. This determination appears improper under the circumstances.

[7-9] While speculation and conjecture as to the testator's intention may not be followed by the court in order to avoid a conclusion of intestacy, Estate of Zilke, 115 Cal.App. 63, 66, 1 P.2d 475, it is well established law in this state that "a gift will not be permitted to fail because of misnomer, misdescription, or ambiguity of description." Estate of Steinman, 35 Cal.App.2d 95, 102, 94 P.2d 821, 825. It is evident from the terms of the bequest itself that the testator knew that there was some fund which was administered by some unit connected with the Great Northern Railway Company and in aid of the company's employees, and that he intended to identify his bequest with such fund. Upon such premise, application of the doctrine of *cy pres* would reasonably accomplish the dominant purpose of the testator to make a charitable bequest for the benefit and assistance of the company's employees. Powers v. Home for Aged Women, 58 R.I. 323, 192 A. 770, 776, 110 A.L.R. 1361; see 14 C.J.S., Case, Action on, § 10, p. 15; Estate of Hinckley, supra, 58 Cal. 457, 504; Collier v. Lindley, supra, 203 Cal. 641, 655, 266 P. 526; Estate of Loring, 29 Cal.2d 423, 436, 175 P.2d 524.

Third: The Railroad Retirement Board is an unincorporated independent agency of the United States Government. Said Board estimates the amounts necessary for the payment of pension benefits under the Railroad Retirement Act, Title 45 U.S.C.A. §§ 228a–s, and the funds therefor are accordingly appropriated by Congress. Ibid, secs. 228j, 228*o*. The railroads and their employees pay wage-taxes but these tax payments are wholly divorced from the pension fund. State of California v. Anglim, 9 Cir., 129 F.2d 455; certiorari denied 317 U.S. 669, 63 S.Ct. 74, 87 L.Ed. 537. Rather the pension payments are actual bounties of the United States Government dependent upon length of service and amount of earnings. In holding the testator's bequest to this pension fund as non-charitable, the probate court (1) likened the fund to a mutual benefit society or insurance company in that the employees through withholding taxes contributed to the payments for their own welfare; (2) observed that disbursements from the fund were not in any way based upon need; and (3) concluded that the bequest to the fund would only serve to relieve federal taxpayers through decreasing the amount which Congress would be required to appropriate for railroad retirement pensions, which relief is not a charitable purpose. This reasoning cannot be sustained.

[10, 11] In the first place and regardless of the discussion in the Estate of Henderson, supra, 17 Cal.2d 853, 859–860, 112 P.2d 605, declaring that a gift may be charitable in purpose though made to a mutual benefit association, the payment plan under the Railroad Retirement Act bears no resemblance to the design of a mutual benefit society, for the amount of the railroad employees' withholding payments—the wage-taxes—has no relation to the pension amounts the United States Government will pay to the railroad employees or their dependents. In other words, there is no such "earmarking" of the employees' contributions as a supporting source for the fund. Nor does it matter that the pension payments are not based upon need. "Need" is a wholly relative term and there is no clear line of "demarkation as to the requisite financial status of a particular recipient in order to justify the characterization of the benefit to him as charitable." In re Skuse's Estate, 165 Misc. 554, 1 N.Y.S.2d 202, 205. As was said in the Estate of Henderson, supra, 17 Cal.2d 853, at page 857, 112 P.2d at page 607: "Relief of poverty is not a condition of charitable assistance. If the benefit conferred has a sufficiently widespread social value, a charitable purpose exists." And finally, while the bequest may also work a benefit to the federal taxpayers, that fact does not change the charitable nature of the gift. The same observation would prevail with respect to the reduction of the taxpayers' burden in the situation discussed in the Estate of Hendrix, 77 Cal.App.2d 647, 176 P.2d 398, where a bequest to the United States Veterans' Administration was upheld as a gift for charitable purposes. In fact, the basic considerations in the Hendrix case likewise obtain here is placing the Railroad Retirement Board as a government agency in the same category as the Veterans' Administration there involved. In each instance the gift was for "charitable purposes to a legally constituted agency," a consideration distinguishing a "bequest to the 'United States Government,' without qualification as to administration or purpose." Estate of Burnison, 33 Cal.2d 638, 646, 204 P.2d 330, 335; affirmed United States v. Burnison, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675. Certainly the fact that the recipient of a charitable gift is already engaged in the charitable project for the use of which the donation was made would not render the gift non-charitable. Estate of Henderson, supra, 17 Cal.2d 853, 856, 112 P.2d 605.

[12] From the above analysis of the respective bequests to the separate pension funds, it is clear that the testator intended them as gifts for charitable purposes, and that they should be upheld as charitable trusts upon that premise consistent with his manifest intent. While it is true that "the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them," as was the case in California Employment Commission v. Betthesda Foundation, 54 Cal.App.2d 348, 350, 128 P.2d 874, 876, where the issue involved was the charitable status of the corporation in question, such rule has no pertinency where the evidence without conflict clearly establishes the impropriety of the inferences drawn by the court from the uncontroverted facts. So here it appears that the probate court erred as a matter of law in its adjudication of the determinative issue—the nature of the testamentary gifts—and in such circumstances its findings contrary to the undisputed facts have no binding force. Estate of Burnett, 11 Cal.2d 259, 263, 79 P.2d 89.

The judgment is reversed with directions to the probate court to proceed in accordance with the views herein expressed. Appellants will recover their costs on appeal.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

38 Cal.2d 73

NEW YORK LIFE INS. CO. v. HOLLENDER et al.

L. A. 21561.

Supreme Court of California, in Bank.

Nov. 21, 1951.

As Modified on Denial of Rehearing

Dec. 20, 1951.

The New York Life Insurance Company brought an action against Leo Hollender and Beatrice Hollender for reformation of life policy by adjusting amount payable under the policy in accordance with provisions of age adjustment clause, and defendant Leo Hollender filed a cross-complaint. The Superior Court, Los Angeles County, Joseph Marchetti, J., pro tem., rendered a judgment adverse to the plaintiff, and the plaintiff appealed. The Supreme Court, Spence, J., held that expiration of prescribed period in incontestable clause did not bar the action.

Judgment reversed.

Carter and Schauer, JJ., dissented.

Prior opinion, 225 P.2d 581.

1. Insurance 🔑400.4

Generally incontestable clause of life policy, after lapse of time it specifies, prevents nullification of policy for any cause not excepted in clause.

2. Insurance 🔑400.8

Denial of liability under life policy by reason of fraud or misrepresentation in its procurement is the "contest" which is governed by incontestable clause of life policy.

See publication Words and Phrases, for other judicial constructions and definitions of "Contest".

3. Insurance 🔑400.5

The raising of question of coverage afforded by life policy under application of age adjustment clause is not the "contest" which is governed by incontestable clause of life policy, and reformation of life policy by adjusting amount payable under policy in accordance with provisions of age adjustment clause was not barred by expiration of prescribed period in incontestable clause.

4. Insurance 🔑400.6

Incontestable clause in life policy is not a mandate as to coverage, and it means only that within limits of coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.

5. Insurance 🔑146(1)

In construing life policies the entire contract is to be construed together to give force and effect to each clause. Civ. Code, § 1641.

6. Insurance 🔑146(3)

In case of doubt provisions of life policy will be construed most strongly against insurer.

7. Insurance 🔑146(1)

Where terms of life policy are plain and explicit, court will indulge in no forced construction so as to cast a liability on insurer which it has not assumed.

8. Contracts 🔑147(1)

In interpreting any written instrument primary object is to ascertain and carry out intention of parties. Civ.Code, § 1636.

◆

Meserve, Mumper & Hughes and E. Avery Crary, all of Los Angeles, for appellant.

Newlin, Holley, Sandmeyer & Tackabury, Los Angeles, Keesling & Keesling, San Francisco, Henry H. Childress, George W. Tackabury and C. Hudson B. Cox, all of Los Angeles, amici curiæ on behalf of appellant.

Leo M. Zinner, Walley & Davis and Milton Davis, all of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action to reform an insurance policy issued on the life of defendant Leo Hollender. Specifically, it sought a reduction in the face amount of the policy so as to conform with the alleged true age of the insured. Defendant cross-complained for the amount of total and permanent disability payments allegedly due under the policy, and for the refund of premiums allegedly paid to prevent forfeiture of the policy. The trial court, sitting without a jury, granted a motion for nonsuit on the complaint and made findings in favor of the insured on the issues embraced in the cross-complaint and the answer thereto. Judgment in favor of defendant was entered accordingly and from such judgment, plaintiff has appealed.

This case presents for determination the question of whether the incontestable clause of the policy bars the right of plaintiff to adjust the amount payable under the insurance contract in accordance with the provisions of the age adjustment clause thereof. The trial court adopted the theory of defendant insured in holding that the reformation sought by plaintiff constituted a contest of the policy after the time limitation therefor had expired, and that plaintiff therefore was precluded from inquiry into the correctness of defendant's statement of age. In challenge of such view, plaintiff maintains that it is not contesting the provisions of the policy but is only seeking to confine its liability within the express terms thereof—to enforce the insurance contract in accordance with its coverage and the risk assumed—and that therefore the incontestable clause does not apply in bar of its claim for reformation. An analysis of the policy sustains the propriety of plaintiff's argument, and we therefore conclude that the judgment must be reversed.

On April 16, 1931, plaintiff issued a life insurance policy, with provision for certain disability benefits, to defendant Leo Hollender. In his application for such policy made on April 10, 1931, defendant stated that he was born in Russia on April 27, 1886, and that his age as of his nearest birthday was 45 years. The policy was in the face amount of $5,000, and the disability payments were fixed at $50 per month, with the proviso that defendant's total and permanent disability must have begun before the anniversary of the policy on which his age at nearest birthday was 60 and prior to the maturity of the contract, and in which event plaintiff would then waive the payment of future premiums. The policy contained these further pertinent provisions:

"Age. If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

"The Contract. The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract.

"Incontestability. This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to the provisions and conditions relating to Disability and Double Indemnity Benefits."

By stipulation of the parties, it is conceded that defendant became totally and permanently disabled on June 15, 1945, within the meaning of the policy, and that on December 16, 1945, defendant filed with plaintiff his proof and claim for disability benefits, with demand for the scheduled $50 monthly payments and the specified waiver of premiums. Upon investigation of defendant's claim and the conclusion that his total and permanent disability did not occur within the prescribed age period, plaintiff refused defendant's demand. The policy was not then in default and defendant continued to make payments so as to avoid cancellation.

Plaintiff thereafter commenced this action for reformation of the policy. It alleged that defendant was in fact born on April 27, 1884, and it asked that the policy be reformed to reflect that age qualification: by changing the face value of the policy from $5,000 to $4,632 (the amount of insurance which the premiums paid would have purchased at the corrected age, that is, 47 instead of 45 years at the time of defendant's original application for the insurance). In answer to plaintiff's complaint, defendant denied the alleged misstatement of age and claimed that he "did not become sixty years of age until April, 1946," which would accord with the representation made at the time he applied for insurance with plaintiff. Defendant then cross-complained for the payment of disability payments, the refund of the premiums allegedly paid to prevent cancellation of the policy, and the waiver of the obligation to pay future premiums. At the trial plaintiff attempted to introduce certain documentary evidence wherein defendant had stated his birthdate as April, 1884. Such documentary evidence included his declaration of intention to become a citizen of the United States made in 1910, his petition for naturalization in 1914, and his World War I draft registration in 1918. Defendant's objection to this evidence—offered by plaintiff in support of its claim for reformation of the policy and its contention that defendant's total and permanent disability occurred subsequently to the anniversay of the policy nearest his sixtieth birthday—was sustained on the ground that the incontestable clause of the policy barred plaintiff from disputing defendant's statement of age as made in his insurance application. In line with such ruling, the trial court found that "at the time of commencement of * * * disability, defendant's * * * age at nearest birthday was fifty-nine years," and that he was entitled to recovery on his cross-complaint. Defendant's age was properly an issue for determination by the court as a matter of fact, and plaintiff's profferred evidence thereon was improperly excluded.

[1] It is generally held that the incontestable clause, after the lapse of time it specifies, prevents nullification of the insurance contract for any cause not excepted in the clause. 29 Am.Jur. p. 674, sec. 881; 45 C.J.S., Insurance, § 747, p. 758; 1 Appleman, Insurance Law and Practice, ch. 17, p. 383, sec. 331; Metropolitan Life Ins. Co. v. Shalloway, 5 Cir., 151 F.2d 548, 550; Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 208, 149 P. 171; Coodley v. New York Life Ins. Co., 9 Cal.2d 269, 272, 70 P.2d 602. However, here plaintiff's effort is not to nullify the insurance contract, but recognizing its validity, to have it enforced according to its terms. Every resistance by the insurer against a claim of the insured or the beneficiary is in one sense a contest, but it is not a contest of the policy within the meaning of the "incontestable clause," that is, a contest against the terms of the policy for the purpose of destroying its validity as distinguished from a contest for or in favor of the terms of the policy for the purpose of securing its enforcement. Moore v. Bankers' Credit Life Ins. Co., 223 Ala. 373, 136 So. 798, 799; Langan v. United States Life Ins. Co., 344 Mo. 989, 130 S.W.2d 479, 481, 123 A.L.R. 1409; Hall v. Missouri Ins. Co., Mo.App., 208 S.W.2d 830, 833; Stean v. Occidental Life Ins. Co., 24 N.M. 346, 171 P. 786, 787.

[2, 3] When an insurance policy by its provisions is made incontestable after a specified period, the intent of the parties is to fix a limited time within which the insurer must discover and assert any grounds it might have to justify a rescission of the contract. Accordingly, the insurer must make its "contest of the policy" within the prescribed period, either by the institution of a suit to cancel the policy or by setting up misrepresentation or fraud in the procurement of the policy as a defense in an action brought by the insured or the beneficiary. But the present case is not within the concept of such litigation. Rather here, defendant's alleged understatement of his age was not, under the terms of the policy, ground for its rescission by plaintiff, for the policy expressly obligated plaintiff to pay the amount of insurance which the premiums paid would have purchased at defendant's "correct age." 1 Appleman, Insurance Law and Practice, ch. 10, p. 187, §

193; Singleton v. Prudential Ins. Co., 11 App.Div. 403, 42 N.Y.S. 446, 448; Zolintakis v. Equitable Life Assur. Soc., 10 Cir., 97 F.2d 583, 586. A policy provision which measures the amount of recovery does not avoid the obligation of the policy. On the contrary, it gives the insured what his money bought at his correct age. The denial of liability under a policy by reason of fraud or misrepresentation in its procurement is the "contest" which is governed by the incontestable clause, Annotations 6 A.L.R. 452, 13 A.L.R. 675, 35 A.L.R. 1492, 170 A.L.R. 1048; Coodley v. New York Life Ins. Co., supra, 9 Cal.2d 269, 272–274, 70 P.2d 602; Blair v. New York Life Ins. Co., 40 Cal.App.2d 494, 501, 104 P.2d 1075; Braun v. New York Life Ins. Co., 46 Cal.App.2d 335, 346, 115 P.2d 880; Trousdell v. Equitable Life Assur. Soc., 55 Cal.App.2d 74, 78–81, 130 P.2d 173, 990, and not the raising of the question of coverage afforded by the policy under application of the age adjustment clause.

[4] It appears that this precise problem has not heretofore been the subject of judicial review in this state. However, the matter apparently has been adjudicated in a number of other jurisdictions, and while there is some conflict of judicial opinion, the weight of authority clearly favors the view that an incontestable clause in a life insurance policy does not invalidate, or prevent enforcement of, an age adjustment clause or provision. 45 C.J.S., Insurance, § 751b, p. 770; Annotations 123 A.L.R. 1416 and 135 A.L.R. 446. As said by Chief Justice Cardozo in Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642, an incontestable clause "is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that *within the limits of the coverage,* the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken." Emphasis added; see, also, Metropolitan Life Ins. Co. v. Shalloway, supra, 5 Cir., 151 F.2d 548, 551; Messina v. New York Life Ins. Co., 173 Miss. 378, 161 So. 462, 463; New York Life Ins. Co. v. Veit, 294 N.Y. 222, 62 N.E.2d 45, 46.

In Murphy v. Travelers' Ins. Co., 134 Misc. 238, 234 N.Y.S. 278, a similar question arose as to the right of the insurance company to litigate the matter of the insured's age in the face of an incontestable clause in the policy. The insured took out the policy upon the representation that his age was 45 years when it was in fact 50. Upon his death following the expiration of the incontestable period, the insurance company paid the reduced amount in accordance with the terms of the age adjustment clause in the policy, and the beneficiary sued for the difference. In holding that the company's resistance to payment of the full amount of insurance was not a "contest" of the policy within the prohibition of the incontestable clause, the court said, 234 N.Y.S. at page 280:

"When the insured * * * applied for life insurance, no matter what age he may have stated in his application, he knew that he was entitled to no more than the amount which he could purchase for the stipulated premium at his true age. This was clearly what the [company] intended when it issued its policy. Can it be logically said that the [company] intended that this intent expressed in the contract should prevail for only one year [the prescribed incontestable period]? I do not think so. A contrary conclusion would of necessity involve an intentional injustice on the part of the [company] to every policyholder paying premiums predicated upon true age. This, it seems to me, was never contemplated.

"The claim that [the company] is contesting a contract contrary to its provisions is not well founded. The case might better be stated in this fashion: The [beneficiary] is attempting to enforce a contract which was never made, is seeking to obtain something which was never paid for, is striving to employ that which was designed for her protection as an instrument of injustice to the [company] and all its policy holders." To like effect see Equitable Life Assur. Soc. v. First Nat. Bank, 5 Cir., 113 F.2d 272, 274; Metropolitan Life Ins. Co. v. Shalloway, supra, 5 Cir., 151 F.2d 548, 550–552; Ginsberg

v. Union Central Life Ins. Co., infra, 240 Ala. 299, 198 So. 855, 858–859; Messina v. New York Life Ins. Co., supra, 173 Miss. 378, 161 So. 462, 463–464; Langan v. United States Life Ins. Co., supra, 344 Mo. 989, 130 S.W.2d 479, 481–483; Hall v. Missouri Ins. Co., supra, Mo.App., 208 S.W.2d 830, 832–833; Stean v. Occidental Life Ins. Co., supra, 24 N.M. 346, 171 P. 786, 787; Unterberg v. New York Life Ins. Co., Sup., 172 N.Y.S. 241, 242; Grenis v. Prudential Ins. Co. of America, 154 Misc. 867, 278 N.Y.S. 137, 138; Sipp v. Philadelphia Life Ins. Co., 293 Pa. 292, 142 A. 221, 222; Home Life Ins. Co. of America v. Greenspan, 360 Pa. 542, 63 A.2d 72, 75.

While, as heretofore indicated, there is some authority in support of defendant's view that the incontestable clause precludes enforcement of the age adjustment clause after the expiration of the specified period for "contest" of the policy, notably Mutual Life Ins. Co. of New York v. New, 125 La. 41, 51 So. 61, 27 L.R.A.,N.S., 431, Arnold v. Equitable Life Assur. Soc., D.C., 228 F. 157, and Lincoln Health & Accident Ins. Co. v. Jones, 175 Okl. 211, 52 P.2d 793, these cases have been respectively distinguished and criticized as unsound in Equitable Life Assur. Soc. v. First Nat. Bank, supra, 5 Cir., 113 F.2d 272, 274–275, and Langan v. United States Life Ins. Co., supra, 344 Mo. 989, 130 S.W.2d 479, 482.

The incontestable clause and the one fixing the terms of liability in case of misstatement of age are not inconsistent; there is no conflict between the two, but rather they both stand, one independent of the other. The like question has been the subject of discussion when there appeared a stipulation against liability in case of suicide, Moore v. Bankers' Credit Life Ins. Co., supra, 223 Ala. 373, 136 So. 798, 799; Myers v. Liberty Life Ins. Co., 124 Kan. 191, 257 P. 933, 935, 55 A.L.R. 542; Stean v. Occidental Life Ins. Co., supra, 24 N.M. 346, 171 P. 786, 787; Scales v. Jefferson Standard Life Ins. Co., 155 Tenn. 412, 295 S.W. 58, 59, 55 A.L.R. 537, a contingency provision governing the payment of double indemnity, Sanders v. Jefferson Standard Life Ins. Co., 5 Cir., 10 F.2d 143, 144, a limitation dependent upon the cause of death, Darden v. North American Ben. Ass'n, 170 Va. 479, 197 S.E. 413, 415, or a restriction relieving from responsibility to pay disability benefits, Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 346, 89 P.2d 732; Fohl v. Metropolitan Life Ins. Co., 54 Cal.App.2d 368, 377, 129 P.2d 24. In all such instances the provisions, as part of the parties' agreement, have been enforced, notwithstanding the insertion of a stipulation limiting the right of contest. Such distinction of a "contest of the policy" from a controversy as to policy coverage simply rests on the well-recognized principle that "Where there has been no assumption of the risk, there can be no liability." Metropolitan Life Ins. Co. v. Conway, supra, 252 N.Y. 449, 169 N.E. 642, 643; see, also, Equitable Life Assur. Soc. v. First Nat. Bank, supra, 5 Cir., 113 F.2d 272, 276; Cohen v. Metropolitan Life Ins. Co., supra, 32 Cal.App.2d 337, 346, 89 P.2d 732.

[5–8] In construing life insurance policies as in the construction of other contracts, the entire contract is to be construed together for the purpose of giving force and effect to each clause. 44 C.J.S., Insurance, § 289, p. 1136; § 298, p. 1196; Civil Code, § 1641; Ogburn v. Travelers Ins. Co., 207 Cal. 50, 52–53, 276 P. 1004; Security Trust & Savings Bank of San Diego v. New York Indemnity Co., 220 Cal. 372, 377, 31 P.2d 365. While it is settled law that in case of doubt the provisions of the insurance contract will be construed most strongly against the insurer, 44 C.J.S., Insurance, § 297c(1), p. 1166; Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal.2d 731, 747, 17 P.2d 661; Mutual Life Ins. Co. of New York v. Margolis, 11 Cal.App.2d 382, 387–388, 53 P.2d 1017, the rule is equally well established that where the terms of the policy are plain and explicit, the court will indulge in no forced construction so as to cast a liability upon the insurance company which it has not assumed, 44 C.J.S., Insurance, § 297c(2), p. 1190; Burr v. Western States Life Ins. Co., 211 Cal. 568, 576, 296 P. 273.

In the interpretation of any written instrument, the primary object is to ascertain and carry out the intention of the parties. 44 C.J.S., Insurance, § 291, p. 1146; Civ. Code, § 1636; Ogburn v. Travelers Ins. Co., supra, 207 Cal. 50, 52, 276 P. 1004. So here, the age adjustment clause is clear and explicit in its measure of the liability assumed by plaintiff; it goes directly to the risk expressed in the terms of the policy according to the "correct age" of the insured. As such qualification on the coverage intended by the policy, it is not affected by the time limitation prescribed in the incontestable clause, at the end of which period plaintiff was bound to the full extent of the risk it had assumed but it was not liable on a risk it had stipulated it would not assume—coverage that was not premised on defendant's "correct age." To hold otherwise and to the effect that the incontestable clause nullified the provision of the age adjustment clause would do violence to the clear intention of the parties plainly and unambiguously expressed. Metropolitan Life Ins. Co. v. Shalloway, supra, 5 Cir., 151 F.2d 548, 551–552; Ginsberg v. Union Central Life Ins. Co., supra, 240 Ala. 299, 198 So. 855, 858; Murphy v. Travelers' Ins. Co., supra, 134 Misc. 238, 234 N.Y.S. 278, 280.

The "correct age of insurants is the chief corner-stone of the life insurance structure", Langan v. United States Life Ins. Co., supra, 344 Mo. 989, 130 S.W.2d 479, 483, 123 A.L.R. 1409, with rates "based on mortality tables, worked out by actuaries" and premiums adjusted according to "life expectancy" experience, Ginsberg v. Union Central Life Ins. Co., supra, 240 Ala. 299, 198 So. 855, 858. In accord with such basic principle affecting the bargaining premise of the parties in their insurance contract, the age adjustment clause is included in the policy. 58 C.J.S., Mortality Tables, pp. 1210–1211. The clear import of such clause is the agreement that any understatement of age, whether intentional or not, shall not be relied upon as a misrepresentation avoiding the policy within the purport of the incontestable clause but rather, in such event of misstatement, the full amount payable under the policy shall be the sum which the premiums paid would have purchased at the correct age. This is manifestly fair to both parties in effecting the "correct age" adjustment, whether the benefit redound to the insurer because of an understatement or to the insured because of an overstatement. It would be untenable to hold that the age adjustment clause should have effect only during the contest period prescribed by the policy as required by statute, and then become innocuous, for then the comprehensive age balance constituting the "corner-stone of the life insurance structure" would be completely distorted through conferring "all the benefits of the age adjustment clause on the insured" by inviting him to "understate his age, get by with it until the time for adjustment had passed, and thereupon become secure in the advantage he had so gained." Ginsberg v. Union Central Life Ins. Co., supra, 240 Ala. 299, 198 So. 855, 858. It must be remembered that ordinarily the age of the applicant for insurance does not affect the acceptability of the risk, and admittedly plaintiff would have issued the policy as readily to defendant at age 47 as at age 45 years, with the age factor simply operating to fix the insurance premiums according to the established mortality tables. Accordingly, the age adjustment clause cannot be held to conflict with the incontestable clause but rather, as an independent provision of the insurance contract, it expresses the parties' agreement for the correction of errors consistent with their rights and obligations during the life of the policy. Langan v. United States Life Ins. Co., supra, 344 Mo. 989, 130 S.W.2d 479, 481–483.

In further objection to plaintiff's right to relief here, defendant cites the case of Richardson v. Travelers Insurance Co., 9 Cir., 171 F.2d 699, for its holding that reformation of an insurance policy on the ground of mistake is barred after the expiration of the prescribed period in the incontestable clause. That case involved the attempt of the insurance company to reform the policy to express the true agreement of the parties, and such relief was denied. Whether or not the Richardson case was correctly decided, cf. Notes, 62 Harv.Law Rev. 890; 97 Univ. of Pa.Law Rev. 741, it is nevertheless clearly distinguishable.

In the Richardson case it appears that through a mistake of the insurance company a pension policy was issued to the insured instead of a life insurance policy on a so-called "Uniform Premium Plan," there being a considerable difference in the benefits and the amount of premiums between the types of policies. Twenty years later the company sought to rectify the mistake through reformation of the policy, and the court held that in the face of the one-year incontestable clause, the company's action was tantamount to a contest of the terms of the policy itself and could not be maintained. But there the company was seeking to *vary* the express terms of the parties' written contract and to substitute therefor a policy containing entirely different provisions. Upon citation of Dibble v. Reliance Life Ins. Co., supra, 170 Cal. 199, 149 P. 171, where the incontestable clause was applied in limitation of the insurance company's right to cancel a policy because of alleged fraudulent representations by the insured, the court in the Richardson case designated the *mistake of the insurance company,* to be, like fraud, an "inception defense," which must be litigated within the stated period of the incontestable clause.

The situation here is quite different in that plaintiff is seeking a reformation of the policy in accordance with the express terms of the age adjustment clause thereof, an enforcement of the provisions of the parties' insurance contract rather than a variance therefrom. As so distinguished, the Richardson case may properly be limited as a decision holding that in the *absence of any other pertinent contractual provision,* the incontestable clause bars the insurance company from setting up mistake as a ground for reformation after lapse of the contestable period. While it is true that the mistake as to defendant's age arose at the inception of the policy and was then subject to correction, it does not appear reasonable to conclude that when the parties' contract expressly provided for an adjustment to rectify such inaccuracy, plaintiff nevertheless had the burden of making discovery of such error and was bound to litigate that misstatement within the two-year contestable period or be foreclosed from having the correction of defendant's age square with the fact. Rather, it would seem, as said in Grenis v. Prudential Ins. Co., supra, 154 Misc. 867, 278 N.Y.S. 137, at page 138, "the consequences of the discovery of the true age of the insured are operative without relation to time. No matter when the discovery is made, the benefits would be adjusted accordingly. * * * [The correction] does not destroy but harmonizes with the intent and spirit of the incontestability provision that the adjustment of the benefits be regulated according to age, whenever the age is revealed, even though the revelation be subsequent to the [contestable period]." Under the circumstances, the ordinary rules of equity sustain plaintiff's right to a reformation of the policy to accord with "the contract of insurance providing the method of the fair and honest adjustment of the rights of the parties". Metropolitan Life Ins. Co. v. Trilling, supra, 194 App.Div. 178, 184 N.Y.S. 898, 902; see 44 C.J.S., Insurance, § 278, p. 1108; Ginsberg v. Union Central Life Ins. Co., supra, 240 Ala. 299, 198 So. 855, 859, and cases there cited.

Before leaving this portion of the discussion, it may be well to state that as plaintiff was relying upon the terms of the contract as written, an action for declaratory relief, Code Civ.Proc. sec. 1060, would have afforded an equally appropriate remedy to determine the rights and duties of the parties thereunder. While the remedy of reformation was properly invoked, the point which should be stressed is that the nature of the reformation which plaintiff sought, unlike that sought in the Richardson case and in certain other cited cases, was entirely in line with the agreement of the parties as expressed within the four corners of their written contract.

Defendant finally contends that since the parties agreed that the "policy and the application therefor * * * constitute the entire contract" and that "*this* policy shall be incontestable," plaintiff may not controvert defendant's age statement by resort to evidence outside the express provisions of their insurance contract. This argument is untenable as applied to plaintiff's right to adjust the terms of its coverage according to the risk assumed. As said in Cohen v. Metropolitan Life Ins. Co., supra, 32 Cal. App.2d 337, at page 346, 89 P.2d at page 738: "An incontestable clause in an insurance policy does not extend the coverage beyond the terms of the policy." Thus in the Cohen case, as in John Hancock Mutual Life Ins. Co. v. Markowitz, 62 Cal.App.2d 388, 144 P.2d 899, the incontestable clause of the policy did not foreclose the insurance company from introducing evidence in dispute of the insured's statements on his insurance application and to show the insured's claim for disability benefits was without the terms of the company's agreed coverage in that the disability had occurred prior to the effective date of the policy. See, also, Fohl v. Metropolitan Life Ins. Co., supra, 54 Cal.App.2d 368, 377, 129 P. 2d 24. So in the present case, in determining a question of insurance coverage, the matter of defendant's "correct age" would be "open to investigation during the life of the policy, and if a misstatement as to it is discovered it [would] not avoid the policy, but 'any amount payable under it,' * * * [must] be adjusted to the true age", Metropolitan Life Ins. Co. v. Shalloway, supra, 5 Cir., 151 F.2d 548, 551–552; and material to the determination of that issue would be "definite statements or declarations of the person whose age is in question, made by him during his lifetime on solemn occasions when it was his bounden duty to speak the truth, and when there was no motive or occasion, actual or supposed, on his part to speak other than the truth", Messina v. New York Life Ins. Co., supra, 173 Miss. 378, 161 So. 462, 464; see, also, Langan v. United States Life Ins. Co., supra, 344 Mo. 989, 130 S.W.2d 479, 483; Sipp v. Philadelphia Life Ins. Co., supra, 293 Pa. 292, 142 A. 221, 223–224; Home Life Ins. Co. of America v. Greenspan, supra, 360 Pa. 542, 63 A.2d 72, 74. Accordingly, it follows that the trial court here erred in excluding admissions made by defendant on other documentary statements as to the date of birth. Since the right to recover moneys paid by an insurance company under a mistake as to the policy coverage, and in reliance upon the insured's representations in his application, has been recognized in this state as without the scope of the incontestable clause, Cohen v. Metropolitan Life Ins. Co., supra, 32 Cal. App.2d 337, 346–347, 89 P.2d 732; John Hancock Mutual Life Ins. Co. v. Markowitz, supra, 62 Cal.App.2d 388, 397–398, 144 P.2d 899, plaintiff properly invokes the same reasoning as applicable in support of its action for reformation of the policy here involved to preclude the payment of moneys which would be subject to recovery if later discovered to have been paid under a mistake as to coverage liability.

Defendant argues that if plaintiff prevails in its proof on the age issue, it will succeed in avoiding the disability benefits and the waiver of premiums provided in the policy. But that was a condition of the policy coverage to which the parties specifically agreed, and the principle of decision cannot be affected by "hardships, advantages or disadvantages which may result from * * * a construction" of the insurance contract according to the parties' intent plainly and unambiguously expressed. Ogburn v. Travelers Ins. Co., supra, 207 Cal. 50, 52, 276 P. 1004; also Burr v. Western States Life Ins. Co., supra, 211 Cal. 568, 576, 296 P. 273. So pertinent is Chief Justice Cardozo's observation in Metropolitan Life Ins. Co. v. Conway, supra, 252 N.Y. 449, 169 N.E. 642, at page 643: "A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen." Also

Equitable Life Assur. Soc. v. Rothstein, supra, 122 N.J. Ch. 606, 195 A. 723, 724.

The judgment is reversed.

GIBSON, C. J., TRAYNOR, J., and WHITE and PARKER WOOD, JJ. pro tem., concur.

CARTER, Justice.

I dissent.

The decision reached here by the majority of this court is another instance where lip-service is paid to a salutary rule by recognizing its existence only to find that under the facts presented it has no application. The rule to which I refer is the old and just one—that a contract of insurance shall be construed most strictly against the insurer.

The incontestability clause in the policy under consideration here provided that "This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to the provisions and conditions relating to Disability and Double Indemnity Benefits." In spite of the fact that none of the three exceptions are involved here, the majority of this court cites many authorities in support of the following statement: "It is generally held that the incontestable clause, after the lapse of time it specifies, prevents nullification of the insurance contract *for any cause not excepted in the clause*." Of course, it is explained that what we have here is not a nullification of the contract, and not a contest, but only an effort to have the policy enforced according to its terms. This explanation is achieved by holding that the age adjustment clause (If the age of the insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age) is not within the scope of the incontestable clause.

To hold that the insurer here is not contesting the policy is to play with words. The insurer is resisting payment of part of the face value of the policy despite the fact that it is claimed that it seeks only to enforce it according to its value as reformed. No matter what the insurer claims, this action destroys the validity of the policy in part. In Arnold v. Equitable Life Assur. Soc. of U. S., D.C., 228 F. 157, the court said that under the terms of the policy no one would contend that the defendant could make an absolute defense upon the ground of misrepresentation as to age, so if it could not make a defense to the whole policy, how could it make a defense to it in part? And yet the defendant there, as here, denied liability for the face value but admitted liability for a smaller sum, the denial being based upon misrepresentation in the application for insurance. The court concluded that the partial defense pleaded could not be sustained.

An incontestable clause in an insurance policy is intended to free the beneficiary from delay, annoyance and expense in acquiring the amount which had been carefully provided. Premiums on life insurance policies are often paid at a great sacrifice, and one of the most disturbing and unsatisfactory features of the insurance contract is the fact that, after these sacrifices and payments have been made for a number of years, and the insured has died, so that his testimony and perhaps that of others has been rendered unavailable by the lapse of time and the occurrence of death, instead of receiving the promised reward, the beneficiary will be met with a contest and a lawsuit to determine whether the insurance ever had any validity or force. Hence it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others. Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S.W. 561, 42 L.R.A. 247. As was said in Humpston v. State Mut. Life Assur. Co., 148 Tenn. 439, 441, 467, 256 S.W. 438, 446, 31 A.L.R. 78: "The incontestable clause in the policies sued on was written into them by the defendant [insurance company] itself. It was contractual, and the effect of it was to prevent the insurer from interposing as a defense the falsity of the representations of the insured, which might be fraudulent. In other words, defendant said to the insured: 'I will take one year in which to ascertain whether your representations are false, and whether you have been guilty of any fraud in obtaining the contract, and, if within that period, I do not ascertain or discover such falsity and fraud, I agree to make no further inquiry into these matters, and make no defense on account of them.'" It is my belief that this is a correct analysis of the purpose of the incontestable clause in a policy of insurance. It is most definitely within the power of the insurer to include any exceptions it wishes to make *within the clause itself,* or specifically to refer to other clauses which it would make a part of the incontestable clause.

We are told here that when an insurance policy by its provisions is made incontestable after a specified period, as this one was, that the intent of the parties is to fix a limited time within which the insurer must discover and assert any grounds it might have to justify a rescission of the contract; that accordingly, the insurer must make its "contest of the policy" within the prescribed period, either by the institution of a suit to cancel the policy or by setting up misrepresentation or fraud in the procurement of the policy as a defense in an action brought by the insured or the beneficiary. As I have pointed out, the present action is a "contest" as to part of the policy whether or not it is actually called that.

We are also told that the correct age of insurants is the chief corner-stone of the life insurance structure but that "it does not appear reasonable to conclude that when the parties' contract expressly provided for an adjustment to rectify such inaccuracy, plaintiff nevertheless had the burden of making discovery of such error and was bound to litigate that misstatement within the two-year contestable period or be foreclosed from having the correction of defendant's age square with the fact." To my mind, if the correct age of the applicant is of such vital importance to life insurance companies, it would appear to be much more reasonable to require the insurers to discover any such errors than to hold that the incontestable clause does not apply.

It would be as simple, and far more just, for this court to hold that the clause providing for adjustment when a misstatement of age has occurred, prevents rescission of the entire contract, provides for reformation so that the amount payable shall correspond to that which the premium paid would have purchased at the correct age, and that this reformation must take place within the time limited in the clause preventing a contest after the two year period. In so doing, effect would be given to both the incontestable clause and the misstatement of age clause because both are general clauses, neither controlling the other. Thus both general clauses are construed together and effect given to both. In Lincoln Health & Accident Ins. Co. v. Jones, 175 Okl. 211, 52 P.2d 793, the court pointed out that the company had, in such a situation, ample time to make inquiry about the age of the insured within the two years after the date of the policy. That if the insured understated his age, the company might have readjusted the policy on the basis of true age, but after two years had elapsed defenses are no longer available *unless the grounds are excepted by the terms of the policy.* It was concluded that the misstatement of age provision can only be taken advantage of by the insurance company during the two year period provided for by the incontestable clause. See also, Mutual Life Ins. Co. of New York v. New, 125 La. 41, 51 So. 61, 27 L.R.A., N.S., 431; Mitchell v. Pennsylvania Mutual Life, 90 Pa.Super. 426; Arnold v. Equitable Life Assur. Soc. of U. S., supra, D.C., 228 F. 157.

If the foregoing construction is placed upon the policy here involved, the contract of insurance will be construed most strongly against the insurer, as it should be.

I would affirm the judgment.

SCHAUER, Justice (dissenting).

I concur in the conclusion reached by Justice Carter.

The argument that in this case the incontestable clause should not be operative because it would work an injustice on other insureds goes too far. On that reasoning the incontestable clause could be held utterly meaningless in any case of misrepresentation or innocent mistake as to a material matter of fact.

It seems incongruous to me to recognize the express declarations of the policy that the "policy and the application therefor [in which the insured's age is stated] * * * constitute the entire contract"; that "This policy shall be incontestable after two years from the date of its issue except for non-payment of premium and except as to the provisions and conditions relating to Disability and Double Indemnity Benefits"; and then to hold that "the matter of defendant's 'correct age' would be 'open to investigation during the life of the policy'." The exceptions to the incontestable clause above quoted are specific; they do not include misstatement of age.

The majority, as I understand their opinion, avoid giving effect to the two-year contest limitation in the incontestable clause by holding that this action to reform the policy is not a contest of liability under it. Yet these facts are unescapable: (1) On the face of the contract and the facts established, accepting the age statement as true, the insurer is liable to pay $50 a month to the insured, commencing October 15, 1945, and to waive premiums falling due under the policy from and after June 15, 1945. On the date of trial the amount prima facie due to the insured was $2,400 in disability payments plus $875.60 in premiums paid under protest, a total of $3,275.60. (2) The insurer refuses to pay any part of this sum except that it would refund what it claims are overpayments of premiums made since April 10, 1944, which date it alleges is "the anniversary of said policy on which the insured's nearest birthday was sixty." (3) The insurer asks that "said policy of insurance * * be reformed by changing the face amount thereof [from $5,000] to $4,632 and by reducing the semi-annual premiums * * payable under said policy * * * from and after April 10, 1944" and that "the application of * * * [the insured] * * * be reformed by changing the date of birth of said insured from April, 1886 to April, 1884." (4) The payment of disability benefits and the waiver of premium is conditioned on disability occurring before age 60; under the facts here alleged by the insurer, if the policy and application are reformed as sought by it, it will avoid entirely the payment of such benefits and the waiver of premiums. (5) The insured was born in Russia and there is no showing that the exact date of his birth was recorded or can be proved with certainty. The policy was applied for on April 10, 1931; it was issued on April 16, 1931; this suit for reformation was filed December 11, 1946. It is reasonable to believe that it would have been easier for the insured to find and produce evidence as to the date of his birth within two years from the time the policy was issued than after the lapse of more than 15 years. Hence the recital in the policy (which includes the application) of the date of birth is a matter as to which the contest limitation period of two years is reasonable and appropriate.

It seems to me that the relief sought by the insurer, under the circumstances shown, amounts to a contest of its policy; certainly it is a contest of the insured's claim under the policy and his claim finds prima facie support in the policy and attached application. It is only by showing misrepresentation or mistake as to the insured's age that his claim is sought to be avoided. Since misrepresentation or mistake as to age is not listed as an exception to the limitation on contestability after two years, I think the trial judge was justified in the conclusions he reached. At most there is ambiguity in the policy which ambiguity, of course, was created by the insurer. As indicated above, it well may be difficult for the insured at this late date, particularly since he was born in a foreign country, to prove the exact date of his birth.

For the reasons stated I would resolve the ambiguity against the insurer and affirm the judgment.

107 Cal.App.2d 662

IDEAL HEATING CORP. v. ROYAL INDEMNITY CO. et al.

Civ. 18650.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1951.

Rehearing Denied Dec. 10, 1951.

Hearing Denied Jan. 24, 1952.

Action by the Ideal Heating Corporation against the Royal Indemnity Company and others to recover on an attachment bond. From a judgment of the Superior Court, Los Angeles County, William R. McKay, J., in favor of the plaintiff, the defendants appealed. The District Court of Appeal, McComb, J., held that evidence with respect to legal services in connection with various proceedings to obtain dissolution of attachment was properly admitted, that instructions on that issue were correct and that there was no error in refusing certain requested instructions on that issue.

Judgment affirmed.

1. Attachment 🔑351

In action against surety on an attachment undertaking measure of damages is actual expense and loss resulting from levy, including counsel fees for professional services rendered in relation to procuring dissolution of attachment, but not counsel fees paid in defense of principal suit.

2. Attachment 🔑352

In action on attachment bond where element of damage is expenditure for services of counsel, it is question of fact as to what services were rendered by counsel in procuring dissolution of attachment and as to value of those services.

3. Attachment 🔑350

In action on attachment bond trial court properly admitted evidence with respect to legal services rendered in connection with two motions to dissolve attachment and with respect to application for a writ of mandate, where counsel's efforts all contributed to final dissolution of attachment.

4. Attachment 🔑350

The fact that court in proceeding to dissolve attachment also passed upon questions which were of benefit in defense of the principal action did not make evidence of efforts of counsel in connection with case as a whole inadmissible in action on attachment bond.

5. Attachment 🔑352

In action on attachment bond, court properly instructed that counsel fees could be recovered only for services in connection with dissolution of attachment, and that if fees paid covered other services, jury must segregate those relating to the dissolution of attachment.

6. Attachment 🔑350

In action on attachment bond, evidence sustained finding with respect to amount of damage from cost of legal services in procuring dissolution of attachment.

7. Trial 🔑260(10)

In action on attachment bond, requested instructions with respect to recovery by plaintiff for expenditures for legal services were properly refused where substance thereof had been stated in other instructions.

8. Trial 🔑260(1)

Trial court need not give more than one instruction on a given question of law.

9. Trial 🔑260(1)

Requested instructions correctly stating the law may be refused if substance of such instructions has been given to jury in other language.

10. Trial 🔑295(11)

In action on attachment bond, instructions with respect to recovery for cost of legal services in procuring dissolution of attachment, when read in their entirety, were proper.

11. Trial ⚿295(1)

The fact that some instructions when taken severally fail to enumerate propositions of law in precise terms and with legal accuracy does not render them erroneous if instructions read as a whole are correct.

◆

McBain & Morgan, Irving E. Tarson and Lane & McGinnis, all of Los Angeles, for appellants.

John W. Preston and Bordon & Bordon, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff for $12,807.22, after trial before a jury in an action to recover on an attachment bond for the wrongful levy of an attachment, defendants appeal.

Facts: 1. In August, 1947, defendants De Mirjian commenced an action against plaintiff herein and others to recover the sum of approximately $300,000.

2. June 10, 1948, the De Marjians filed with the clerk of the court an undertaking in attachment executed by defendant surety company and caused a writ of attachment to be issued and levied on the sum of $35,876.85, belonging to plaintiff.

3. About June 9, 1948, the Ideal Heating Corporation (plaintiff herein) filed a notice of motion to discharge the attachment.

4. On July 13, 1948, after the matter had been fully argued, the motion to discharge the attachment was denied and no appeal was taken therefrom.

5. On July 15, 1948, the Ideal Heating Company filed a second motion to discharge the attachment.

6. On August 6, 1948, the court denied the motion to discharge the attachment from which an appeal was taken and the District Court of Appeal reversed the order of the trial court and dissolved the attachment as wrongful.

7. July 26, 1949, the present action was instituted seeking to recover damages sustained by Ideal Heating Corporation as a result of the wrongful retention of its funds by virtue of the writ of attachment and for the reasonable value of attorneys' fees incurred and paid by it in procuring the dissolution of attachment.

The jury returned a verdict in favor of plaintiff.

Questions: First: *Did the trial court commit prejudicial error in admitting evidence (1) as to the legal services in connection with the first motion to dissolve the attachment, (2) services rendered regarding the second motion to dissolve the attachment, and (3) legal services with respect to the Ideal Heating Corporation's application for a writ of mandate to the District Court of Appeal which was denied?*

[1] *No.* In an action against a surety on an attachment undertaking the measure of damages to be recovered is the actual expense and loss resulting from the levy, including counsel fees for professional services rendered in relation to procuring the dissolution of the attachment but not counsel fees paid in defense of the principal suit. Soule v. United States Fidelity & G. Co., 82 Cal.App. 572, 574 et seq. [1], 255 P. 886; Java Cocoanut Oil Co. v. Fidelity & Deposit Co., 300 F. 302, 303 et seq., 39 A.L.R. 523. Cf. Hornaday v. Hornaday, 95 Cal.App.2d 384, 393[6], 213 P.2d 91; Albertsworth v. Glens Falls Indem. Co., 84 Cal.App.2d 816, 823[2], 192 P.2d 66.

[2] The foregoing rule is correct. However it is a question of fact for the determination of the trier of fact as to what services were rendered by counsel "in procuring the dissolution of the attachment."

[3] In the present case the trial court properly received the evidence to which defendants objected because such evidence was relevant to the issue of what services counsel rendered in procuring the dissolution of the attachment.

It is obvious that in preparing the first motion which was denied counsel made research and other preparation which were beneficial in connection with the preparation and presentation of the second motion which ultimately resulted in the dissolution of the attachment. The same reasoning applies to the preparation and presentation of the writ of mandate to the District Court of Appeal which was denied, because such research and preparation was beneficial in the presentation of the appeal which in turn resulted in the dissolution of the attachment.

[4] The fact that in deciding De Mirjian v. Ideal Heating Corp., 91 Cal.App.2d 905, 206 P.2d 20, the court passed upon other questions which were of benefit in defense of the principal action did not make the evidence of the work and preparation of counsel in connection with that appeal inadmissible, it being a question of fact for the determination of the trier of fact under proper instructions as to the value of the services rendered by counsel in obtaining the dissolution of the attachment.

[5] In the present case the court instructed the jury as requested by defendants that counsel fees could be recovered only for services rendered by plaintiff's attorneys relating to their work in connection with the dissolution of the attachment; also that if the jury should find that the fees paid by plaintiff to its attorneys were in part for services rendered in procuring the dissolution of the attachment and in part for services rendered in defense of the main action, then it was the duty of the jury to segregate the services and fees relating to the dissolution of the attachment from the services rendered in the main action. (Cullinan v. McColgan, 87 Cal.App. 684, 692, 263 P. 353.)

These instructions were correct and it is apparent from the results that the jury followed them for the reason that the evidence disclosed that plaintiff actually paid counsel fees in the sum of $13,400 for all services, including those necessary to procure the dissolution of the attachment. However the jury under the foregoing instructions returned a verdict for plaintiff for only $10,000 for counsel fees. It is thus evident the jury concluded the services rendered by plaintiff's attorneys in the dissolution of the attachment were of the reasonable value of $10,000, not including the work done on the petition for a writ of mandate, the first motion to dissolve the attachment and the collateral benefits to the defense of the main action resulting from the opinion of the District Court of Appeal.

Curtiss v. Bachman, 110 Cal. 433, 42 P. 910, Bustamente v. Stewart, 55 Cal. 115, Mitchell v. Hawley, 79 Cal. 301, 21 P. 833, Soule v. United States Fidelity & G. Co., 82 Cal.App. 572, 255 P. 886, Miramonte, Etc., v. National Surety Co., 91 Cal.App. 64, 266 P. 576, and Hornaday v. Hornaday, 95 Cal.App.2d 384, 213 P.2d 91, relied on by defendants, do not reach a conclusion inconsistent with the foregoing. They merely state and apply the general rule set forth above relative to the circumstances under which attorney's fees incurred in connection with the dissolution of an attachment may be recovered as an item of damages in a suit on an attachment bond.

[6] Second: *Was there substantial evidence to sustain the trier of fact's finding that plaintiff was damaged in the sum of $10,000 because of legal services rendered by its attorneys in procuring the dissolution of attachment?*

Yes. The evidence disclosed the services which had been rendered and the witness for plaintiff testified that payments were made to the attorneys in the aggregate amount of $13,484 "in efforts to release the attachment."

[7] Third: *Did the trial court commit prejudicial error in refusing to instruct the jury at defendants' request as follows?*

1. "You are instructed that counsel fees may be recovered by the plaintiff in an action of this kind only when such fees were actually paid for legal services solely and directly relating to proceedings involving the dissolution of the attachment itself and then only to the extent that such fees are reasonable and necessary. Thus counsel fees paid in connection with the defense by plaintiff herein of the principal suit from which the attachment arose are not recoverable in this action."

2. "If you should find that counsel fees claimed herein by plaintiff were paid in part in connection with the proceedings

involving the dissolution of attachment and in part with reference to issue involved in the principal action which has been called the 'fire case', and if you are unable to so segregate the fees and services and are unable to determine what portion of fees and services, if any, were paid in connection with the proceedings for dissolution of attachment, and what portion, if any, was paid in connection with the issues in the fire case, then you must not suffer yourself to guess or speculate and must not make any allowance to plaintiff for counsel fees in your verdict."

3. "If you find from the evidence that certain of the professional services allegedly rendered by counsel for plaintiff and claimed by plaintiff as services relating to the dissolution of the attachment were actually rendered either wholly or in part for the purpose of attempting to secure an advantage to plaintiff in said action other than the dissolution of the attachment, you may not allow for that portion of said services but can only allow for services rendered in respect to the dissolution of the attachment. As triers of the facts you should attempt to determine what portion of the services were rendered for the general benefit of plaintiff in said action and what portion, if any, were rendered solely and directly for the purpose of effecting a dissolution of the attachment and what fee, if any, was paid by plaintiff solely for the services rendered in respect to the dissolution of the attachment. If you should find that plaintiff either made no payment solely for legal services relating to the dissolution of the attachment or if you should be unable to determine the amount of either the payment made solely for that purpose, if any, or the amount of legal services rendered solely for that purpose, then you may find that plaintiff has failed in its burden and is not entitled to recover for the monies paid by it to its counsel."

4. "You will not allow the plaintiff any recovery for any counsel fees allegedly paid with respect to the attachment proceedings for the time expended on unsuccessful proceedings designed to obtain the dissolution of the attachment. The fees allowable, if any, are only for those services rendered in connection with necessary, proper and successful proceedings."

5. "You shall make no allowance to plaintiff herein for counsel fees paid by plaintiff for legal services rendered in respect to the motion for dissolution of attachment filed on June 18, 1948, and decided on July 13, 1948, or in connection with the petition for writ of mandate filed in the District Court of Appeal and the legal services rendered by plaintiff's attorney in respect to those matters shall be disregarded."

[8, 9] *No.* The trial court correctly stated to the jury in other instructions requested by defendants the substance of the instructions set forth above. Hence the general rule is applicable that the trial court need not give more than one instruction on a given question of law, and that even if requested instructions which are refused correctly state the law it is not error if the substance of such instructions has been given to the jury in other language. (Nelson v. Colbeck, 94 Cal.App.2d 792, 797, 211 P.2d 878; Luis v. Cavin, 88 Cal.App.2d 107, 115, 198 P.2d 563.)

[10] Fourth: *Did the trial court err in instructing the jury as follows?*

"It is for you to determine from the evidence in this case the reasonable value of the legal services, if any, necessarily rendered, relating to, incident to, connected with, a part of and reasonably necessary in connection with the proceedings designed to obtain the dissolution of the attachment and only those rendered for that purpose. In arriving at such reasonable value you may consider all the facts and circumstances before you and may use your own opinions and arrive at your own conclusions as to what was the reasonable value of those services, if any.

"* * * The only counsel fees which may be awarded are reasonable fees rendered relating to, connected with, a part of, and reasonably necessary to the prosecution of the attachment proceedings litigation. The determination of this issue is a question of fact for the jury in view of the evidence presented and the Court's instructions. * * *

"* * * amount of legal services actually rendered relating to, incident to, connected with, a part of, and reasonably necessary in connection with the dissolution of the attachment; * * *

"* * * counsel fees, if any, actually paid for services relating to, incident to, connected with, a part of, and reasonably necessary in respect to the dissolution of the attachment, * * *

"* * * legal services were in fact performed by plaintiff's attorneys in respect to the attachment litigation and that said services were incident to, connected with, a part of, and reasonably necessary to the prosecution of the litigation in the so-called attachment proceedings. * * *

"* * * plaintiff is entitled to recover fees for legal services rendered relating to, connected with, a part of, and reasonably necessary to the prosecution of the attachment proceedings litigation, * * *"

No. Defendants contend that the trial court by the foregoing instructions failed to limit plaintiff's recovery to the amount *paid* for *successful* proceedings resulting in the dissolution of the attachment; that the foregoing instructions informed the jury that it should allow for all services in any wise relating to the attachment proceedings as such whether successful or unsuccessful in effecting a dissolution of the attachment, as well as for the value of benefits resulting to the defense of the action on its merits.

[11] Instructions are to be read and considered as a whole. The fact that some, when taken severally, fail to enumerate the propositions of law in precise terms and with legal accuracy does not render them erroneous if the instructions read as a whole are correct. (See cases cited in 2 Cal.Jur. (1921), Appeal & Error, section 509, note 3, page 869.)

In the instant case the instructions of the court read in their entirety were complete and correctly stated the rules of law applicable to the issues. No error appears in them.

Affirmed.

MOORE, P. J., concurs.

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107 Cal.App.2d 541

PEOPLE v. DARNELL.

Cr. 2742.

District Court of Appeal, First District,
Division 2, California.
Nov. 15, 1951.

Newt Darnell was convicted of escape and of injuring a jail structure by the Superior Court, County of Contra Costa, Hugh H. Donovan, J., and he appealed. The District Court of Appeal, Goodell, J., held that evidence established that complaint against defendant had been presented to magistrate prior to defendant's escape, that under those circumstances alleged informality in arresting defendant was no defense in escape prosecution and that instructions based upon premise that confinement was unlawful were properly rejected on trial of charge of injuring the jail structure.

Judgment affirmed.

1. Escape ⟹10

In prosecution for escape under statute prohibiting escape from confinement by one charged with a felony or misdemeanor, evidence sustained implied finding that complaint against defendant for disturbance of the peace was laid before magistrate prior to defendant's escape from jail. Pen.Code, §§ 415, 841, 4532.

2. Arrest ⟹68

Compliance by officer with statutory formalities in making arrest was unnecessary if arrest was made while defendant was actually engaged in a disturbance of the peace. Pen.Code, §§ 415, 841.

3. Escape ⟹6

Failure to comply with statutory formalities in arresting defendant for disturbance of the peace was no defense in subsequent prosecution for escape where evidence indicated escape was made after complaint against defendant had been presented to magistrate. Pen.Code, §§ 415, 841, 4532.

4. Escape ⟹10

Where defendant, who was arrested for disturbing the peace, thereafter escaped from jail and pleaded guilty to charge of disturbing the peace, trial court in prosecution for escape properly ruled that issues of whether defendant's conduct was a disturbance of the peace and whether his arrest and confinement were unlawful could not be considered. Pen.Code, §§ 415, 841, 4532.

5. Criminal Law ⚿814(3)

In prosecution for injuring a jail structure, where evidence indicated that defendant had been lawfully confined in jail, various instructions based upon premise that defendant's confinement was unlawful were properly rejected. Pen.Code, § 4600.

6. Criminal Law ⚿808

The fact that language is substantially the same as that employed in a judicial opinion does not make it adaptable to or appropriate in an instruction to a jury.

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Henry Teichert, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., of California, David K. Lener, Deputy Atty. Gen., for respondent.

GOODELL, Justice.

Appellant was charged by the first count of an information with escape, Penal Code, § 4532, and by the second with injuring a jail structure. Penal Code, § 4600. Four prior felony convictions were alleged. He pleaded not guilty to both counts but admitted the prior convictions. A jury found him guilty of both offenses and he was sentenced to the penitentiary, the sentences to run concurrently. This appeal followed.

The escape was made after appellant had been arrested by a deputy sheriff and lodged in a branch county jail at Crockett for disturbing the peace. The jail was damaged in making the escape.

Appellant was paroled from Folsom penitentiary in June, 1950 because of illness, and was living in Richmond. On the afternoon of September 12, 1950 he went with his brother to Crockett to look for work. He was seen lying in the street, apparently intoxicated, and the authorities were notified. Deputy Sheriff Joseph drove to the scene, found him lying under a tree to which he had been helped, attempted to arouse him and finally did so by a blow on the sole of his shoe. The deputy testified that appellant appeared to be intoxicated and that he detected a strong odor of wine on him. Appellant denied that he had been drinking and asserted that he had "blacked out" in a fainting spell, was in pain, and had difficulty in breathing. The deputy testified that he showed signs and symptoms of asthma.

The deputy helped him to his feet and into the deputy's car. He testified that appellant weaved and staggered. Appellant said his name was Woods and that he worked for the Southern Pacific Company. The deputy drove toward the railroad depot where he was met by another officer, Sergeant Briggs. Appellant offered no physical resistance but at that point became very profane and abusive toward Joseph in a loud voice, whereupon the latter said "If you're going to act like that, I'll lock you up." Sergeant Briggs was dressed in a khaki uniform and wore a cap and badge and appellant testified that he saw that it was a uniform, also, that when Joseph returned after meeting Briggs he had keys in his hand. Deputy Sheriff Joseph was dressed in a business suit and kept his badge in his pocket. Sergeant Briggs had brought with him the key to the jail. The two officers lodged appellant in the jail and Joseph searched him. There was a tank or cage in the jail but it was not used in this instance and appellant was left there on a bunk outside the tank. The officers left the jail with appellant locked therein. Later in the afternoon Joseph returned with a constable to see if he could identify appellant but nothing further happened on that visit.

When the jail was visited after dinnertime the appellant had departed. A medicine bottle which he had left in his coat pocket showed his name and address, and he was re-arrested the same evening in Richmond.

The following morning he appeared in the Justices' Court and pleaded guilty to the charge of disturbing the peace. At the same time, after being sentenced in the misdemeanor case, he was arraigned on the two felony charges.

On the trial of the felony case appellant's counsel sought to prove that appellant's conduct had not constituted a disturbance of the peace, and contended that both the arrest and confinement were unlawful. The court ruled that that issue could not be relitigated as the appellant had pleaded guilty to the misdemeanor charge.

Appellant frankly admits that the only defense there is to a charge of escape is that the confinement was illegal, but complains that by the court's ruling he was deprived of that defense. Appellant also concedes that "if in fact the defendant had been guilty of a misdemeanor at the time of his arrest a failure on the part of the arresting officer to disclose his authority, intention and cause of arrest would have been cured and the confinement of the defendant could have been said to be lawful (Pen.Code, sec. 841)."

Appellant's counsel (appointed by the court) stressed at the trial, as he does on appeal, the serious difficulties with which the defense was confronted. Appellant testified that when, on the day after the arrest, he was arraigned on the charge of disturbing the peace and pleaded guilty, "I thought I was pleading guilty to the whole thing, escape and—all." In the misdemeanor case appellant had no counsel. On the felony trial appellant's counsel strenuously argued that if not permitted to show the insufficiency of the evidence to sustain the charge of disturbing the peace appellant's plea of guilty to that misdemeanor amounted, in its effect and legal consequences, to a plea of guilty to both felony charges, entered without benefit of counsel.

Section 4532 Penal Code reads: "Every prisoner charged with or convicted of a felony or misdemeanor who is confined in any county or city jail or prison * * * or who is in the lawful custody of any officer or person, who escapes or attempts to escape from such county or city jail, * * * or from the custody of any officer or person in whose lawful custody he is, is guilty of a felony and is punishable by imprisonment in the state prison not exceeding ten years, or in the county jail not exceeding one year; * * *."

The record is not too clear with respect to the time when the complaint for disturbing the peace was filed. Deputy Sheriff Joseph, under cross-examination by appellant's counsel, testified:

"Q. When did you file a complaint against him? A. That same day.

"Q. What time? A. * * * Sometime between 4:00 and 5:00 o'clock. Sometime around there."

Elsewhere the same witness, under direct examination by the prosecuting attorney, when narrating what happened when appellant arrived back in Crockett in the evening after his second arrest said: "There was a complaint already on file in the Justice Court, charging him with 415 * * *

"Q. Who filed that? A. I did. When we take a man in custody if he's in a condition we can't take him into court that day we file a complaint and bring him into court in the morning.

"Q. You filed the complaint? A. I filed the complaint and he was brought into court later and pled guilty to the charge [of disturbing the peace]."

[1] The foregoing testimony is sufficient to sustain the implied finding by the jury that the complaint under § 415, Penal Code was laid before the magistrate before the break was made. That being so, appellant was brought squarely within the terms of the statute; he was a prisoner charged with a misdemeanor and confined in a jail.

The Justice of the Peace testified that the complaint was not *filed* until the morning after the break. Under cross-examination by appellant's counsel he testified:

"Q. Would it be after 9:00 in the morning? A. It would be after 9:00. * * *

"Q. Did Mr. Fortado or did Mr. Joseph file that? A. Mr. Joseph. * * *

"Q. * * * You're not sure it was the 13th, but you know it was the day after the break. Is that true? A. Yes, it was the day after the man broke out of jail. And I'm * * * almost sure it was the 13th."

However, on redirect examination by the prosecuting attorney the following testimony was given:

"Q. The practice of the peace officers in your court is to present complaints and then you file them in the morning when you come to work; is that right? A. That's right.

"Q. As a matter of fact, the Highway Patrol, they present complaints at your office during the day and the night; is that right? A. Yes.

"Q. You enter them all the first thing the next morning? A. Yes."

The latter testimony seems to explain the situation, and it is consistent with Joseph's testimony that circumstances may be such that the defendant cannot be brought before the court when the complaint is drawn up, or until the next morning.

Appellant contends that the deputy did not make the arrest in accordance with § 841, Penal Code which requires that "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, *except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense,* * * *." (Emphasis added.)

[2] It was not until appellant became profane and abusive in a loud voice that the situation took on the character of an arrest. Up to that time Joseph had been simply helping a stranger who was either sick or under the weather, to straighten himself out. It was then that the deputy said "If you're going to act like that, I'll lock you up." If the arrest was made while appellant was "actually engaged" in a disturbance of the peace, § 415 Penal Code, then it came within the exception contained in § 841 emphasized above. See People v. Craig, 152 Cal. 42, 45–46, 91 P. 997. "The reason that notification of official character of the person making an arrest is not required when the party is apprehended in the commission of an offense * * * is because he must know the reason why he is arrested" 3 Cal.Jur. p. 129; see People v. Young, 136 Cal.App. 699, 705, 29 P.2d 440, quoting People v. Pool, 27 Cal. 572, 576.

[3] But conceding for the purpose of the discussion that the arrest was less formal than it might have been, it is difficult to see how that could affect in any way the legality of the confinement. As soon as the appellant was locked up the arrest, as such, was an accomplished fact, and as soon as the complaint was drawn up appellant was a "prisoner charged with * * * a * * * misdemeanor" and confined in a jail. That being so, it was the only question in the case under the first count and any irregularity in the arrest would not be material or have any bearing at all on such issue.

If appellant had offered physical resistance, § 148, Penal Code and was being prosecuted therefor, the circumstances of the arrest would certainly have been material, see People v. Perry, 79 Cal. App.2d Supp. 906, 180 P.2d 465, where the authorities on arrest are collected in an extensive discussion of the subject. Again, had appellant broken away from the arresting officer before reaching the jail (a distinct offense under § 4532) the circumstances of the arrest would undoubtedly have been material. But he neither offered physical resistance, nor broke away from the officer. In an action for false arrest the circumstances would likewise have been material.

In People v. Serrano, 123 Cal.App. 339, 11 P.2d 81, 82, the defendant was arrested without a warrant late one Saturday afternoon and placed in jail where he was booked on the charge of "suspicion of forgery". He remained there Saturday night and Sunday and was last seen in jail about 5:30 Sunday afternoon. Thereafter he made his escape. No complaint was filed against him for forgery until Monday morning, after he had escaped. When charged with escape he moved to quash the information on the ground that there was no escape because he had not been in lawful custody. The information was quashed, but on appeal by the People that order was reversed. The court said: "* * * we are convinced that the charge 'suspicion of forgery' in the jail record was a sufficient designation of the fact that defendant was being held in the city jail until a formal charge of forgery should be made against him upon the opening of the justice's court on the first judicial day following his arrest and detention in jail. Under the provisions of section 836 of the Penal Code said peace officers had a right to arrest the defendant, without a warrant, for forgery. It was the duty of the arresting officer to take defendant before the nearest or most accessible magistrate in the county in which the arrest was made without unnecessary delay. Pen.Code, § 849. The arrest being made on a nonjudicial day, the arresting officer had the right to place defendant in the city jail, and under the circumstances of this case the defendant was lawfully detained by, and was in the custody of, the officer in charge of the jail at the time of the escape."

Two leading escape cases are cited by appellant, People v. Ah Teung, 92 Cal. 421, 28 P. 577, 15 L.R.A. 190, and People v. Clark, 69 Cal.App. 520, 231 P. 590, but neither is in point. In the Ah Teung case the defendant was prosecuted for aiding in the escape of one Lee Yick from the county jail of Alameda county. The opinion does not show the physical circumstances of the escape but it would appear that it was made without violence. Lee Yick had entered this country from Mexico and was taken before a United States Commissioner in San Diego who made a finding that he was not entitled to remain. Instead of deporting him to Mexico as the law required, he was for some reason or other transferred to the Alameda county jail wherein he was held without any commitment or adjudication (other than the San Diego Commissioner's finding) that he should be deported. He was in a different district from that wherein the hearing was held, and the court in this (northern) district had no jurisdiction of the case. The opportunity presented itself to absent himself from the jail and he made a getaway. Ah Teung was convicted of aiding his escape but the judgment was reversed because there was no authority or legal justification for holding Lee Yick in the Alameda county jail hence there could be no escape. The court's language, appropriate enough to the decision of that case, has no application to the instant case.

In People v. Clark, supra, the defendant who was convicted of an escape had been convicted of burglary, the penalty for which was confinement in the state prison. The court suspended the sentence, imposing the condition that he work in the Los Angeles county road camp, the imposition of which was wholly beyond the jurisdiction of the court. While in the road camp the defendant availed himself of the opportunity to walk out and his conviction of an escape was reversed because he had never been legally committed to the camp and was not legally confined therein.

Let it be assumed that appellant, instead of pleading guilty after having been re-arrested, had stood trial for disturbing the peace, and had won a clear-cut acquittal on that charge. It is difficult to see how such acquittal would have made him any less guilty of escape. *He had still escaped from a jail while charged with a misdemeanor.* See discussion in People v. Ah Teung, supra, 92 Cal. at pages 425–426, 28 P. 577 and cases cited.

[4] For these several reasons we find no error in the ruling rejecting appellant's application to submit to the jury in the felony case, *as an issue therein,* the disturbance of the peace episode. Appellant was on trial for a distinct and later offense. No authority has been cited holding that an informal arrest, even if proved, can vitiate or at all affect proceedings arising out of an independent, subsequent offense, and we are satisfied that no such authority can be found.

[5] Appellant's contention with respect to the second count is that he was entitled to instructions stressing his right to free himself from an unlawful confinement even though he incidentally injured jail property.

Section 4600, Penal Code reads: "Every person who wilfully and intentionally breaks down, pulls down, or otherwise destroys or injures any jail or prison, is punishable by fine not exceeding ten thousand dollars ($10,000), and by imprisonment in the State prison not exceeding five years."

The admitted facts are that in the late afternoon or early evening of September 12, 1950, appellant broke out of the branch jail. It is a small wooden structure with a stucco exterior, about 20 feet long and 10 feet wide, with barred windows and a heavy plank door. In the part where appellant was confined there was a washbasin standing on legs about ¾" in diameter. Appellant ripped loose one of these legs, used it to pry the frame and bars from one of the windows, and climbed out the window.

The court instructed the jury that "Every person who willfully and intentionally destroys or injures any jail is guilty of a public offense. For this purpose, it does not matter whether or not he is lawfully arrested or even whether or not he is a prisoner." While conceding that this is correct as an abstract statement of the law, appellant claims that in this case it was improper because it fails to tell the jury that one unlawfully confined has the right "to avail himself of whatever means are at hand to effect his freedom."

If we are correct in holding that at the time appellant broke out he was lawfully confined, such holding answers this contention, based, as it is, on the untenable premise that the confinement was unlawful.

The defense proposed, but the court rejected, the following instruction: "A person unlawfully deprived of his liberty is not obliged to submit to such violation of his rights merely because the person restraining him is an officer of the law. This is true even though such officer may honestly believe that he is performing his legal duties." That instruction is founded upon the same untenable premise.

The following instructions were tendered by the defense:

"The very foundation of the crime of escape is the lawful confinement of the prisoner; and therefore it is a generally and well-established rule that, when the imprisonment is unlawful, the reason which makes flight from prison an offense does not exist. In such a case, the right to liberty is absolute and he who regains it is not guilty of the crime of escape.

"The right to liberty is absolute. A person illegally arrested may use any reasonable means to effect his escape, even to the extent of using such force as is reasonably necessary. Accordingly, if you find that the defendant was justified in escaping and if you find that he had no other means of escaping than to tear down the window of the jail, you must find that he was not guilty of the second count in this charge, that of intentionally injuring jail property.

"Where one is unlawfully confined, a jail is merely a private building. Any destruction of it in connection with a lawful departure therefrom is not an offense."

[6] These proposed instructions, for the most part, were taken from language which the Supreme Court used in People v. Ah Teung, supra, or from cases cited therein. In the first place, the fact that the language was substantially the same as that employed in a judicial opinion does not mean that it was adaptable to, or appropriate in, an instruction to a jury, 24 Cal.Jur. "Trial" § 84, p. 816. Second, they were based on the same premise as the first, quoted above, which is untenable. Third, there is no similarity between this and the Ah Teung case.

There was no error in refusing these instructions.

Appellant concedes that the case of People v. Boren, 139 Cal. 210, 72 P. 899, "is the principal obstacle to appellant's contention in the present appeal". That case was decided when the subject now covered by § 4600 was covered by § 606, Penal Code. The two sections are, as appellant concedes, "extremely similar in wording" and we see no reason why the present section should be given any different effect or meaning than that given to the parent section in the Boren case. See, also, People v. Sheldon, 68 Cal. 434, 9 P. 457.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

107 Cal.App.2d 659

ELBERT, Limited, v. BARNES et al.

Civ. 18425.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1951.

Action by Elbert, Ltd., a corporation, against John Barnes, and others and Murray J. Black, Jr. From an adverse judgment and order of the Superior Court of Los Angeles County denying a motion for new trial, Roger Alton Pfaff, J., Murray J. Black, Jr., appealed. The District Court of Appeal, Hanson, J., pro tem., held that the appellant as holder of a tax deed based on foreclosure of a street bond assessment was not entitled under the statute to parity and equality with the holder of a tax deed which was based on a tax lien levied in a subsequent year.

Judgment affirmed. Appeal from order denying new trial dismissed.

1. Taxation ⚷733

A title acquired through tax lien proceedings at a time when the property was not subject to other tax liens or deeds based thereon is subject and inferior to later tax liens or tax deeds based thereon, without any right to a claim of equality or parity. Revenue and Taxation Code, § 3900.

2. Courts ⚷107

The sweeping language in an opinion must be read in connection with the facts thereof.

3. Taxation ⚷786

A holder of a tax deed based on foreclosure of a street bond assessment was not entitled to parity and equality with the holder of a tax deed which was based on a tax lien levied in a subsequent year, under the statute providing for parity of all final tax deeds of all taxing agencies, where at the time, the holder's predecessor received his title, there were no liens or encumbrances against the property. St.1911, p. 730, as amended; Revenue and Taxation Code, § 3900.

Ralph M. Goldstein, Los Angeles, for appellant.

John F. Bender and Gizella M. Allen, Los Angeles, for respondent.

HANSON, Justice pro tem.

The only question presented by this appeal is whether the holder of a tax deed based on the foreclosure of a street bond assessment is entitled to parity and equality with the holder of a tax deed which was based on a tax lien levied in a subsequent year. The solution of the problem turns upon the meaning of the language of Revenue and Taxation Code, sec. 3900,[1] which places certain tax and assessment liens, along with tax deeds issued pursuant thereto, on a parity and equality with certain other liens and tax deeds.

At the time the two tax deeds here involved were issued the rule was well established that all coexisting tax liens on a property or tax deeds based thereon were on a parity and equality with one another by virtue of the code section just mentioned. We are now asked to hold that the section applies not only to coexisting liens or deeds made pursuant thereto, but to all tax liens against a property, regardless of when they became liens on the property.

In the case before us appellant derived his title through a tax deed that was issued to his predecessor in title as a consequence of the nonpayment of an assessment bond lien levied against the vacant lot here involved. The original assessment against the lot became a lien thereon, by virtue of proceedings had under the Improvement Act of 1911, St.1911, p. 730, as amended, sometime prior to September 22, 1928, at which time appellant's predecessor acquired a City Treasurer's tax deed thereto. At the time appellant's predecessor received his title, there were no liens or encumbrances of any kind or character against the lot. There being no existing liens or tax deeds outstanding against it, it is manifest that the rule of parity and equality with respect to future liens or future tax deeds based thereon is not involved and has no application unless the statute provides otherwise. Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408. While it is true, as appellant argues that his predecessor could have delayed invoking the procedure that was taken by him and that led to his tax deed, and thereby have placed himself on a parity with the general tax when it was levied the following year he, nevertheless, voluntarily failed to do so. Moreover, it is evident that if appellant's predecessor had not taken the action he did the then owner of the property would have continued to have a right of redemption and might have redeemed from him and thus left him with no interest whatever in the realty. Accordingly, if appellant's predecessor desired, as he evidently did, to procure title to the lot as soon as possible rather than to enable the owner to redeem, he exercised a choice that was given to him under the law. As owner of the delinquent street bond he was entitled to hold it unforeclosed and permit interest thereon along with penalties to pile up in his favor and gamble on the possibility of a redemption or, if he chose, procure title, if he valued the property highly, and thus cut off all redemption rights by the owner. He chose the latter alternative. To contend, as appellant in effect does, that he should be permitted under the circumstances to gamble on receiving back his investment with interest and penalties years and years later, just because he claims through a tax title, it seems to us does not make sense.

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[1] Section 3900 of the Revenue and Taxation Code reads as follows: "* * * It is hereby declared to be the policy of the State and the intent of the provisions in this code contained, that the final tax deed or deeds of all taxing agencies, * * * that annually levy, assess and collect taxes or assessments upon real property within the State, should be and they are hereby declared to be upon a parity with each other, and that regardless of when the levy of such taxes or assessments is or has been made, and regardless of when the final tax deed or assessment deed is or has been taken by such taxing agency, that the rights of all taxing agencies and all such deeds shall be equal and upon a parity with each other."

[1–3] That a title acquired through tax lien proceedings at a time when the property was not subject to other tax liens or deeds based thereon becomes subject and inferior to later tax liens or tax deeds based thereon, without any right to a claim of equality or parity is the holding of our Supreme Court in Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408. The case distinguishes La Mesa Lemon Grove and Spring Valley Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143, and Neary v. Peterson, 1 Cal.2d 703, 37 P.2d 82, the basic principles of which are the basis for the holdings in Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995, and Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537, which are so heavily relied upon by appellant. Appellant's contention that the latter two cases support his position is accordingly without merit. The cases just mentioned involved coexisting liens or tax deeds based on coexisting liens, and hence the somewhat sweeping language found in those opinions must be read with the facts thereof in mind.

For the reasons indicated the judgment must be and it is affirmed. The appeal from the order denying a new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

MOUNTAIN STATES CREAMERY CO. v. TAGERMAN et al.*

Civ. 18303.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1951.

Rehearing Denied Dec. 12, 1951.

Hearing Granted Jan. 17, 1952.

Action by Mountain States Creamery Company, etc., against George Tagerman and another to recover balance due for goods sold and delivered to alleged partnership, to recover on an open book account and to recover on an account stated. From a judgment of the Superior Court of Los Angeles County, William R. McKay, J., named defendant appealed. The District Court of Appeal, Hanson, J., pro tem., held that permitting plaintiff after resting its case to file a supplemental complaint to conform to proof erroneously admitted, alleging that appellant, as part of consideration for formation of partnership with co-defendant, had agreed to pay outstanding indebtedness due plaintiff for the goods previously sold and delivered to co-defendant individually was error and resulted in a miscarriage of justice.

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* Subsequent opinion 246 P.2d 21.

Judgment reversed.

1. Partnership ⚷217(2)

In action to recover balance due for goods sold and delivered to alleged partnership, evidence that defendants had subsequently formed the alleged partnership and that, as part of the consideration for formation of the partnership, one of the defendants had agreed to pay outstanding indebtedness due plaintiff for the goods previously sold and delivered to codefendant individually, was inadmissible.

2. Partnersnip ⚷218(3

Where complaint sought recovery of the balance due for goods sold and delivered to alleged partnership and plaintiff's evidence showed that the goods had been sold and delivered to one of the defendants individually before he and codefendant entered into alleged partnership, codefendant was entitled to a nonsuit at the close of plaintiff's evidence, though it also showed that codefendant as part of consideration for formation of partnership had agreed to pay outstanding indebtedness due plaintiff for the goods previously sold and delivered.

3. Pleading ⚷279(4)

Where original complaint sought recovery of balance due for goods sold and delivered to alleged partnership, permitting plaintiff after resting its case to file a supplemental complaint to conform to proof erroneously admitted, that one of the defendants as part of consideration for formation of partnership had agreed to pay outstanding indebtedness due plaintiff for the goods previously sold and delivered to codefendant individually was error and an abuse of discretion, since supplemental complaint stated a separate and distinct cause of action requiring evidence of a character wholly at variance with that required to sustain causes of action alleged in original complaint. Code Civ.Proc. § 1868.

4. Pleading ⚷279(4)

Permitting a supplemental complaint which introduces a new cause of action or substantially changes the cause of action sued upon to be filed to conform to evidence erroneously admitted over objection that such evidence goes beyond the issues upon which case was tried is error. Code Civ.Proc. § 1868.

5. Pleading ⚷236(3)

A large discretion is necessarily given trial judge to grant or refuse amendments to pleadings in the course of a trial, but such discretion is a legal discretion to be exercised and guided by fixed principles of law.

6. Trial ⚷79

An objection to an offer of evidence stands thereafter, without being repeated, to like offers of evidence.

7. Pleading ⚷420(1)

An objection to tendered amendment to pleadings stands thereafter, without being repeated, to like offers of amendments.

8. Appeal and Error ⚷195

Record disclosed sufficient objection to order permitting plaintiff after resting its case to file a supplemental complaint stating a new cause of action.

9. Appeal and Error ⚷1041(5)

Permitting plaintiff after resting its case in action to recover balance due for goods sold and delivered to alleged partnership to file a supplemental complaint to conform to proof, alleging a separate and distinct cause of action based on alleged agreement by one of the defendants as part of consideration for formation of partnership to pay outstanding indebtedness due plaintiff for the goods previously sold and delivered to codefendant individually, resulted in a miscarriage of justice.

David C. Marcus, Los Angeles, for appellant.

George Penney, Los Angeles, for respondent.

HANSON, Justice pro tem.

The decision of this case turns primarily on the question whether the trial court abused its discretion in permitting an amendment of the complaint to conform to proof which was inadmissible under the allegations of the complaint.

The plaintiff below, respondent here, instituted an action against the appellant Tagerman and one Garrett. The complaint—in three counts—averred that at all times mentioned therein the defendants Tagerman and Garrett were partners doing business under the name of the "Garrett Distributing Co." The first count averred that between February 6th and March 5, 1948, plaintiff sold and delivered to the defendant partnership goods, wares and merchandise in the amount of $8,716.50 upon which, by reason of payments made thereon, there was due to the plaintiff $6,640. The second count averred there was due to plaintiff from the defendants on an open book account the sum of $6,640. The third count averred that the defendants were indebted to plaintiff in the sum of $6,640 on an account stated between February 6 and March 5, 1948. The defendant Tagerman filed a general denial. The undisputed evidence is that he was not a partner during the period mentioned and that the goods were sold to Garrett who operated under the name of the "Garrett Distributing Co."

The case was originally called for trial on January 13, 1950, but was continued at the request of the plaintiff to March 23, 1950. At the opening of the trial on that date plaintiff sought permission to file an amendment to his complaint so as to set forth a fourth count alleging in substance that prior to March 17, 1948, the defendant Garrett was doing business individually under the name of the Garrett Distributing Co. and between February 6, 1948, and March 5, 1948, he became indebted to the plaintiff for goods, wares and merchandise sold and delivered to him, the balance of which aggregated $6,640; that thereafter on March 17, 1948, Tagerman and Garrett formed a partnership and that as a part of the consideration for the formation of the partnership Tagerman agreed to pay the outstanding indebtedness due to plaintiff from Garrett. Over apt objection by Tagerman the court permitted the amendment to the complaint to be filed, but after further colloquy with counsel the court indicated that it was of the view that counsel for Tagerman was entitled to demur to the complaint, as amended, and hence it should and would transfer the case back to the calendar department. At that stage counsel for plaintiff stated he was anxious to proceed to trial at once and hence moved that he be given permission to withdraw the amendment which was granted. He further stated he would move at the conclusion of the case to amend the complaint to conform to the proof he produced and would take his chance as to the ruling the court might then make.

[1] The case then proceeded to trial on the issues made by the original complaint. Instead of confining the proof to the issues the court, over apt objection by counsel for Tagerman, permitted evidence on the issues which were made by the fourth count even though the issues which had been made thereby were no longer in the case. The evidence should not have been received and it was plain error to do so.

[2, 3] At the close of the plaintiff's evidence the defendant moved (1) to strike the testimony at variance with the issues made by the complaint and (2) for a nonsuit. The motions were erroneously denied. The plaintiff having rested his case, thereafter asked and was granted permission to file a supplemental complaint to conform to proof, i. e., alleging that defendant Tagerman had agreed to pay the obligation of Garrett to the plaintiff. This ruling was likewise erroneous.

[4] Respondent appears to labor under the impression—an impression seemingly widely held—that if evidence is received by the court over objection which goes beyond the issues upon which the case is tried, it is not error for the trial court to permit a supplemental complaint to be filed to conform to the evidence admitted regardless of the fact that the pleading proposed introduces a new cause of action or substantially

changes the cause of action sued upon. The notion is wholly erroneous. Von Goerlitz v. Turner, 65 Cal.App.2d 425, 150 P.2d 278.

[5] The law necessarily contemplates that a large discretion must be given to trial judges to grant or refuse amendments to pleadings in the course of a trial. But the discretion given is a legal discretion to be exercised and guided by fixed principles of law. Stringer v. Davis, 30 Cal. 318, 322.

In the case before us it is plain that the fourth count proposed by plaintiff stated a separate and distinct cause of action of a character entirely at variance with the three counts set forth in the complaint. In that connection we observe that in Chapman v. Americus Oil Co., 117 Ga. 881, 45 S.E. 268, suit was brought upon an account for a stated quantity of cotton seed sold and delivered at a given price per ton. An amendment was offered, alleging that the defendant agreed to take the cotton seed, and deliver to plaintiff cotton seed meal, which he had failed to do; the amendment averring that, as a result of such failure, the defendant had become liable to plaintiff in a stated sum. It was there held that the amendment set forth a new cause of action, and was properly disallowed. Speaking to that very point the court said, "The amendment * * * clearly added a new cause of action, and was properly disallowed. The original suit was for goods sold and delivered by plaintiff to defendant. The amendment sought to recover for a failure to deliver goods bought by plaintiff from defendant." See also, Ivy Coal & Coke Co. v. Long, 139 Ala. 535, 36 So. 722. The fourth count as tendered by the plaintiff in this case could not possibly have been sustained by any evidence properly requisite to sustain any of the three counts in the original complaint. Accordingly, the cause of action upon which plaintiff was compelled to rely in order to recover was that tendered by the proposed fourth count. That count required evidence of a character, wholly at variance with that required to sustain any of the three counts of the original complaint. See Code Civ.Proc., sec. 1868. The defendant Tagerman was entitled to meet the count tendered by demurrers and motions—none of which he was called upon to prepare and file at the trial. Scott v. McPherson, 168 Cal. 783, 145 P. 529. This fact was recognized and conceded by the trial judge at the opening of the trial. When counsel for plaintiff withdrew the amended complaint and the court stated the case would be tried on the issues raised by the original complaint, counsel for defendant was entitled to assume that the court would not permit evidence to be received outside of the issues and, what is more, that it would not grant permission to the plaintiff to amend to conform to proof based on inadmissible evidence. He was justified in assuming that the court would not do indirectly what it could not do directly. See Code Civ.Proc., sec. 1868. The action of the court in this respect was an abuse of discretion. But quite apart from the abuse thus shown it was equally an abuse of discretion for the trial court to permit an amendment which set forth a new cause of action. It is one thing to permit a litigant to amend a cause of action defectively stated in order to properly present his case as it is made by germane allegations; it is quite another thing to ignore fundamental rules of pleading and justice.

[6–8] In an endeavor to avoid a reversal respondent contends that appellant failed to object to the ruling of the court which permitted him to file the supplemental complaint. There are at least two complete answers to the contention. *First,* it appears that appellant objected at the opening of the trial to any amendment of the pleadings which would set forth a count such as was tendered. In the law of evidence it is a well-established rule that an objection to an offer of evidence stands thereafter, without being repeated, to like offers of evidence. Green v. Southern Pac. Co., 122 Cal. 563, 55 P. 577; 1 Wigmore on Evidence, 3rd ed., sec. 18, p. 331, n. 18; 64 C.J. 179, sec. 201, n. 41–42. Logically, it would seem to follow that amendments offered to pleadings should and must be governed by a like rule. *Second,* it is plainly evident that appellant did object to the order even though his objection was not as aptly phrased as it might have been.

[9] Respondent's further contention that no miscarriage of justice is shown we think is answered by the facts and requires no further comment from us.

Additional errors assigned by appellant need not be considered or decided in view of the conclusion we have reached.

The judgment is reversed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

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107 Cal.App.2d 599

CELLI v. FRENCH.

Civ. 4184.

District Court of Appeal, Fourth District. California.

Nov. 19, 1951.

Hearing Denied Jan. 17, 1952.

Gary Celli, by his guardian ad litem Francine Celli, brought an action against Robert H. French, Jr., for injuries sustained when plaintiff was struck by an automobile being driven by defendant. The Superior Court, Orange County, Franklin G. West, J., granted plaintiff a new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that the allegedly newly discovered testimony was not merely cumulative and might well affect the result.

Affirmed.

1. Appeal and Error 🔑981
New Trial 🔑99

An order granting a new trial on ground of newly discovered evidence is a matter largely within the discretion of the court, and will not be disturbed unless an abuse of discretion clearly appears.

2. New Trial 🔑99

The newly discovered evidence which will justify a new trial must not be merely cumulative and must be sufficient to indicate that a different result is probable, and a sufficient showing of diligence must be made.

3. New Trial 🔑104(3)

Where the main question in pedestrian's personal injury action had been as to which side of the street defendant motorist was traveling on at time of accident, and conflicting testimony had placed automobile on both sides of the street after the accident, and defendant had testified that he had not moved automobile after accident until after ambulance had left scene, newly discovered testimony, offered as basis for new trial, to effect that after accident automobile had moved before ambulance had arrived, was not merely cumulative evidence, but might well affect the result, and therefore new trial would be granted.

4. New Trial 🔑102(5)

Where basis for pedestrian's motion for new trial of his personal injury action against motorist was newly discovered evidence, and evidence in proceedings on motion showed that prior to trial pedestrian had interviewed all the neighbors near the scene of the accident in an effort to locate all witnesses and that new witness had presented herself for first time the day before jury argument, such evidence was sufficient to support finding of due diligence necessary to sustention of motion.

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Sampson & Dryden, Robert E. Moore, Jr., Los Angeles, for appellant.

Mize, Kroese, Larsh & Mize, Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order granting a new trial upon the sole ground of newly discovered evidence.

On August 7, 1948, the minor plaintiff was struck and injured by defendant's automobile which was traveling north on Victoria Drive in Laguna Beach. The boy, then four years old, was attempting to cross from the west side of the street to his home on the east side.

The main question at the trial was as to whether or not the defendant had been traveling on the west or wrong side of the street. The defendant moved his car after the accident but the time at which this was done, in relation to another event, was of great importance. A witness for the plaintiff testified that immediately after she heard the screech of brakes she saw the defendant's car parked near the west side of the road, facing north, with its left wheels about four feet from the left side of the road. The defendant testified that he was driving on the right side of the road at the time of the accident; that he did not move his car after hitting the boy until after the ambulance left the second time, to take the boy to the hospital; and that when the ambulance left to go to the hospital it went north around and to the left of his car. The testimony for both parties showed that when the ambulance first arrived it came south and parked on the west side, opposite the boy's home; that since the doctor had not yet arrived the ambulance left and proceeded south; that the ambulance later returned, going north, and parked on the right or east side of this street; and that after the boy was placed in it it was driven away in a northerly direction.

The presentation of evidence closed on February 9, 1950, and on motion of the defendant the giving of instructions and the arguments to the jury were postponed to February 14, 1950. On that day, counsel for the plaintiff asked permission to reopen his case for the purpose of putting on some evidence, which is the newly discovered evidence here in question. An offer of proof was also made. It was stated that a new witness had just been discovered who was employed by the Los Angeles school department, but who at times occupied a house adjoining the scene of this accident, and that she would testify that she was there at the time of the accident; that she heard the commotion and went out on the street; that she saw the defendant's car, immediately after the accident, clear over on the west side of the street and headed north; that she saw the defendant move his car from that location, moving it to the right-hand side of the street, going north; that this moving of the car occurred before the ambulance came the first time; and that she saw the ambulance come the first time, driving south on Victoria Drive. The court remarked that this offered evidence contained a new element in that there had been no evidence of the moving of the car by any eyewitness to the moving, and no evidence to the effect that the car had been moved prior to the time the ambulance first arrived. The court suggested that this was an element of newly discovered evidence which could well be considered on a motion for a new trial, if one were made, but denied the motion to reopen for the reason that to do so would be unfair to the defendant who had been allowed to return to his school in Oregon. The case proceeded, and the jury voted 10 to 2 in favor of the defendant. A motion for a new trial was made on all the statutory grounds and was granted "upon the sole ground materially affecting the substantial rights of plaintiff, viz., newly discovered evidence, material for the said party making the said application, which he could not, with reasonable diligence, have discovered and produced at the trial."

[1, 2] An order granting a new trial on the ground of newly discovered evidence is a matter largely within the discretion of the court, and will not be disturbed unless an abuse of discretion clearly appears. Such evidence must not be merely cumulative and must be sufficient to indicate that a different result is probable, and a sufficient showing of diligence must be made. Laverne v. Dold, 17 Cal.App.2d 180, 61 P.2d 497. Recognizing these rules, the appellant contends that an abuse of discretion here appears. It is argued that the proposed evidence was merely cumulative, impeaching and contradictory; that it was only rebuttal and could not have affected the result; that the respondent could have brought out the same things by other witnesses; and that the showing of diligence was insufficient.

[3] Instead of being merely cumulative and impeaching, the new evidence furnished a plausible and probable explanation of what, in its absence, had seemed to present the impossible situation of two cars being parked in the same place. When the ambulance first arrived, coming south, it was parked on the west side of the street in the very place where the respondent's

witnesses had testified the appellant's car was stopped immediately after the accident. The new evidence that the appellant's car was moved from that place over to the east side of the road, before the ambulance first arrived, introduced a new element which would naturally clarify the situation and which might well affect the result. The new witness would be the only disinterested witness with respect to the relative time at which the car was moved. Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062. In a very real sense she viewed a most material element of the situation from a different angle than that of any of the other witnesses. Laverne v. Dold, 17 Cal.App.2d 180, 61 P.2d 497. None of the other witnesses for the respondent did or could testify as to this matter since it was not known to them. It appears, without dispute, that the identity of this new witness, and the fact that she had been present and had seen these things, was not known to respondent or his counsel until after the taking of evidence was completed. The evidence in question was sufficient to constitute newly discovered evidence within the meaning of the established rules.

[4] The evidence is also sufficient with respect to the showing of diligence. This question was peculiarly one of fact for the trial court, and there is an express finding in that regard. Dry v. City and County of San Francisco, 83 Cal.App.2d 790, 189 P.2d 761; Dasso v. Bradbury, 39 Cal.App.2d 712, 104 P.2d 128. It appears without conflict that this new witness was employed in Los Angeles and that she spent only a portion of her time in Laguna Beach; that she came to Laguna Beach on the February 13 holiday, and then learned that this action was pending; and that the respondent and his counsel were informed on that day for the first time that she had been present at the time of the accident and as to what she had seen. Respondent's counsel acted immediately and tried to have the case reopened. It further appears that a very considerable effort had been made on behalf of the respondent during the latter months of 1948 and during the months of December, 1949 and January, 1950, to discover any witnesses who might know facts material to the case by interviewing all of the neighbors near the scene of the accident; that they had gone twice to the house sometimes occupied by the new witness, finding it closed and unoccupied; and that no one at any time had told them that this witness was present at the scene of the accident. There is no evidence of anything which could reasonably be expected to have indicated to the respondent that this new witness had been present at the scene, or that she knew of any facts which were material to the action which was pending.

The appellant further contends that the respondent was estopped from seeking a new trial because he did not request a continuance on February 14; and that he should not be allowed "to await a favorable outcome of his litigation" before taking action to protect himself. This contention is without merit. The respondent acted as soon as the new evidence became known and before the close of the trial, trying to have the case reopened and offering to pay the expense of bringing the appellant back from Oregon. His requests were denied, and he made a timely motion for a new trial. Every reasonable effort was made to produce the new evidence before the case was submitted to the jury, and no grounds for estoppel appear.

Under familiar rules, it cannot be held that the court abused its discretion in making the order appealed from.

The order is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

107 Cal.App.2d 550

BULPITT v. BULPITT.

Civ. 18366.

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1951.

Rehearing Denied Dec. 12, 1951.

Hearing Denied Jan. 10, 1952.

Helen Green Bulpitt brought suit for divorce against Paul Adams Bulpitt. The Superior Court of Los Angeles County, Harry J. Borde, J., entered a judgment for the plaintiff, and the defendant appealed. The District Court of Appeal, Hanson, J. pro tem., held that as defendant had accepted the benefits of the judgment, he could not appeal therefrom.

Appeal dismissed and judgment affirmed.

1. Divorce ⚷252

If trial court in divorce suit found that all property of the parties was community property and granted divorce to wife on ground of extreme cruelty, court was vested with discretion to assign the properties to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, might deem just, provided that wife was awarded more than 50 per cent of the community property. Civ.Code, § 146.

2. Divorce ⚷178

General rule that a person who accepts the benefits of a judgment, order or decree cannot afterward maintain an appeal to review it, applies to divorce proceedings.

3. Divorce ⚷178

Where two airplanes, which were part of community property, were not only awarded to husband in divorce suit, but shortly after judgment granting wife divorce, on ground of cruelty, was entered, were sold and proceeds thereof taken by husband, and parties filed a written stipulation about two weeks after judgment was entered, agreeing that court might authorize and direct receiver to sell the airplanes and disburse funds according to terms of judgment except as modified by stipulation, husband could not appeal from the judgment because he accepted the benefits thereof, though he was allegedly required by his financial situation to accept proceeds allotted to him by the judgment.

4. Husband and Wife ⚷272(1)

Statute giving husband the management and control of community personalty, with like absolute power of disposition, other than testamentary, as he has of his separate estate, is not applicable after an interlocutory divorce decree has been entered dissolving the community and adjudicating distinct and separate titles thereto. Civ.Code, § 172.

◆

John L. Huntzinger and W. Eugene Henry, Los Angeles, for appellant.

Robert N. Baker, Santa Monica, for respondent.

HANSON, Justice pro tem.

Appellant who was the defendant below appeals from a decree which granted a divorce to his wife on the ground of extreme cruelty, awarded a part of the property involved to the wife and a part thereof to the husband, ordered the husband to pay a specified amount of money to the wife for the support of their minor children and that he pay the premiums on policies of insurance. The appeal is based primarily on the contention that the evidence is insufficient to sustain the decree.

We are faced at the outset with the question whether we can review the case on the merits in view of the fact that two DC-3 airplanes—a part of the community property—were not only awarded to appellant but shortly after the judgment was entered were sold and the proceeds thereof taken by appellant. In that connection it should be stated that the parties to the cause filed a written stipulation therein about two weeks after the judgment was entered wherein they agreed that the court might authorize and direct a receiver to sell the planes and disburse the funds according to the terms of the judgment except as modified by the terms of the stipulation.

On the merits, the argument in the brief of appellant covers a wide range, but the initial issue before us is a narrow one and if decided adversely to appellant forecloses our consideration of the merits of the case. We think we are here thus foreclosed.

In her complaint the wife set forth a long list of properties all of which she averred were community property. In his answer the defendant husband admitted that the property as listed was community property except as to certain properties which he contended were not a part of the community but instead were held in joint tenancy.

The defendant did not personally attend the trial of the action, but was represented by counsel who participated in it without cross-examining the witnesses for ths plaintiff or offering any evidence for the defense. The wife's testimony was to the effect that the property involved was community property. This testimony accordingly stands uncontradicted and was found by the court to be true.

[1] If, as here, the court found that all the property of the parties was community property and, as here, granted the divorce to the wife on the ground of extreme cruelty, it was vested with a discretion to assign the properties to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, might deem just, Civ. Code, sec. 146, provided that the plaintiff was awarded more than fifty per cent of the community property. Arnold v. Arnold, 76 Cal.App.2d 877, 174 P.2d 674.

[2] The general rule that a person who accepts the benefits of a judgment, order or decree cannot afterward maintain an appeal to review it is applied in this state to divorce proceedings. Storke v. Storke, 132 Cal. 349, 64 P. 578; Cline v. Cline, 132 Cal.App. 713, 23 P.2d 431; Swallers v. Swallers, 89 Cal.App.2d 458, 201 P.2d 23.

In the Storke case the trial court entered a final judgment granting the plaintiff husband a divorce upon the ground of defendant wife's extreme cruelty. The judgment awarded the wife $450.00. After the entry thereof and before any notice of intention to move for a new trial had been given, plaintiff paid to defendant and defendant accepted, the said $450.00 so awarded to her by the judgment. She thereupon filed a motion for a new trial. Thereafter plaintiff filed a motion to dismiss the motion for new trial on the grounds, among others, that defendant had received all the money awarded to her by the said judgment, and thus waived her right to move for a new trial. The appeal by plaintiff was from the order denying the motion. The court said:

"The court found by the judgment that defendant had been guilty of extreme cruelty, and that plaintiff was entitled to a divorce. The presumption is that the judgment is correct. * * *

* * * * * *

"* * * Defendant accepted the part of the judgment that was beneficial to her. It was a final judgment, and by its terms gave her $450. This sum was based upon the findings, and was the result of the litigation. Defendant took the $450, and now seeks to attack the judgment through which she received it. This she cannot do. Having taken the benefit, she must bear the burden. * * * If the defendant should procure a new trial, she would still have the $450, and plaintiff would not have his divorce. If she has used it, or is otherwise unable to pay it back, the plaintiff cannot be placed in the same condition in which he was before the trial.

"The principle is well settled that a party accepting and receiving the portion of the judgment beneficial to him cannot appeal from it." [132 Cal. 349, 64 P. 579]

[3] Appellant's contention that he was forced to stipulate to a sale of the property and to accept the proceeds allotted to him by the judgment due to his financial situation not only is not sustained by the record, but likewise is of no legal materiality. Moreover, the Minnesota case of Spratt v. Spratt, 140 Minn. 510, 166 N.W. 769, from which he quotes to support his contention, was upon reargument superseded by the court's decision dismissing the appeal. 140 Minn. 510, 167 N.W. 735. The original opinion as well as the opinion vacating it are both set forth in 140 Minn. 510. His further contention that a reversal of the judgment could not affect the property

rights as established by the decree in his favor is based on the thought that he was in any event entitled to one half of the community property. This is not the law. Arnold v. Arnold, 76 Cal.App.2d 877, 174 P.2d 674.

[4] Appellant's final contention that he was entitled after the interlocutory decree to manage and control the community personal property with a like power of disposition as he has of his separate estate, in view of Civil Code, sec. 172, is obviously without merit. The section, it seems to us plain, is not applicable after an interlocutory decree of divorce has been entered dissolving the community and adjudicating distinct and separate titles thereto. Cf. De Godey v. De Godey, 39 Cal. 157 [dicta]; Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697. Such an adjudication is final, short of an existing right of appeal or an order vacating the decree. Leupe v. Leupe, supra.

As the appellant under the facts of the case before us must be deemed to have waived his right of appeal, the appeal is dismissed and the judgment below affirmed.

WHITE, P. J., and DORAN, J., concur.

HILL v. WESTBROOK'S ESTATE.

Civ. No. 18479.*

District Court of Appeal, Second District, Division 1, California.

Nov. 15, 1951.

Rehearing Denied Dec. 12, 1951.

Hearing Granted Jan. 10, 1952.

Minnie Hill, also known as Minnie Westbrook, brought an action against the estate of Charles Westbrook, deceased and Edward J. Westbrook, administrator, to recover for services rendered decedent. The Superior Court of Los Angeles County, Robert H. Scott, J., entered a judgment adverse to the plaintiff, and the plaintiff appealed and was opposed by the administrator. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to prove an express agreement on part of decedent that the plaintiff, who had been living in a meretricious relationship with him, should be rewarded for services rendered by her in decedent's business projects and that she be reimbursed for moneys contributed from her earnings.

Judgment reversed.

1. Executors and Administrators 🔑221(5)

In action against estate for services rendered decedent by woman who had lived in meretricious relationship with decedent, evidence was sufficient to prove an express agreement on part of the decedent that woman should be rewarded for services rendered by her in the decedent's business projects and that she should be reimbursed for moneys contributed from her earnings.

2. Witnesses 🔑176(2)

Where, in previous trial of action against estate for services rendered decedent, plaintiff's testimony as to her earnings was admitted without objection, statute prohibiting a party to an action against an executor or administrator upon a claim or demand against the estate of deceased person from testifying as to any matter or fact occurring before death, was waived to that extent, and refusal of trial court to permit plaintiff to testify in subsequent trial of action against estate regarding her earnings was reversible error. Code Civ. Proc. § 1880, subd. 3.

◆

Emmet E. Patten, Glen A. Duke, Monrovia, for appellant.

Hugh E. Macbeth, Hugh E. Macbeth, Jr., Los Angeles, for respondent.

DRAPEAU, Justice.

The instant action is founded on a claim for $10,000 against the above entitled estate, which was rejected by defendant administrator. It was made a part of the complaint and reads: "For services rendered decedent from about August 15, 1930, to date of death, by Minnie Westbrook, consisting of keeping house for him during all of said time, living with him as man and wife during all of said time, and during said time bearing decedent two children,

* Subsequent opinion 247 P.2d 19.

namely * * *; performing the usual duties of a housewife during all of said time, and earning a salary from time to time during said period, all of which was turned over to decedent * * * $10,000.00."

The complaint also alleged the performance of services by claimant in the management of decedent's rooming house.

The amended answer denied generally all the material allegations of the complaint and set up affirmative defenses of (1) the statute of limitations; (2) payment for the services; (3) that the complaint did not state facts sufficient to constitute a cause of action.

This case has been tried twice. The first trial resulted in a judgment for plaintiff for $3,000, which was reversed on appeal because it included the value of services for which recovery was not allowable. Hill v. Westbrook's Estate, 95 Cal.App.2d 599, 602, 213 P.2d 727, 729. The court there stated: "When a man and woman knowingly live together in a meretricious relationship—in the absence of an express agreement, oral or written, that she be compensated for services performed—there is no implied obligation on the part of the man to compensate the woman for household services rendered by her. Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 719, 200 P.2d 49, and cases cited therein * *.

"Although the parties live together in illicit relationship during the time the services are performed, an express contract to compensate for services performed as a housekeeper has been held valid and enforceable unless made in contemplation of such illicit relationship. * * * Whether the contract was dependent upon the illicit relationship is a question of fact. Trutalli v. Meraviglia, 215 Cal. 698, 12 P.2d 430; Lytle v. Newell, 68 S.W. 118, 120, 24 Ky.Law.Rep. 188.

"When a man and woman live together 'under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884; Mitchell v. Fish, 97 Ark. 444, 134 P. [S.W.] 940, 36 L.R.A.,N.S., 838; see Feig v. Bank of America etc. Ass'n, supra (5 Cal.2d 266, 54 P.2d 3); Bracken v. Bracken, 52 S.D. 252, 256, 217 N.W. 192; Hayworth v Williams, 102 Tex. 308, 116 S.W. 43, 132 Am.St.Rep. 879. Even in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition. Hayworth v. Williams, supra; Delamour v. Roger, 7 La.Ann. 152.' Vallera v. Vallera, 21 Cal.2d 681, 685, 134 P.2d 761."

During the instant trial it was disclosed that plaintiff was not seeking to recover for housekeeping and those services contemplated by the illicit relationship, but only for her services rendered in the business of decedent and for sums advanced to decedent in his lifetime from salary earned by plaintiff while working in a shirt factory in 1944, 1945 and 1946.

Accordingly, plaintiff produced several witnesses, who testified that decedent made statements to them that he bought the Monrovia house for plaintiff, because she suffered from asthma; that if anything happened to him she was to have it; that she would be well fixed; that he and plaintiff were "working together making the payments on the home"; that decedent had money in a safe deposit box in the bank; that Minnie had a key to the box and he wanted her to have everything in it; that he had made a will in her favor and that of the two children and was leaving $5 each to his older sons, Buford and Edward. Those witnesses who saw the will testified that it "provided two-thirds to Minnie and the children."

There was also testimony to the effect that plaintiff helped decedent in the liquor store and managed it in his absence, ordering, buying and selling; that she did the cooking in the hamburger stand and the cleaning in the rooming house.

Some of defendant's witnesses testified similarly. Defendant denied that he saw plaintiff working in the rooming house or the hamburger stand, but his testimony was impeached by the record of the previous trial. Other witnesses stated that when they observed plaintiff at the rooming house, she was suffering from asthma and was unable to work.

The trial court found that any work or services performed by plaintiff in the business of decedent, or any sums advanced by her for the joint use of herself, decedent and their children, were gratuitous and voluntary, in contemplation of and dependent upon the meretricious relationship, and denied recovery of their reasonable value.

From the judgment entered in accordance with such findings, plaintiff appeals.

Appellant here urges that the judgment is against the evidence because it was established that she rendered services in reliance on decedent's promise to reward her after death. In other words, that the evidence is insufficient to support the findings and the judgment.

[1] We believe this contention must be sustained. The testimony of the many witnesses at the instant trial was sufficient to prove an express agreement that appellant should be rewarded for services rendered by her in decedent's business projects and that she be reimbursed for moneys contributed from her earnings. While the illicit relationship is admitted, there is no testimony in the record even tending to support the trial court's findings that such services were rendered or the moneys contributed gratuitously or in contemplation of the relationship.

It is further urged that the trial court erred in prohibiting appellant from testifying regarding her earnings, because such evidence was given without objection in the first trial and "a waiver in one trial is a waiver in all subsequent proceedings in the same case."

Section 1880, Code of Civil Procedure reads as follows:

"The following persons cannot be witnesses: * * *

"3. *Actions against estates.* Parties or assignors of parties to an action or proceeding * * * against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

At the instant trial, when respondent's objection to appellant's competency as a witness under the statute was sustained, it was explained by her counsel that "we merely want the earnings and her contributions toward this estate. They were admitted at the previous hearing and by inadvertence we omitted the year 1944, and that is the only one I wish to add to the previous testimony."

At the previous trial, the following took place:

"Mr. Patten: Would the question of her earnings be objected to—her earnings at the shirt factory?

"The court: Is there any question about the earnings?

"Mr. Macbeth: I will stipulate as to that. * * * We will stipulate that in this one package, $787.27, that is for the year 1946.

"The Court: What do the earnings show for 1945?

"Mr. Patten: $249.20 plus $700.79 for the year 1945."

In Moul v. McVey, 49 Cal.App.2d 101, 106, 121 P.2d 83, 86, appellant took the position that the introduction of his testimony, although given in another proceeding, lifted the bar of the statute prohibiting him from testifying in support of his claim against the estate. It was there stated: "The limitations of the statute may be waived by the personal representative by calling the survivor as a witness and going into the transaction had by him with the decedent. In so doing he waives the benefit of the statute and opens the door to the witness to testify in his own behalf fully as to the transaction gone into. Kinley v. Largent, 187 Cal. 71, 200 P. 937. Likewise the door is opened to the survivor when his deposition is taken in the action by the executor or administrator whether it is read in evidence upon the trial or not. McClanahan [McClenahan] v. Keyes, 188 Cal. 574, 206 P. 454; Borgess Inv. Co. v. Vette, 142 Mo. 560, 44 S.W. 754, 64 Am.St.Rep. 567.

"If the testimony given in evidence had been taken from a deposition given by the plaintiff in the case, or had been given by him from the witness stand herein, there would be no room for discussion as to his right to testify in explanation of the subject matter of his examination. No substantially different situation exists when the testimony of the survivor given in a previous proceeding is put in evidence. * * *

"In other states the courts have uniformly held that the introduction in evidence of testimony previously given lifts the bar of the statute. (Citation of authorities.) The ruling of the trial court in not permitting the plaintiff to testify in his own behalf is a denial of a substantial right and warrants a reversal of the judgment."

[2] In the circumstances here presented, this rule appears applicable.

For the reasons stated, the judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

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107 Cal.App.2d 656

BATES v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 4291.

District Court of Appeal, Fourth District, California.

Nov. 21, 1951.

Petition by Donald A. Bates against the Superior Court of the State of California, in and for the County of San Diego, and Judge John A. Hewicker, for a writ of prohibition to test the question of sufficiency of evidence taken at a preliminary hearing and to determine whether an information was found without reasonable or probable cause. The District Court of Appeal, Griffin, J., held that the committing magistrate had no authority to set aside its previous order dismissing prosecution against the petitioner in order that he might testify against his codefendant.

Writ of prohibition issued.

1. Criminal Law 🔑239

Where committing magistrate in criminal prosecution, granted motion of the district attorney to dismiss as against defendant in order that he might become a witness as against his codefendant, and there upon the defendant testified against his codefendant, the magistrate had no authority to set aside its previous order and was without jurisdiction to further act in the matter after granting the motion to dismiss. Pen.Code, §§ 995, 1099; Const. art. 1, § 13.

2. Criminal Law 🔑239

Committing magistrate upon motion of the prosecuting attorney had an inherent right and power to dismiss a criminal complaint. Pen.Code, §§ 995, 1099; Const. art. 1, § 13.

◆

Augustine, Bryans & Champion and C. H. Augustine, all of San Diego, for petitioner.

James Don Keller, Dist. Atty., Claude B. Brown, Deputy Dist. Atty., San Diego, for respondent.

GRIFFIN, Justice.

Petitioner, Donald A. Bates, filed this petition (after denial of motion made under sec. 995, Pen.Code) to test the question of the sufficiency of the evidence taken at the preliminary hearing and to determine whether the information was found without reasonable or probable cause.

Petitioner, the alleged passive agent, and one Andrew M. Herman, the alleged active agent, were jointly charged with the crime of sex perversion under sec. 288a of the Penal Code. They were duly arraigned and their preliminary hearing was set for September 19, 1951. Both defendants were present at that time and were represented by separate counsel. It appears from the petition that counsel for petitioner, prior to the preliminary hearing, was assured by the deputy district attorney that if petitioner would offer himself as a witness against his codefendant he would move to dismiss the complaint. Under these circumstances the police officers were sworn and examined at the hearing and testified generally as to the acts they saw, which testimony did indicate reasonable grounds for holding both defendants to the Superior Court. Counsel for petitioner waived any cross-examination of the witnesses. Thereupon, the people called petitioner "under sec. 1099 of the Penal Code". Some discussion followed. Counsel for the codefendant remarked: "This section 1099 seems to contemplate some action on the part of the court. The district attorney probably wants to make an application that the court has to rule upon". The deputy district attorney then said: "If the court please, the people will ask that the complaint be dismissed against the defendant" (Bates) "so that he may be a witness for the People". The court responded: "Under 1099 the application is granted". Thereafter, the court remarked: "The court is a little surprised that the District Attorney feels that it is necessary to take this action, these steps at this time, in view of the record, but I am going to grant the application". The petitioner Bates then said: "Just what does that mean?" And his counsel replied: "The motion was to dismiss as against Donald Bates in order that he may become a witness and the court granted that motion." "The Court: Yes, with the observation of the court that I am somewhat surprised that the District Attorney feels it is necessary to make such application at this time in view of the record. * * * You may proceed."

The petitioner then testified against his codefendant. Thereafter, the committing magistrate stated that "after thinking it through" he questioned his authority to dismiss the action against petitioner under sec. 1099 of the Penal Code. However, he stated that the record did show that he had dismissed the action against petitioner. The record further shows that after petitioner testified the court did, on his own motion "reverse the decision" and held the petitioner and his codefendant to answer to the Superior Court. The deputy district attorney remarked that he could "not conscientiously" ask for a bindover as to petitioner.

At the preliminary hearing counsel for petitioner made the same argument as he does here on this appeal, i. e., that after the magistrate granted the motion to dismiss, as appears by the record, there was no case pending against the petitioner; that petitioner acted upon the knowledge that the action against him had been dismissed, and upon information that his counsel gave him that if he would so testify the case would be dismissed; that accordingly petitioner has suffered prejudice by virtue of the claimed reversal of such decision; that the reinstatement of the charges against him after the dismissal was entered and after he had testified under such a promise was unauthorized by law; that the committing magistrate's actions in so doing were a violation of petitioner's constitutional rights; and that accordingly, there was no valid and existing complaint against petitioner at the time he was purportedly held to answer to the Superior Court.

[1] We are in accord with the general principles set forth in the argument. People v. Walther, 27 Cal.App.2d 583, 81 P.2d 452; In re Critchlow, 11 Cal.2d 751, 81 P.2d 966; People v. Dillon, 68 Cal.App. 457, 229 P. 974; Art. 1, sec. 13, Calif.Const.; Ex parte Clarke, 103 Cal. 352, 354, 37 P. 230. This is not a case which questions the power of the court to cause its records to correctly set forth the orders which it had actually made or which it had made through inadvertence or mistake. The facts here recited show that the committing magistrate had no authority under the law to set aside its previous order. Holtum v. Greif, 144 Cal. 521, 524, 78 P. 11; Carpenter v. Pacific Mutual Life Ins. Co., 14 Cal.2d 704, 96 P.2d 796; Stevens v. Superior Court, 7 Cal.2d 110, 112, 59 P.2d 988.

[2] Whether or not a dismissal may be authorized by a committing magistrate under sec. 1099 of the Penal Code, as it then read, may be open to question. People v. Indian Peter, 48 Cal. 250; Ex parte Stice, 70 Cal. 51, 11 P. 459; See amendment 1951

to sec. 1099, Penal Code. Nevertheless, the committing magistrate, upon motion of the prosecuting attorney, had an inherent right and power to dismiss any such complaint. People v. Ward, 85 Cal. 585, 24 P. 785; 22 C.J.S., Criminal Law, § 316, page 467; 8 Cal.Jur. 664, sec. 630. Accordingly, there was no proceeding pending against petitioner at the time he was allegedly held to answer to the Superior Court, and the committing magistrate was without jurisdiction to further act in the matter after granting the motion to dismiss.

The writ of prohibition will issue as prayed for in the petition.

BARNARD, P. J., and MUSSELL, J., concur.

107 Cal.App.2d 483

In re JAMISON'S ESTATE.

JAMISON v. JOHNSON et al.

Civ. 18730.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1951.

Rehearing Denied Dec. 3, 1951.

Hearing Denied Jan. 10, 1952.

Proceeding in the matter of the estate of Arthur C. Jamison, also known as A. C. Jamison, deceased, wherein Chancey B. Jamison and the California Trust Company offered a will for probate and its admissibility was contested by Francis Jamison Johnson and others. The Trial Court, John Gee Clark, J., entered judgment admitting the will to probate, and contestants appealed. The District Court of Appeal, Hanson, J., pro tem., in ruling on appellants' motion to dismiss the appeal, held that the statute authorizing appeals from "orders" rejecting or admitting wills to probate applies also to judgments in contested proceedings.

Motion to dismiss appeal denied.

1. Statutes ⇨167(2)

It was not the intent or purpose of the Code Commission in compiling the Probate Code to thereby effect a repeal of any provision of Code of Civil Procedure or of the Civil Code other than those sections expressly repealed. Probate Code, §§ 2, 1240.

2. Wills ⇨358

The word "order", in the section of the Probate Code providing for appeal from orders rejecting or admitting will to probate, means "judgment or order". Probate Code, § 1240.

See publication Words and Phrases, for other judicial constructions and definitions of "Judgment or Order" and "Order".

3. Wills ⇨358

Where admissibility of will to probate was contested, appeal would lie from such proceedings, though will was admitted by way of judgment rather than by way of order. Probate Code, § 1240.

4. Wills ⇨339

Under the Probate Code, uncontested wills are to be omitted or rejected by way of orders, and contested wills are to be admitted or rejected by way of judgments. Probate Code, §§ 329, 332, 373.

◆

Allan F. Bullard, San Pedro, Edward Alton and Frank M. Sturgis, Beverly Hills, Frederick W. Mahl, Jr., Los Angeles, Thomas B. Sawyer, San Pedro, for appellants.

Church, Church & Howard, Los Angeles, for respondent Chancey B. Jamison.

HANSON, Justice pro tem.

Respondent Jamison moves to dismiss the appeal taken by appellants, who below contested the admissibility of the will which was admitted to probate, on the ground that the judgment appealed from is not an appealable order within the meaning of Section 1240 of the Probate Code or appealable under any other provision of our statutory law.

Two wills were presented for probate, one dated May 17, 1948, and one dated December 31, 1949. Appellants filed a contest before the probate of either will contending the latter will was invalid. The trial of this contest was held in October, 1950, a jury being waived. Under date of April 25, 1951, the trial court signed findings of fact and conclusions of law to the effect that the will was admissible to probate and a judgment based thereon. The appeal is from this judgment. Under the same date the court signed a separate document designated "Order Admitting Will to Probate And For Letters Testamentary." No appeal was taken from this order, which was filed with the clerk, as were the findings and judgment, on April 26, 1951. All these documents were entered on May 1, 1951.

The theory of the moving party is that the judgment is not an order admitting to probate the will of December 31, 1949, in view of its phraseology and, even if it were, that there must be a separate and distinct subsequent "order" after judgment admitting the will to probate and that such an order alone is appealable under the language of Probate Code, sec. 1240, which reads: "An appeal may be taken to the supreme court from an *order* * * * admitting a will to probate or revoking the probate thereof." (Italics supplied.)

It will be observed, as respondent contends, that the statute as we have quoted it does not say that an appeal may be taken from a "judgment or order," but merely that an appeal may be taken from an "order * * * admitting a will to probate or revoking the probate thereof". Nevertheless, for reasons presently to be stated, we are of the view that the word "order" in the statute must be construed to mean "judgment or order."

[1] Section 1240 of the Probate Code enacted in 1931 it has been stated, time and again, is a substitute for subdivision 3 of section 963 of the Code of Civil Procedure which was repealed at the same time the Probate Code was enacted and that it was not the intent or purpose of the Code Commission in compiling the Probate Code to thereby effect the repeal of any provision of the Code of Civil Procedure or of the Civil Code except such sections as were expressly repealed. Estate of Armstrong, 8 Cal.2d 204, 64 P.2d 1093; Estate of Hart, 92 Cal.App.2d 691, at pages 693–694, 208 P.2d 59. The view thus expressed is fully substantiated not only by the report of the California Code Commission in submitting the Probate Code to the legislature for enactment (Appendix to Journals of Senate & Assembly, Calif., Forty-ninth Session, Vol. 2) but by section 2 of the Probate Code which reads as follows: "The provisions of this code, so far as they are substantially the same as existing statutes, *must be construed* as continuations thereof, and not as new enactments." (Italics supplied.)

[2, 3] Turning to subdivision 3 of section 963 of the Code of Civil Procedure we find that before its repeal in 1931 it read as follows: "An appeal may be taken from a superior court in the following cases: * * * 3. From a judgment or order granting or refusing to grant * * * letters testamentary, * * * or admitting or refusing to admit a will to probate * * *." Accordingly we think it clearly follows under settled rules of construction, see Childs v. Gross, 41 Cal.App.2d 680, 687, 107 P.2d 424, cf. Hunt v. Authier (dissenting op.) 28 Cal.2d 288, 303, 169 P.2d 913, 177 A.L.R. 1379, that we must construe the word "order" in section 1240 of the Probate Code as reading "judgment or order," and hold that the judgment from which the appeal was taken was appealable under section 1240 of the Probate Code.

We are told, however, that the judgment was not in any event appealable for the reason that where a will is contested the court must first enter a judgment disposing only of the issues raised by the contest and thereafter enter a separate and distinct order either admitting or rejecting the will to probate. No cases are cited to us which so hold. However, when this court at the oral argument questioned the power of the superior court to enter the order it made after the entry of the judgment, counsel stated that such was the well-established procedure of the Superior Court of Los Angeles County. What the general practice of the various judges sitting in probate may be is not disclosed by the record but so far as the members of this court know it, it is just the reverse. At all events that the procedure here employed was improper we shall shortly demonstrate.

The procedure which was followed in the instant case was the accepted practice in this state prior to 1862. This was due to the fact that the statutory law of that period expressly required it. In that period the probate court was required to certify will contests to the District Court for trial, which court after the trial in turn certified the judgment it rendered to the Probate Court and the latter court thereupon entered on its own records its own order admitting or rejecting the will basing such order on the judgment certified to it. Matter of Tomlinson's Estate, 35 Cal. 509; Matter of Bowen's Will, 34 Cal. 682.

When in 1879 the constitution of that year abolished the district, county and probate courts as such and vested the jurisdiction of these courts in one court—the superior court—there was no necessity for a judgment on the contested issues in a will contest and a separate order admitting or denying probate to a will after contest. Indeed no such procedure but the very reverse is contemplated by the statute, Probate Code, sec. 373.

[4] The section just mentioned reads as follows: "The jury must return a special verdict upon the issues submitted to them by the court; and upon the verdict, or upon the proof taken if a jury is waived, the court must render judgment, either admitting the will to probate or rejecting it." From the language of this section it is apparent that the judgment rendered on a jury's verdict or upon findings and conclusions of the court shall embody therein a provision expressly "admitting the will to probate or rejecting it." On the other hand where a will proposed for probate is not contested the procedure to be followed is that outlined in secs. 329 and 332. The latter section reads as follows: "When the court admits a will to probate it must be recorded in the minutes by the clerk, with the notation 'Admitted to probate (giving date).' If the will is in a foreign language, the court shall certify to a correct translation thereof into English, and such certified translation shall be recorded in lieu of the original." Accordingly, it is self-evident that uncontested wills are to be admitted or rejected by way of "orders" and that contested wills are to be admitted or rejected, not by orders but by judgments.

It is contended, however, that even if this be true that the judgment is insufficient in that it recites merely that the "will is entitled to be admitted to probate as such" and that this is not a recital presently admitting the will to probate. If that be true the will is not yet admitted to probate as the order purporting to admit it to probate is of no validity under the statute. Moreover if the judgment be defective in that aspect it seems that the order is likewise defective in that it recites, "that the document heretofore filed purporting to be his last Will and so alleged to be in said petition, be admitted to probate." We leave the point for consideration upon the hearing on the merits.

The motion to dismiss the appeal is denied.

WHITE, P. J., and DRAPEAU, J., concur.

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107 Cal.App.2d 562

PEREZ v. CITY OF SAN JOSE et al.

Civ. 14766.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1951.

Action by Eugene Reyes Perez, M.D., against the City of San Jose, a municipal corporation and others, wherein the State of California, on relation of the Department of Public Works intervened. From a judgment in favor of defendants in the Superior Court for the County of Santa Clara, Byrl R. Salsman, J., the plaintiff appeals. The District Court of Appeal, Bray, J., held that the use by a municipality of tax funds for the improvement, jointly with the state, of a state highway within the municipality's boundaries was for a "municipal purpose" within the constitutional provision vesting in the municipal authorities power to assess and collect taxes for "municipal purposes".

Judgment affirmed.

1. Municipal Corporations ⚷985

The true test of what is a "municipal affair", for which municipality may use tax funds is that the work should be essentially public and for the general good of all inhabitants of the city and should not be undertaken merely for gain or for private objects and the purpose must primarily be to satisfy the need or contribute to the convenience of the people of the city at large. Const. art. 11, § 12.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Affair".

2. Highways ⚷105(2)

The statutes authorizing the Legislature to establish a system of state highways do not manifest the legislative intent, to limit cities in the improvement of state highways within their borders exclusively to the use of funds allocated to them by the state. Streets and Highways Code, §§ 113, 114, 194, 200, 2107, 2109; Const. art. 4, § 25.

3. Statutes ⚷238

Enabling legislation does not necessarily require an interpretation making the method provided exclusive.

4. Municipal Corporations ⚷957(1)

The use by a municipality of tax funds for the improvement, jointly with the state, of a state highway within the municipality's boundaries is for a "municipal purpose" within the constitutional provision vesting in the municipal authorities power to assess and collect taxes for "municipal purposes." Const. art. 11, § 12.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Purpose".

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Callaghan, Giannini & Anello, San Jose, for appellant.

Robert E. Cassin, City Atty. City of San Jose, Eugene L. Rendler, Asst. City Atty. San Jose, for respondents City of San Jose et al.

Robert E. Reed, Russell S. Munro, Harry S. Fenton and Warren P. Marsden, all of Sacramento, for intervener, State of California.

BRAY, Justice.

This appeal by plaintiff from a judgment in favor of defendants in a taxpayer's suit raises the question of whether a municipality may use tax funds for the improvement, jointly with the state, of a state highway within the municipality's boundaries.

Facts.

The appeal is on an engrossed settled statement. The Alameda in San Jose is a part of state highway route No. 2. Pursuant to a prior cooperative agreement between the city and the state, the city promulgated plans and specifications for a central dividing strip 6 feet in width, electrical traffic signals, and a central highway lighting system, for the improvement of a certain portion of The Alameda within the city limits. After advertising for bids the city let a contract for the performance of the work. The total contract price is $71,878.52. All but $15,000 of this amount was put up by the state. The $15,000 was appropriated by ordinance from the unappropriated surplus of the city's general fund, to wit, tax funds.

Was This a Municipal Purpose?

The determination of plaintiff's contention that the appropriation of city tax funds for such a purpose is unconstitutional depends upon whether such purpose is a municipal one. Plaintiff cites article XI, section 12 of the Constitution, which provides: "Except as otherwise provided in this Constitution, the Legislature shall have no power to impose taxes upon counties, cities * * * for county, city * * * or other municipal purposes, but may * * * vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Plaintiff then points out that in Rancho Santa Anita, Inc., v. City of Arcadia, 20 Cal.2d 319, 323, 125 P.2d 475, 477, the court said: "Article XI, section 12 of the Constitution quoted above provides that the taxing power conferred upon cities by the legislature may be exercised only for municipal purposes * *." To the same effect, People v. Parks, 58 Cal. 624; City of Redwood City v. Myers, 7 Cal.2d 283, 60 P.2d 291, 108 A.L.R. 727. Plaintiff then argues that the improvement of a state highway, even though within the city limits, is not a municipal affair. Plaintiff relies principally upon Southern California Roads Co. v. McGuire, 2 Cal.2d 115, 39 P.2d 412, where the court used some rather broad language apparently supporting plaintiff's contention. There, the city had entered into a cooperative contract with the state for the improvement within the city of Sepulveda Boulevard, a state highway. The moneys to be used by the city were from state funds and not from municipal tax funds. The question presented was whether the contract let by the city for doing the work was subject to the provisions of the Public Works Wage Rate Act, St.1931, p. 910, as a portion of the state funds to be used came from the federal government. It was contended that the improvement of the boulevard by the city was a municipal affair and therefore the contract for doing the work was not subject to the act. The court said, 2 Cal.2d at page 123, 39 P.2d at page 416: "The legality of the provision of the co-operative contract between the city and the state, whereby the city is given the right to improve certain state highways within the city, is not questioned. Still it does not necessarily follow that the work to be done in making said improvements is *merely* a municipal affair. * * * The improvement of said highways from their inception to their final completion are projects of the state. They are not municipal affairs in any sense in which those words are used in the Constitution." (Emphasis added.) It will be noted that the court stated that the improvement in question was not necessarily *merely* a municipal affair before using the language giving plaintiff here comfort. On pages 121–122 of 2 Cal. 2d, on page 415 of 39 P.2d the court used the same language: "* * * the work of improving said street is not *merely* a local or municipal affair of the city, but * * * it is an affair in which the state has a direct and vital interest." (Emphasis added.) The determination that a contract for the construction of a portion of a state highway by a city with state funds under a cooperative agreement with the state, is not a municipal affair for the purposes of the application of the Public Works Wage Rate Act, is not determinative of the question here. Particularly is this so in view of the holdings in the cases hereafter discussed.

In Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365, plaintiff sued for injuries caused by a defect in a city street at a railroad crossing. Defendant contended that the railroad commission had exclusive jurisdiction over the crossing. The court held that the improvement of streets within the boundaries of a city is an affair in which the city is vitally interested. A somewhat analogous situation to that in our case occurs in City of Sacramento v. Adams, 171 Cal. 458, 153 P. 908. "Substantially, then, the question is whether the city of Sacramento may expend municipal funds or incur a bonded indebtedness, for the purpose of purchasing real property in the city to be donated to the state, on condition that the state erect and equip thereon public buildings for the use of the state, at an expense of at least $3,000,000, devoting such portion of the real property as is not actually used for buildings to the purposes of a public park for the enjoyment of the people. It is true that the land proposed to be purchased and donated to the state is to be under the absolute control of the state in so far as its needs and desires as to the actual occupation of the same by state buildings are concerned, and that the state will be at liberty to use all of the same for buildings, excluding all use of the same for park purposes. So that substantially the question is whether the city of Sacramento may acquire land to be absolutely donated to the state for state buildings." 171 Cal. at page 461, 153 P. at page 909. "There has not been cited, and we have not found, any case which denies the power of the *state* to authorize one of its municipalities to appropriate money or property to the state for a public purpose which may fairly be held beneficial to the municipality and the people thereof, notwithstanding that such purpose is not strictly a municipal one." 171 Cal. at page 465, 153 P. at page 911. The court concluded that a bond issue by the city to raise funds for that purpose was not unconstitutional. As pointed out by plaintiff, the court in that case was mainly concerned with the question of whether the use of city funds for the purpose mentioned constituted a violation of section 31, article IV of the Constitution, which prohibits the Legislature from authorizing the giving or lending of the credit of any city for the aid of any corporation, and held that the state is not a corporation within the meaning of the section. Nevertheless, it was necessary for the court to determine as it did, that although the purpose was not strictly a municipal one, it was a public purpose beneficial to the municipality and its people and hence it was a municipal affair.

In City of Oakland v. Garrison, 194 Cal. 298, at page 304, 228 P. 433, at page 435, the court said: "The question, then, is whether the improvement of this particular street within the city of Oakland is a matter of such general county interest that the county funds may properly be expended therein." It then held that it was. Certainly, if the improvement by the county of a city street is a county affair, the improvement by a city of a state highway within its borders is a city affair.

In The City of Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168, the contention was made that the conduct by several contiguous cities of a joint survey of the entire affected area for sewage disposal purposes was a "state" and not a "municipal" affair. The court refused to uphold such contention. It held that as the solution of the respective municipal sewage problems of these cities required a joint survey of the affected area, such survey was a municipal affair as to each city and that the expenditure of the funds of each city for that purpose was a proper municipal expenditure.

In Lewis v. Leon Company, 91 Fla. 118, 107 So. 146, the court said that the expenditure of county funds for the improvement of state roads passing through the county was for a county purpose. And in Jackson v. City of Rome, 182 Ga. 848, 187 S.E. 386, a municipal purpose was found allowing a city to buy land with funds raised by municipal taxes and then donate it to the state for the construction of a state highway through the city.

[1] A good test to apply to the question here is set forth in the following from Bank v. Bell, 62 Cal.App. 320, 330, 217 P. 538, 542: "In defining a 'municipal affair' it has been said that—

" 'The true test is that which requires that the work should be essentially public, and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects. Gain or loss may incidentally follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large. Within that sphere of action, novelty should impose no veto.' "

Almost identically the same question has been decided in Kansas where the Constitution is analogous to ours, except that there the question was the expenditure of county instead of city funds on state roads. In State ex rel. McMullen v. State Highway Comm., 139 Kan. 858, 33 P.2d 324, the question was whether funds that were collected by taxes for county roads were diverted for another purpose when they were used to improve state roads within the county. The court said that to so hold would mean that state roads ceased to be county roads as much as if they were beyond the borders of the state. It pointed out that generally the cost of maintaining state highways is on the state and that in exchange for its assistance in the improvement of the highway within its borders the county is relieved of such maintenance and thereby has more money available for the construction and maintenance of other county roads. It then held that it could not be said that money spent on state roads was not of special benefit to the taxpayer of the county and that there is no intrinsic difference between a state, city, or county road.

Streets and Highways Code.

[2] Plaintiff contends, further, that by sections 113, 114, 194, 200, 2107 and 2109 of the Streets and Highways Code enacted under the authority of section 25, article IV of the Constitution, which provides that the Legislature may establish a system of state highways, and pass all laws necessary or proper to construct and maintain them, the Legislature intended to limit cities in the improvement of state highways within their borders exclusively to the use of funds allocated to them by the state.

An examination of these sections indicates no such intention. Section 113 provides that upon request from the highway department any city may acquire any real property within the city needed for state highway purposes, taking title either in its name or that of the state. Any such city may aid in the construction, improvement or maintenance of any state highway within its boundaries by contributing any part of the expense thereof to the department "out of any city funds available or to become available for construction, improvement or maintenance of streets within the city." Obviously, these contributions are not limited to state funds received by the city, but include other funds, such as tax funds, which the city could use for its own streets. Section 114 provides that when the highway commission has allocated funds for the construction, maintenance or improvement of a state highway within a city, the department may enter into a cooperative agreement with such city for the performance of the work by the department or the city, or for the apportionment of its expense between the department and the city. Here there is no limitation upon the city. The section sets forth the power of the department to cooperate with the city and to apportion the expense after the commission has allocated funds for the department (not the city) to use. Section 131 provides for certain aid which the department may give to a city applying therefor and also provides that the city may pay into the state treasury, for the state to use for highway purposes, any moneys in its treasury or raised by the issuance of bonds which moneys are available for use by the city for highway purposes. Here, again, there is no limiting of the use by the city of moneys for state highway purposes to moneys received from the state. While the section deals with payment to the state of city funds for state highway purposes, it would be unreasonable to hold that thereby the Legislature intended to limit the use of city tax funds to a payment to the state to use it for state highways within the city, and to prohibit the use of it by the city for the same purpose under the cooperative agreements and apportionment of expense which section 114 provides that the department may enter into with the city. Section 200 provides that ,to permit the accomplishment of a major project in its entirety, the city may accumulate money accruing over a period of years from the state highway fund. The city "may include in its budget and the department may approve projects for the expenditure of any money accruing to the city under the provisions of this article upon any State or county highway or other major traffic street, including those outside the limits of such city." Here, again, is no limitation on the use by the city of its tax funds. It is a limitation only on the use by the city of the moneys which it receives from the state. Section 2107 provides that a certain sum from the gas tax moneys shall be transferred to the state highway fund for expenditure in cities as provided in section 194, which section provides for the expenditure and proportioning within the cities of said moneys. Section 2109 provides from what funds the state may maintain and construct and improve state highways in cities.

[3] Not only is there no indication that the Legislature intended by the above mentioned sections or by any of the other sections of the Streets and Highways Code, to limit the cities in the construction and maintenance of state highways within their boundaries to state funds, but the language of section 113 alone shows that it intended to expressly permit the use of any funds which the city might properly use for the construction and maintenance of its own streets. Even if, as contended by plaintiff, section 113 refers only to state funds re-

ceived by the city, the situation is not changed. It and the other sections referred to simply provide a permissive method of use by the cities of gas tax funds for cooperation with the state in the construction of state highways. The cities are not *compelled* to cooperate, nor, should they desire to cooperate, are they in any wise prevented from using city tax funds for that purpose. See Shealor v. City of Lodi, 23 Cal.2d 647, 145 P.2d 574, to the effect that enabling legislation does not necessarily require an interpretation making the method provided exclusive.

[4] San Jose and its inhabitants receive a special benefit, as compared with the rest of the state, in the improvement of The Alameda within the city limits. It facilitates local as well as through traffic. The lighting, the signals, and the general safety advantages of the improvement are for the benefit of the local citizens as well as others. There could be no possible question that this improvement on any other city street would be a municipal purpose. The fact that this city street is also a state highway makes it no less a city street and makes its improvement no less a matter of city concern.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

108 Cal.App.2d 561

DALGLEISH v. HOLT.

Civ. 7956.

District Court of Appeal, Third District, California.

Nov. 19, 1951.

Rehearing Granted Dec. 4, 1951.

As Modified on Rehearing Jan. 7, 1952.

Further Rehearing Denied Jan. 24, 1952.

Hearing Denied March 6, 1952.

Action by Hartland Kenneth Dalgleish against Norman Holt for personal injuries sustained as a result of an automobile accident which occurred while plaintiff was riding in an automobile owned and operated by defendant. The Superior Court, San Joaquin County, M. G. Woodward, J., granted plaintiff's motion for a new trial, and defendant appealed. The District Court of Appeal, Van Dyke, J., held that there was evidence which would sustain a decision in favor of the plaintiff, and that therefore the order granting, for error of law, plaintiff's motion for a new trial, would not be reversed.

Order affirmed.

1. Appeal and Error 🔑979(2)

Appellate Court will not reverse an order of a trial court granting or refusing a new trial unless it can be said as a matter of law that there was no substantial evidence to support a judgment for the moving party, or that there was a clear and manifest abuse of discretion on the part of the trial court in granting the new trial.

2. Appeal and Error 🔑933(1)

On appeal from an order granting a new trial, all presumptions favor the order as against the verdict.

3. Appeal and Error 🔑978(1)

In action by employee against employer for personal injuries sustained when employer lost control of his automobile while employee was riding with him, wherein employer contended that employee's exclusive remedy was under Workmen's Compensation Act, there was evidence which would support a finding that at time of accident employee was not within scope of employment, and therefore Appellate Court would not reverse order of trial court granting, for error of law employee's motion for new trial.

4. Workmen's compensation 🔑617

For an injury to occur in "course of employment", employee must be engaged in work he has been hired to perform, it must occur within period of his employment and at a place where he may reasonably be for that purpose while engaged in performance of his duties or while doing something necessarily incident thereto. Labor Code, § 3600.

See publication Words and Phrases, for other judicial constructions and definitions of "Course of Employment".

5. Workmen's Compensation ⚷597

Proximate cause test for determining whether Workmen's Compensation Act is applicable to claim of injured employee excludes injury which comes from hazard from which workman would be equally exposed apart from employment. Labor Code, § 3600(c).

6. Workmen's Compensation ⚷715

Generally, a commercial traveler is regarded as acting within course of employment during entire period of travel upon employer's business, and, his acts in traveling and procuring food and shelter being incidents of his employment, where injuries are sustained during course of such activities the Workmen's Compensation Act applies, however, such rule does not embrace all activities of a commercial traveler irrespective of their connection with the purpose of the employment. Labor Code, § 3600.

7. Workmen's Compensation ⚷715

Conditions essential to compensation as set forth in Labor Code apply equally to traveling employees, and the status of an employee as a traveling salesman does not change a course of action which is not within scope of employment to one that is. Labor Code, § 3600.

8. Workmen's Compensation ⚷2138

In action by employee against employer for personal injuries sustained when employer lost control of his automobile while employee was riding with him, wherein employer contended that employee's exclusive remedy was under Workmen's Compensation Law, issue as to whether employee's injury occurred during course of employment was one of fact. Labor Code, § 3600.

9. Workmen's Compensation ⚷2129

Generally, the claim that an injury is within the Workmen's Compensation Act is an affirmative defense in tort action by employee against employer.

10. New Trial ⚷39

In granting a motion for a new trial on ground that jury were wrongly instructed, much rests within sound discretion of trial court.

11. Appeal and Error ⚷978(1)

Where, from instructions given, in action by employee against employer for personal injuries sustained when employer lost control of his automobile in which employee was riding, jury might well have erroneously concluded that burden of proof, in respect of employer's affirmative defense that injury was within Workmen's Compensation Act, rested on employee, trial court acted properly, within its sound discretion, when it granted employee's motion for a new trial. Labor Code, § 3600.

◆

Miller and Kroloff by Francis Mackey, Stockton, for appellant.

Smith & Zeller, Stockton, for respondent.

VAN DYKE, Justice.

Plaintiff-respondent brought this action against defendant-appellant to recover damages for personal injuries sustained as a result of an automobile accident which occurred while plaintiff was riding in an automobile owned and operated by defendant. The jury returned its verdict in favor of appellant and against respondent. Respondent's motion for a new trial was granted upon the ground of error in law occurring at the trial. It appears from the record and the briefs on file that the trial court based the error upon certain instructions given at the request of appellant.

Appellant first contends that the order granting a new trial should be reversed for the reason that the evidence would not support a judgment in favor of respondent as a matter of law. In this connection the appellant asserts that the evidence conclusively shows that at the time of the injury the respondent was an employee of the appellant acting within the scope of his employment, and therefore the Industrial Accident Commission had exclusive jurisdiction of the matter.

[1, 2] The rule to be applied has been recently stated by this Court in Martin v. Smith, 103 Cal.App.2d 894, 897, 230 P.2d 679, 681, where it was said that "an appel-

late court will not reverse an order of a trial court granting or refusing a new trial unless it can be said as matter of law that there was no substantial evidence to support a judgment for the moving party, or that there was a clear or manifest abuse of discretion on the part of the trial court in granting the new trial." See, also, Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 168, 153 P.2d 338; Yost v. Johnson, 91 Cal.App.2d 849, 206 P.2d 13; Rembold v. Goodwin, 93 Cal.App.2d 605, 209 P.2d 402. We are also guided by the rule that "Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict". Mazzotta v. Los Angeles Ry. Corp., supra [25 Cal.2d 165, 153 P.2d 340].

[3] Testing this case by the above principles, we hold there was evidence which would sustain a decision in favor of respondent. It is undisputed that respondent was in the employ of the appellant at the time of the injury, and the main question is whether he was acting within the scope of his employment at the time the injury occurred. The evidence introduced by him, if believed, is sufficient to show that he, at the time of the accident, was engaged in a course of action entirely without the scope of his employment, and in no way connected therewith, or incidental thereto.

Viewing the evidence and all reasonable inferences deducible therefrom in favor of the respondent, the record shows the following: The appellant manufactured neon signs in Stockton, California, and respondent was one of his salesmen. On the day of the accident, the appellant, the respondent and another employee went to Sonora, California, in appellant's automobile. As a general rule, respondent traveled in his own automobile and paid all expenses during travel in the course of his employment. On the day of the accident he had not planned to go to Sonora and had no appointments there. He went on the invitation of the appellant. The parties arrived in Sonora around 12:30 p. m. and respondent called on some of his customers in the afternoon. Appellant and the other employee worked elsewhere. The parties ended their respective duties for the day around 6 o'clock p. m. Respondent was informed by the appellant that he (the appellant) had to remain overnight in Sonora to attend to some business the following day. Respondent had no assignments to perform in Sonora the following day, and he could have returned to Stockton by bus. But appellant asked respondent if he wanted to stay in Sonora overnight, telling him that he might as well stay and have a little fun that evening. Thereafter all went into the Mountain Club and had a couple of drinks. While in this establishment the appellant stated, "Well, let's—if it's O.K. with you fellows, we'll call it a day and go farther up in the mountains and have ourselves some fun", and suggested going to the El Nido Inn where they could drink, eat, and gamble as they might desire. They departed for the El Nido in the company of Mr. Rieben, the owner of that establishment. They remained at El Nido for approximately an hour. Respondent and the other employee had a drink at the bar and the appellant engaged in a dice game. Dinner was not being served at El Nido and so, accompanied by Mr. Rieben, they all returned to Sonora to obtain food. On the return trip the appellant lost control of the car, and respondent was injured in the accident which followed. No business was discussed or transacted at the Mountain Club or El Nido. Mr. Rieben was not a customer. Respondent often went out socially with appellant, which was entirely aside from business matters.

We are satisfied that the above evidence would support a finding that at the time of the accident plaintiff-respondent was not acting within the scope of his employment. Section 3600 of the Labor Code provides:

"Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment * * *, in those cases where the following conditions of compensation concur:

"(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

"(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

"(c) Where the injury is proximately caused by the employment, either with or without negligence. * * *"

[4, 5] The principles set forth in Robbins v. Yellow Cab Company, 85 Cal.App.2d 811, 193 P.2d 956, are applicable here. The court stated at page 813 of 85 Cal. App.2d, at page 957 of 193 P.2d:

"Compensation may be awarded by the commission only for an injury 'arising out of and in the course of the employment.' Labor Code, sec. 3600. For the injury to occur in the 'course of the employment' the employee must be engaged in the work he has been hired to perform; it must occur within the period of his employment and at a place where he may reasonably be for that purpose while engaged in the performance of his duties or while doing something necessarily incident thereto. Griffin v. Industrial Acc. Comm., 19 Cal. App.2d 727, 732, 66 P.2d 176. In order for an industrial injury to come within the purview of the Workmen's Compensation Act the personal activity of the employee must have been the natural incident of his duties or a momentary interruption thereof. The voluntary visit of an employee to the premises of his employer for the purpose of attending to a strictly personal matter is not such an act as the employee might reasonably be expected to do in the performance of his duties. State Department of Institutions v. Industrial Acc. Comm., 46 Cal.App.2d 439, 442, 116 P.2d 79. The statute makes this more specific by providing that the employee must be 'performing service growing out of and incidental to his employment.' Labor Code, § 3600 b. Thus, generally, the employee must be performing acts within the scope of his duties and in conformity with the directions of his employer.

"Another basic requirement for a compensation award is that the injury must be one arising out of the employment, or that it must be 'proximately caused by the employment.' Labor Code, § 3600 c. The test for determining whether the Workmen's Compensation Act is applicable to the claim of an injured employee excludes an injury which comes from a hazard to which the workman would be equally exposed apart from the employment. Kimbol v. Industrial Acc. Comm., 173 Cal. 351, 353, 160 P. 150, L.R.A.1917B, 595, Ann.Cas. 1917E, 312."

[6–8] As a general rule a commercial traveler is regarded as acting within the course of the employment during the entire period of his travel upon his employer's business. His acts in traveling, procuring food and shelter are all incidents of the employment, and where injuries are sustained during the course of such activities, the Workmen's Compensation Act applies. See California Casualty Indemnity Exchange v. Industrial Acc. Comm., 5 Cal.2d 185, 53 P.2d 758; Pacific Employers Ins. Co. v. Industrial Acc. Comm., 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798. However, this rule does not embrace all activities of a commercial traveler irrespective of their connection with the purposes of the employment. The conditions essential to compensation as set forth in Section 3600 of the Labor Code apply equally to traveling employees; the status of an employee as a traveling salesman does not change a course of action which is not within the scope of the employment to one that is. In the present case the trier of the fact could have concluded that the plaintiff's activities during the evening of the accident amounted to a purely personal undertaking bearing absolutely no relation to the purposes of the employment. The fact that the employer was also active in the social intercourse of the evening would not necessarily compel a different conclusion. Where, as here, there is a conflict in the evidence on the issue of whether the injury occurred during the course of the employment, the issue is one of fact. Industrial Indemnity Exchange v. Industrial Acc. Comm., 26 Cal.2d 130, 136, 156 P.2d 926.

Respondent's motion for a new trial was granted for error in law, claimed to have been committed when the court gave, at appellant's request, an instruction on the burden of proof. The instruction read as follows: "In civil actions—and this is a civil action—the party who asserts the affirmative of an issue must carry the burden of proving it, *and in this case, that party is the plaintiff, Douglas Dalgleish.* In other words, the burden of proof as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the plaintiff, Douglas Dalgleish." (Emphasis ours.)

Immediately following the above instruction, the court told the jury:

"Herein there are several issues for determination by you as the jury:

"First; whether or not at the time and place of the said accident, the plaintiff Kenneth Dalgleish was acting within the course and scope of his employment.

"If you find in the affirmative on this issue that the plaintiff was acting within the scope of his employment at said time and place, then in that event your verdict must be in favor of the defendant and you need not concern yourself with the next issue I am about to relate to you;

"Secondly, if you find that plaintiff was not acting within the scope of his employment at the time of said accident, then the next issue to be determined is whether or not defendant, Norman Holt, was guilty of willful misconduct.

"If on this issue it is determined by you that the defendant, Norman Holt, was not guilty of willful misconduct, your verdict must be in favor of defendant."

The jury were asked to specially answer as to whether respondent was acting in the course and scope of his employment and their answer was affirmative.

[9] Appellant had pleaded as a special defense that at the time of the accident plaintiff was an employee acting within the scope of his employment and that therefore the Industrial Accident Commission had exclusive jurisdiction. There was no instruction that defendant had the burden of proving the affirmative defenses asserted by him. As a general rule, the claim that the injury is within the Workmen's Compensation Act is an affirmative defense. Butler v. Wyman, 128 Cal.App. 736, 739, 18 P.2d 354.

[10] In granting a motion for a new trial on the ground that the jury were wrongly instructed much rests within the sound discretion of the trial court. As was said in Mazzotta v. Los Angeles Ry. Corp., supra, 25 Cal.2d at page 170, 153 P.2d at page 341: "much is committed to the discretion of the trial judge in determining a motion for a new trial which is made upon the ground of asserted error in instructions. * * * She [the court] was in a position to determine far more accurately than an appellate court the effect of a particular instruction upon the jury * * *."

[11] From the instructions given the jury might well have concluded that the burden of proof in respect of appellant's affirmative defense rested on respondent. It did not. And we think the trial court acted within its discretion when it granted a new trial.

The order appealed from is affirmed.

PEEK, J., and SCHOTTKY, J. pro tem., concur.

107 Cal.App.2d 586

NARCISI et al. v. REED.

Civ. No. 14707.

District Court of Appeal, First District.
Division 2, California.
Nov. 19, 1951.

Emile Narcisi, and another, lessors, brought action against H. W. Reed, lessee, for damages caused by lessee's vacation of premises during term of lease. The Superior Court, County of Alameda, A. J. Woolsey, J., entered judgment for plaintiffs, and the defendant appealed. The District Court of Appeal, Goodell, J., held that under the terms of the lease, the lessors could recover damages though they entered the premises and operated the market and thereafter relet to a third party for a term exceeding defendant's term.

Judgment affirmed.

Landlord and Tenant 🔑194(2)

Where meat market lease provided that upon lessee's breach, lessors could enter into possession without affecting liability of lessee for rent thereafter coming due or for deficiency arising from rental for remainder term, and after lessee vacated within term of lease, lessors operated the market and thereafter leased part of it to third party for a term extending beyond breaching lessee's term, lessors did not accede to surrender of lease or terminate it by reoccupying and reletting, and could recover damages.

◆

Erwin C. Easton, Mark M. Coleman, San Francisco, for appellant.

Felton L. Watson, Oakland, for respondents.

GOODELL, Justice.

This appeal was taken from a judgment awarding respondents $1,684.48 damages, plus a $750 attorney fee, and costs.

On March 1, 1947 a three-year lease was made by respondents as lessors to appellant as lessee, of a meat market stall 8 feet by 48 feet in area, within a market known as the Golden Gate Food Center on San Pablo Avenue in Oakland. The rental was fixed in the lease at $205 for the first month; at $80 a month for the next 5 months; at $100 for the next 6; at $110 for the next 12, and at $125 for the last 12 months.

Appellant paid the rent for the first 4 months but none thereafter. He also paid his proportion of the utility bills for the whole Food Center—one-third thereof as required by the lease—for March and April, but not thereafter.

The court found that the place was operated as a meat market from March 1 to May 8, but not from May 10 to June 10; that operations were resumed from June 11 to August 17, but that on August 18 appellant "left the demised premises without explanation and never returned to conduct a meat market business thereupon".

On August 26, 1947 respondents served on appellant the following notice: "Please take notice that you have failed to conduct a meat business in the demised space since on or about August 18, 1947; and that the undersigned lessors elect, after three days after the delivery to you of this notice, to enter the demised premises and to operate a meat business thereupon, holding you for the rental accruing monthly under the terms of the lease and for any deficiency in rental and benefits under the lease."

About September 1, 1947 respondents repossessed the place and, as indicated in the notice, proceeded "to operate a meat business thereupon". They continued to operate it, selling meat products and other goods until May 17, 1948, when they leased a part of the place to John C. Lahey for 3 years commencing on June 1, 1948, at rentals lower than those reserved in appellant's lease.

Appellant's principal contention is that respondents terminated the lease by reoccupying the place, using it for their own purposes, and then leasing a portion of it for a period extending beyond the expiration date of the lease. They rely on Welcome v. Hess, 90 Cal. 507, 27 P. 369, and similar cases. In Phillips-Hollman, Inc., v. Peerless Stages, Inc., 210 Cal. 253, 259, 291 P. 178, 180, the court said: "Ordinarily the reletting of the premises amounts to an election to terminate the lease and to hold the tenant for damages, * * *.

The lease, however, may be so drawn as to contain provisions by which the application of that rule may be evaded." (Emphasis added.) That case discusses the New York decisions which recognize that "* * * a damage clause can be drawn in such a way as to make a tenant responsible for monthly deficits after the re-entry of his landlord * * *." The lease in the Phillips-Hollman case contained such a provision, and the lease in the instant case does likewise. Section 19 thereof reads:

"19. If default shall be made in the payment of the rent above reserved, or any part thereof, for three (3) days, or, if the lessee after three (3) days notice fails or neglects to perform or observe any of the covenants, agreements or conditions herein contained to be kept by the lessee, the lessors may, at any time thereafter, without notice or demand, declare the said lease terminated and ended and may re-enter in and upon said premises or any part thereof, with or without process of law, and expel, remove and put out the lessee or any person or persons occupying the said premises, using such force as may be necessary to again repossess and enjoy said premises without prejudice to any remedies which might otherwise be used for arrear of rent or precedent breach of covenants, and any claim for damages occasioned by such removal is hereby expressly waived by lessee. It is further understood and agreed that anything to the contrary in this lease notwithstanding, the lessors may give the three (3) day notice to quit hereinbefore in this paragraph mentioned, and require the delivery up of the possession of said premises, and enter into possession of said premises without effecting [sic] the liability of the lessee under the terms of this lease; it being understood and agreed that the lessee shall be liable monthly to the lessors for any rent thereafter to become due under the terms of this lease, or for any deficiency arising from the rental of said premises for any part of the remainder of the term of this lease * * *"

The recent case of Yates v. Reid, 36 Cal. 2d 383, 224 P.2d 8, 9 is directly in point on several grounds. The lease there contained a provision similar in effect to § 19 and, as in this case, *the lessor repossessed the premises and ran the business for his own account until he found a new lessee.* There a tourist resort was leased on October 15, 1945 at $300 a month for the first 3 months and $450 a month for the remaining 4 years. On June 15, 1947 the lessees quit and the lessor resumed possession and operated the resort until April 7, 1948 when he leased it to a new tenant at $300 a month. Shortly thereafter he served on the original lessees a notice declaring the lease terminated and demanding payment of the deficiency resulting under the new lease, and then sued. The trial court held that the abandonment of the premises by the defendants with the subsequent re-entry by the plaintiff and reletting to a new tenant amounted to a surrender of the lease by operation of law, which relieved the defendants of their obligations under the lease.

In reversing the judgment the court said:

"The plaintiff contends that his actions were not an acceptance of a surrender by the defendants, since the lease expressly authorized him to re-enter and to relet. He relies upon a provision in the lease, which reads:

" 'Should any of the rent reserved be due and unpaid, * * * or should the lessee vacate or abandon said property, * * * the Lessor may, at its option, and without demand or notice of any kind whatsoever, re-enter and take possession of said property and remove all persons therefrom; and should the Lessor elect to re-enter and take possession of said property * * *, said Lessor may, at his option, either terminate this lease and recover from the Lessee all damages caused by the breach hereof of the Lessee, * * *; or, said Lessor may relet said property or any part thereof, * * *. No re-entry of said property by the Lessor, as herein provided, shall be construed as an election on his part to terminate this lease, unless written notice to that effect is delivered to the Lessee * * *.'

"In view of the foregoing provision in the lease it is clear that the re-entry by the plaintiff and his subsequent acts in leasing to the new tenant did not constitute an acceptance of a surrender by the defendants.

"The defendants contend that a surrender by operation of law followed necessarily from the conduct of the parties and was unaffected by the terms of the lease. It is true that the conduct of the landlord and tenant may result in a surrender by operation of law. But it is only when their conduct is inconsistent with the rights of the tenant under the lease that such a surrender results. This is illustrated by the cases of Welcome v. Hess, 90 Cal. 507, 27 P. 369 [25 Am.St.Rep. 145], and Rognier v. Harnett, 45 Cal.App.2d 570, 114 P.2d 654, upon which the defendants rely. It did not appear in either of those cases that there was, as here, a provision in the lease for re-entry by the landlord or for reletting upon the tenant's abandonment. Furthermore the doctrine of the Welcome case has not always been applied. See De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453, and comments in 34 Cal.L.Rev. 252.

"In the present case the retaking of possession by the plaintiff as landlord and his reletting of the premises were entirely consistent with the rights of the tenants under the lease. The plaintiff did no more than exercise the rights accorded to him. His conduct did not result in a surrender of the lease by operation of law. The provision in the lease was valid and controlling. Burke v. Norton, 42 Cal.App. 705, 184 P. 45; Brown v. Lane, 102 Cal.App. 350, 283 P. 78; see Security Realty Co. v. Kost, 96 Cal. App. 626, 628, 274 P. 608; cf. Phillips-Hollman, Inc., v. Peerless Stages, 210 Cal. 253, 291 P. 178.

"The trial court found as a fact that the plaintiff took possession of the premises and relet them on his own behalf and not for the account of the defendant. The plaintiff contends that the evidence is insufficient to support this finding. The sufficiency of the evidence on this point, however, need not be decided. It is immaterial that the plaintiff re-entered and relet for his own account. The terms of the lease gave him the right to do so if he so desired."

On the authority of that case we must reject appellant's contention that respondents acceded to a surrender of the lease or terminated it by reoccupying the place, using it for their own purposes, and later reletting to Lahey

Appellant contends that respondents' action in making the Lahey lease for a term extending (15 months) beyond the original lease showed plainly, as was said in Welcome v. Hess, 90 Cal. 507, 514, 27 P. 369, 371, "that he was acting in his own right, and not as their self-constituted agent". Yates v. Reid also answers that contention where, in referring to Welcome v. Hess and Rognier v. Harnett, 45 Cal.App.2d 570, 114 P.2d 654 the court says: "It did not appear in either of those cases that there was, as here, a provision in the lease for re-entry by the landlord or for reletting upon the tenant's abandonment. Furthermore the doctrine of the Welcome case has not always been applied. * * * It is immaterial that the plaintiff re-entered and relet for his own account. The terms of the lease gave him the right to do so if he so desired."

Furthermore, the appellant suffered no pecuniary loss, or any other detriment, by reason of the fact that Lahey's lease extended beyond the original term. *Lahey's occupancy during the original term minimized the damages* and no question is raised respecting respondents' good faith in the matter, nor respecting the adequacy of the Lahey rentals, except a complaint that the first two months should not have been rent-free.

The monthly rentals under the Lahey lease were as follows: for June and July, 1948, gratis; $50 for the next 10 months; $60 for the next 12, and $75 for the last 12. The space leased to Lahey was 9 feet by 18 feet instead of 8 feet by 48 feet.

The judgment for damages of $1,684.48 was computed as follows in the findings: rental for July and August, 1947, $160; one-third of the total utility bills for May, June, July and August, 1947, $74.48; and "difference between the rental reserved in the lease between the parties and the rental payable by John Lahey, from June 1, 1948 to the end of the term of the lease between the parties, $1450.00". The accuracy of the computation is not challenged. Respecting the period from September 1, 1947 to May 17, 1948, during which respondents occupied the place, the court found that "the plaintiffs sold $1311.19 of packaged meat products and preparations from the demised space, and $435.30 was realized therefrom which sum is smaller than the rental reserved in the lease for the same period." The rental reserved for that period was approximately $875. No attack is made on these figures by appellant.

We find no error in the record.

The judgment is affirmed.

NOURSE, P. J., concurs.

107 Cal.App.2d 570

CHARLES L. HARNEY, Inc. v. DURKEE, Director of Public Works.

Civ. No. 15058.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1951.

Hearing Denied Jan. 15, 1952.

Proceeding by Charles L. Harney, Inc., a corporation, against Frank B. Durkee, as Director of Public Works of the State of California, to compel the Director by writ of mandate to award a contract for construction of a highway, and for other relief. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., rendered a judgment for petitioner, and made an order directing that appeal should not operate as a stay, and the Director appealed. The District Court of Appeal, Peters, P. J., held that in rejecting all bids, the Director acted within the discretion conferred upon him by the State Contract Act.

Judgment and order reversed.

1. States 🔑98

Under State Contract Act conferring upon Director of Public Works the power to reject all bids if he deemed rejection in best interests of the state, reasonable possibility of securing lower bid if all original bids are rejected is not the only fact that may be considered in determining whether acceptance or rejection is in the best interest. Government Code, §§ 14254, 14255, 14270, 14271, 14275, 14330, 14335.

2. States 🔑98

Purpose of State Contract Act providing that Department of Public Works must prepare full, complete and accurate plans, specifications and estimates is to enable Director, based on estimate, to determine whether money is available for project, and, if so, whether department desires to undertake it at estimated cost, to determine type of advertising that must be employed in connection with calling for bid, and to provide Director with yardstick by which to measure fairness of bids. Government Code, §§ 14270, 14290–14293.

3. Highways 🔑113(3)

Where engineers of Department of Public Works fail to prepare estimate of cost of highway project, Director can and should for that reason alone reject all bids. Government Code, §§ 14250–14424, 14270.

4. Highways 🔑95(1)

Director of Public Works was chargeable with knowledge of what his subordinates were doing and had done and hence knew or should have known of preparation of revised or new estimate for construction of highway. Government Code, § 14270.

5. States 🔑98

State Contract Act, requiring that before entering into contract Department of Public Works shall prepare complete and accurate specifications and estimate of costs, does not contemplate that estimates shall be prepared after examining bids and bidders' work sheets. Government Code, § 14270.

6. Highways 🔑113(3)

Where low bid for construction of highway was over 17 per cent in excess of estimate of cost, and Director of Public Works knew that Department's original estimate was substantially in error, and new estimate justifying cost had been prepared after examination of low bidder's work sheet, Director acted within his discretion in rejecting all bids notwithstanding recommendations of subordinates, some of whom were engineers, that low bid be accepted. Government Code, §§ 14270, 14271, 14275, 14330, 14335.

7. States ⚷93

In awarding contract, Director of Public Works is not compelled to follow recommendations of his subordinates. Government Code, §§ 14250–14424.

8. States ⚷97

Accurate estimate provision of State Contract Act, requiring preparation of estimate prior to award of contract, was passed to give Director of Public Works a check on his subordinates. Government Code, § 14270.

9. States ⚷98

Competitive bidding statutes are not passed for benefit of bidders but for benefit and protection of public.

10. States ⚷98

No right exists in lowest bidder to have his bid accepted by state where statute confers power to reject all bids.

11. Appeal and Error ⚷1180(2)

Where main judgment was reversed, special order after final judgment directing that appeal should not operate as a stay of execution would also be reversed.

◆

Robert E. Reed, Holloway Jones, Jack Howard, Norris J. Burke, Sacramento (Lewis L. Fenton, Sacramento, of counsel), for appellant.

Gardiner Johnson, Thomas E. Stanton, Jr., San Francisco, for respondent.

PETERS, Presiding Justice.

By this proceeding Charles L. Harney, Inc., hereafter referred to as Harney Co., low bidder on a public improvement under the supervision of the department of public works, seeks to compel the director of that department, by writ of mandate, to award the contract to it after the director had rejected all bids and issued a call for new bids. The trial court determined that the director, in rejecting all bids, had acted arbitrarily and capriciously and had abused the discretion vested in him by law. It ordered the director to award the questioned contract to Harney Co., and enjoined the re-advertisement for new bids. The director appeals.

It should be noted that during the periods here involved Charles Purcell was director of public works and Frank B. Durkee was deputy director of the department. Purcell was ill and Durkee was acting as director. Purcell has since died, Durkee has been appointed director, and has been properly substituted as appellant in this case.

The record discloses the following: On March 16, 1951, pursuant to the terms of the State Contract Act, Gov. Code, §§ 14250 to 14424, the state advertised for bids for the construction of a section of the Bayshore Freeway in San Francisco. Prior to publication of this call for bids the state highway department, pursuant to law, § 14270, Gov.Code,[1] had prepared, and the director had approved, § 14271, Gov.Code,[2] plans, specifications and estimates of cost for the project. The approved estimate was in the amount of $1,231,000. Three competent, reputable and approved construction firms submitted bids. The bids were opened April 11, 1951. It was then discovered that Harney Co., the respondent on this appeal, was the low bidder. Its bid was $1,446,641.45. This is $215,641.45 or 17.47 per cent in excess of the department's estimate of cost.

The contract here involved was a "unit basis" contract. In such cases the director is not prohibited by law from awarding the contract to a bidder whose bid exceeds the estimate.[3] The director is required to "award the contracts to the lowest responsible bidders," Gov.Code, § 14330, except that, "If the director deems the acceptance of the lowest responsible bid or bids is not for the best interests of the State, he may reject all bids and proceed by day's labor or advertise for other bids * * *." Gov. Code, § 14335.

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[1] The section provides: "Before entering into any contract for a project, the department shall prepare full, complete, and accurate plans and specifications and estimates of cost * * *."

[2] This section provides: "The plans, specifications, and estimates of cost shall be approved by the director and the original draft or a certified copy filed permanently in the office of the department before further action is taken."

[3] § 14275, Gov.Code, provides: "Except in unit basis contracts, contracts shall not be made exceeding in amount the estimates of costs approved by the director * * *."

When the department discovered that the lowest bid exceeded the estimate by 17.47 per cent, the district engineer of the San Francisco office directed his staff to review the situation. Harney Co. was directed to present to the engineers all of its work sheets and data upon which its bid was predicated. Checks were made with the other two bidders to make sure that bona fide competitive conditions had prevailed. As a result of these studies, and upon a review of the original estimate, the engineers concluded that their original estimate had been in error in several material respects. These engineers also were of the opinion that Harney Co.'s bid was fair and reasonable and as low as could be expected. Under date of April 17, 1951, J. H. Skeggs, assistant state highway engineer, by letter, recommended to George T. McCoy, state highway engineer, that the contract be awarded to respondent as the lowest responsible bidder. In this letter Skeggs stated that upon re-examination of the original estimate "it is felt that" the prices of ten major items and thirty-five minor items "were estimated too low." The letter points out that costs are increasing and that respondent's bid, in the opinion of the engineers, is "as low as could be expected at this time, or anticipated if the project were readvertised."

Under date of April 24, 1951, McCoy wrote an interdepartmental communication to the director in which he, too, recommended that Harney Co.'s bid be accepted. In this communication McCoy stated that the "original estimate was too low and very definitely in error"; that "the original estimate was definitely in error. The low bid is believed to be reasonable, and we feel certain that a lower bid would not be secured through re-advertisement." The letter also called attention to the fact that the appropriate federal agency (federal funds were involved) concurred in the recommendation that the contract be awarded to respondent.

On the morning of April 27, 1951, Durkee, as acting director, rejected all bids and directed that steps be taken to have the work re-advertised for new bids. On the afternoon of the same day the state highway engineer presented to Durkee a new or revised estimate of the cost of the project, showing a total estimate $37,479.30 in excess of respondent's bid. On April 28, 1951, Durkee approved the new estimate and directed that the project be re-advertised for new bids.

On May 3, 1951, Harney Co. filed this petition for a writ of mandate, requesting that the director be ordered to award the contract to it, and be compelled to discontinue proceedings for the re-advertisement for new bids. In the meantime, proceedings for receiving new bids continued and three new sealed bids were received, one from Harney Co., one from one of the other of the original bidders, and one from a new bidder. Before these bids were opened the trial court enjoined further proceedings on such re-advertisement until the mandate case could be decided on its merits. Thereafter, a trial was had of the issues presented in the mandate proceeding. After such trial the court entered its judgment directing that the peremptory writ of mandate issue commanding the director to award the contract to respondent. It is from this judgment that this appeal is taken.

The trial court found that Durkee, in rejecting the bids "refused to make any independent determination as to the best interests of the State of California, or to consider and weigh the above-described evidence, facts, reports and recommendations available to him. He concluded that as a matter of law he could not consider or weigh any revised estimates of cost, and could not legally approve the award of the contract to petitioner, in view of the amount by which petitioner's bid exceeded the original approved estimates of cost. Therefore, he considered that it was not his duty under the law even to consider and weigh such evidence, facts, reports and recommendations in reaching a determination as to the best interests of the State. Believing this, he failed and refused even to consider said revised estimates or said reports and recommendations." The court also found that the action of Durkee in rejecting all bids "was not for the best interests of the State of California, and was arbitrary, capricious and an abuse of discretion"; that at the time he rejected all bids Durkee "was in possession of facts of his own knowledge, and had available to him information, from which the only reasonable conclusion that could be drawn was that the acceptance of Petitioner's proposal and bid was for the best interests of the State of California." The main question on this appeal is the correctness of these findings in view of the record and the law.

At the inception of these proceedings, by demurrer and other means, the State contended that the trial court had no power to review the actions of the director; that his actions were executive in nature and not subject to review by the courts, except perhaps for fraud. Admittedly, no fraud on the part of the director was charged or found to exist. After being overruled on these contentions, the State answered contending that there had been no abuse of discretion on the part of the director. In support of this defense Durkee, called as a witness for Harney Co., and as its witness, testified at some length as to the factors that motivated him in rejecting the bids. He testified that he studied the problem as to whether to accept or reject respondent's bid for two days; that he received McCoy's report on the bids and his recommendation to accept the Harney bid; that he knew the amount of the original estimate and that respondent's bid exceeded it by 17.47 per cent; that he knew that his staff admitted that the original estimate was materially in error; that he knew, as was customary, that a revised estimate was being prepared, and knew that it would be substantially higher than the original estimate; that he conferred with one of the engineers and sought and received advice from his attorney; that he was particularly troubled because the low bid was in excess of the original estimate, and because his staff admitted that the original estimate was in error in most material respects; that under such circumstances he determined to reject all bids because: "The statute requires that the estimate be made by the Department before a contract is entered into. We do not estimate our projects after you get the bids; and what the State Highway Engineer was doing in substance, in the communication which he presented to me * * * was making an estimate after the bids were in. We don't do business—that isn't our usual procedure, it isn't the procedure provided for by the Contract Act." He also testified that, in his opinion, "the Director is entitled, in considering any bid on a project such as this—or any other state highway project, or any other work that the Department is doing—he's entitled to a yardstick which is based upon an accurate estimate, so he can tell whether or not the bid ought to be approved. And we didn't have it in this case."

Just before this testimony he had stated: "Well, I had in mind all of the matters that I think the Director should take into consideration: The policy of the law, the whole purpose of the competitive bidding statute, the administration of our Department, the requirement that before contracts are entered into, there shall be full, complete and accurate estimates, the whole policy of the law with regard to awarding contracts to bidders."

He also explained his actions as follows: "Well, I took into consideration the whole administration of our Department, the effect upon it of accepting bids and then saying, 'Well, the estimates were wrong,' and making up an estimate after bids came in; the policy of awarding to the low bidder on a job, irrespective of the relationship of his bid to the approved estimate, or any other factors that might be involved; the whole policy of competitive bidding as set forth in the Contract Act. In this case the low bid had exceeded the estimate by approximately 17½ per cent, ran over $230,000, which to me was a very important consideration; and the administration of the Department would seem to me to be a very important consideration, the necessity for impressing on the engineers that we must have what the law requires in the way of accurate estimates in the beginning, so when the Director has bids before him, he's got some real yardstick to determine whether or not he's getting a fair, reasonable bid under the circumstances."

On this evidence, the trial court came to the conclusion that Durkee should have accepted the low bid and that in rejecting all bids he acted arbitrarily and capriciously, and abused whatever discretion he may have possessed.

The first contention of the State is that under the statute the director has absolute discretion to reject all bids, and that his actions in this respect are not subject to control by the courts, except, perhaps, for fraud or bad faith. This contention was rejected by the trial court, it holding that, in this respect, the actions of the director were controllable for abuse of discretion. There is language in at least two California cases that seems to support the broad contention made by the State. Stanley-Taylor Co. v. Board of Supervisors, 135 Cal. 486, 67 P. 783, and Laurent v. City and County of San Francisco, 99 Cal.App.2d 707, 222 P.2d 274. On the other hand, there is language in Landsborough v. Kelly, 1 Cal.2d 739, 37 P.2d 96 A.L.R. 707, which seems inconsistent with the Laurent and Stanley-Taylor Co. cases. The weight of authority elsewhere, where the agency involved has rejected all bids and the lowest bidder seeks to secure the contract, seems to be in accord with the contentions of the State, although there are cases to the contrary. See cases collected, State ex rel. United District Heating, Inc., v. State Office Building Comm., 124 Ohio St. 413, 179 N.E. 138, 80 A.L.R. 1382. We do not find it necessary to decide this point in the instant case because we are of the opinion that, even if we accept Harney Co.'s contention that the actions of the director in rejecting all bids are controllable by the courts for an abuse of discretion, the record here demonstrates that there was no abuse of discretion, and that the findings to the contrary are unsupported by any evidence.

The State Contract Act places the control of the construction of public roads costing over $1,000 in the director of public works. Gov.Code, §§ 14254, 14255. The balance of the statute contains the provisions requiring competitive bidding. The powers of the director are carefully defined by the statute. Thus, section 14270 of the Government Code provides that: "Before entering into any contract for a project, the department shall prepare, full, complete, and accurate plans and specifications and estimates of cost," which the director must approve. Gov.Code, § 14271. Except as to unit basis contracts (and this is one), no contract can be awarded if the bid exceeds the estimate. Gov.Code, § 14275. The bid must be awarded to the "lowest responsible bidders" Gov.Code, § 14330, unless "the director deems the acceptance of the lowest responsible bid or bids is not for the best interests of the State," in which event "he may reject all bids and proceed by day's labor or advertise for other bids in the manner required by this chapter." Gov. Code, § 14335.

[1, 2] Thus, the statute confers the power to reject all bids if the director deems that such rejection is in the best interests of the State. In the instant case Harney Co. seems to contend that the only factor that determines whether rejection or acceptance of the lowest bid is or is not in the best interests of the State is whether or not there is a reasonable likelihood of securing a lower bid on re-advertising. It is urged by Harney Co. that, in view of the rising costs of road construction, and of the opinion of the engineers that a lower bid was not likely, it has proved that a lower bid is not likely and therefore it has proved that the rejection of its low bid was not in the best interests of the State. But this argument proceeds on a false premise. The reasonable possibility of securing a lower bid, if all original bids are rejected, is not the only factor that may be considered by the director in determining whether acceptance or rejection is in the best interests of the State. The statute prescribes how the director and his department must proceed. Among other things, the department must prepare "full, complete, and accurate" plans and specifications and estimates. There are several very sound reasons of public policy why such an estimate is required. In the first place, the director, based on the estimate, can determine whether money is available for the project, and, if so, whether the department desires to undertake the project at the estimated cost. In the second place, the amount of the esti-

mate determines the type of advertising that must be employed in connection with calling for bids. Gov.Code, § 14290 through § 14293. But there is also an important third reason for requiring such an estimate, and that is to provide the director a yardstick by which to measure the fairness of the bids. The director is not required by law to be an engineer. When he knows that a fair and accurate estimate has been prepared by the engineers of his staff before submitting the project to bids, he can then determine whether the bid is or is not fair in comparison with that estimate. But when he has no estimate at all, or has an estimate that is admittedly erroneous in major respects, or has an estimate that has been prepared after the bids have been submitted and after his engineers have consulted the work sheets of the bidder, the director has been deprived of the very yardstick given him by law and intended to protect him and the public.

[3] In the instant case the director knew that the lowest bid exceeded the estimate by 17.47 per cent—some $215,000 in excess of the estimate. If the director had had the yardstick given him by law—a full, complete and accurate estimate—and that estimate showed that the lowest bid exceeded the estimate by 17.47 per cent, there can be no doubt at all that the director, acting well within his conferred discretion, could reject all bids for that reason alone. But here he had been informed that his yardstick was inaccurate and that his engineers had admitted that the original estimate was in error in very material respects. It was the same as if no estimate at all had been prepared, because an erroneous estimate cannot and should not be used to measure the fairness of a bid. Certainly, if no estimate at all had been prepared, the director could and should, for that reason alone, reject all bids. In fact, in such event, any contract he might award to the lowest bidder would be subject to attack and would probably be held to be invalid. In Atkinson v. State Dept. of Engineering, 165 Cal. 699, 706, 133 P. 616, 618, the court stated, referring to a statute substantially similar to section 14270 of the Government Code: "Clearly under the act an estimate of cost was required as to such matters, and, if no estimate had been made in regard thereto, the Department of Engineering was not warranted in proceeding in the matter of letting a contract for the work." See, also, Board of Com'rs of Wyandotte County v. Davis, 92 Kan. 672, 141 P. 555, L.R.A.1915A, 198. This conclusion follows from the well-settled rule that: "Ordinarily, compliance with the terms of a statute requiring the letting of certain contracts by a public agency such as a municipal corporation or county by competitive bidding and the advertising for bids is mandatory with respect to those contracts coming within the terms of the statute; a contract made without compliance with the statute is void and unenforceable as being in excess of the agency's power." Miller v. McKinnon, 20 Cal.2d 83, 87, 124 P.2d 34, 37, 140 A.L.R. 570; see, also, Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839, 71 A.L.R. 161.

Durkee here testified that one of the major factors that motivated him in rejecting all bids was that he knew that the statute required that a "full, complete and accurate" estimate was a condition precedent to awarding a valid contract, and he knew that the original estimate was not "accurate" because his staff had told him that it was materially and basically in error. Because of these errors Durkee was not only deprived of the yardstick given to him by law—i. e., an "accurate" estimate—a yardstick provided for his benefit and for the protection of the public—but he had grave doubts as to the legal validity of any contract he might enter into based upon an erroneous and invalid estimate. He knew that any taxpayer could attack the validity of such a contract and that, in such event, grave delays might ensue. After consultation with his attorney, he had to make his decision. He determined that it was not for the best interests of the State to enter into a contract of such doubtful validity. This legal question is certainly at least a debatable one. His determination, honestly arrived at, is binding on all bidders.

But, says Harney Co., Durkee knew that a revised or new estimate was being drafted, and knew or should have known that such revised or new estimate would be in excess of Harney Co.'s bid, and he should have considered this new and revised bid in determining what the best interests of the State might be. The trial court found that Durkee did not consider this new estimate in rejecting all bids, and its judgment is basically predicated on the theory that such failure was arbitrary, capricious and an abuse of discretion.

[4] We agree with Harney Co. that Durkee knew or should have known that a revised or new estimate was being prepared. He knew this from McCoy's letter and from his knowledge of the practice of the department. Moreover, as head of the department, he is chargeable with knowledge of what his subordinates were doing and had done. It must be accepted as a fact, therefore, that Durkee knew or should have known of the preparation of the revised or new estimate. But his failure to wait for the new estimate or to consider it does not prove an abuse of discretion. This is so because he also knew some other facts. He knew that the revised or new estimate was being prepared not only to permit the engineers to check respondent's bid and their estimate, but also as a basis for re-advertising for bids if he should reject all bids. He also knew that the new estimate was not prepared until after the bids were opened and until after the engineers had discovered that the lowest bid exceeded their estimate by 17.47 per cent. He also knew that, upon ascertaining that fact, the engineers had requested Harney Co. to bring to them its work sheets and other data upon which its bid had been predicated, and that such work sheets and data had been examined and studied by his engineering staff—all prior to the preparation of the new estimate. He also knew that the other two bidders had been consulted, and their bids discussed.

[5] Under such circumstances Durkee was certainly justified in believing, reasonably, that a new estimate prepared under these circumstances, was not the estimate provided for by law. As already pointed out, one of the purposes of requiring an estimate is to protect the public and the director, and to give him an objective and accurate yardstick to measure the fairness of the bid. The law does not contemplate that estimates shall be prepared after examining the bids and the bidders' work sheets. Such an estimate would be valueness and such a practice would lend itself to the very abuses that the statute, by requiring prior estimates, was intended to prevent. Durkee considered these matters. He had grave and reasonable and sound doubts as to whether a new estimate so prepared would constitute substantial compliance with the provisions of the statute.

[6] Thus, the legal and factual situation is one where Durkee knew that the original estimate was substantially in error, and for that reason he doubted, reasonably, whether such erroneous estimate could serve as a basis for awarding a valid contract to Harney Co. So far as the new estimate is concerned, he doubted, with good reason, whether he could consider such estimate under the law. Under such circumstances, even if new bids might be in excess of the old ones, Durkee acted well within the discretion conferred upon him by law in rejecting all bids, and the findings to the contrary are unsupported.

[7, 8] Harney Co. also points out that all of Durkee's subordinates in the department, all of whom were engineers, recommended the acceptance of Harney Co.'s bid. It is argued that he should have followed their recommendations since he is not an engineer. The statute confers the discretion involved on the director, not upon his subordinates. Certainly, the director is not compelled to follow the recommendations of his subordinates. In fact, the "accurate" estimate provision of the statute was passed to give the director a check on his subordinates. While their recommendations are a factor that Durkee should and did consider they were not binding upon him.

[9, 10] This conclusion may seem a harsh one so far as Harney Co. is concerned. Admittedly, its bid was honestly and fairly prepared. But competitive bidding statutes are not passed for the benefit

of bidders but for the benefit and protection of the public. No right exists in the lowest bidder to have his bid accepted where the statute confers the power to reject all bids. While it is unfortunate that all bids were rejected because the department engineers made mistakes in the original estimate, public policy requires that the director have this power and protection or grave abuses may arise.

[11] An appeal has also been taken from a special order after final judgment directing that the appeal should not operate as a stay of execution. In view of the reversal of the main judgment, this order, too, should be reversed.

The judgment and the order appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

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PEOPLE v. HESS et al.

Cr. 4337.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1951.

Rehearing Denied Nov. 20, 1951.

Hearing Denied Dec. 6, 1951.

John K. Hess, William E. Rose, and Frank O. Greer were convicted in the Superior Court of Los Angeles County, Frank G. Swain, J., on indictment charging conspiracy to embezzle public moneys, embezzlement of public moneys, and corrupt performance of official acts to injury of state, and they appealed from judgments of conviction and orders denying new trial. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain convictions.

Judgment and orders affirmed.

1. Embezzlement ⇨44(1)

Evidence sustained conviction for fraudulent appropriation or secretion of public property by officer of state. Pen. Code, § 504.

2. Embezzlement ⇨11(2)

Where state right of way agents, acting in concert with realty broker, appraised property under control of broker at amount which resulted in profit of $4,500 over and above price for which realty broker had purchased property short time prior to appraisal, and share of such profit was appropriated to use and purpose of right of way agents, broker and such agents were guilty of violation of provision of Penal Code prohibiting fraudulent appropriation or secretion of public property by officer of state. Pen.Code, § 504.

3. Indictment and Information ⇨71

Indictment for offense of conspiracy to embezzle public moneys, which alleged that defendant real estate broker, acting in concert with defendant right of way agents, willfully and unlawfully entered into corrupt agreement, object of which was to cause officers of state to corruptly perform official act by reason of which other state officers innocently caused misappropriation of state funds to use and benefit of conspirators, all to injury of state, when viewed in conjunction with overt acts of false appraisal of property under control of broker and sale at excess profit, of which defendants were apprised by transcript of testimony before grand jury, was sufficient to inform defendants of charges which they would be required to meet at trial. Pen. Code, §§ 925, 950.

4. Embezzlement ⇨9

To constitute embezzlement it is not necessary to show actual possession of money or property, but it is sufficient to show that, while accused was not in actual possession of money, it was under his control in sense that it was under his direction and management. Pen.Code, § 504.

5. Indictment and Information ⇨110(13)

Indictment, charging offense of embezzlement of public moneys by public officers, which was framed substantially in words of section of Penal Code defining crime, was sufficient to state public offense. Pen.Code, § 504.

6. States ⇨81

Indictment for offense of corrupt performance of official act by officer or employee to injury of state, which alleged that defendant right of way men were officers and employees of department of public works of state and that such defendants, aided and abetted by real estate broker, did corruptly perform official act to injury of state by recommending approval of purchase of parcel of realty which had been improperly appraised, was sufficient to state offense when particular circumstances upon which charge was predicated had been furnished to defendants through medium of transcript of testimony adduced before grand jury. Government Code, § 14420; Pen.Code, §§ 925, 950.

7. States 🔑81

Evidence was sufficient to sustain convictions for offense of corrupt performance of official act to injury of state. Government Code, § 14420.

8. Statutes 🔑105(1), 109.1, 109.3

Constitutional provision which requires that subject matter of statute be expressed in title should be construed liberally to uphold legislation reasonably included within general subject indicated by title, for title to act is not expected to be index to all provisions, but it is sufficient if provisions themselves are germane to subject matter of title. Const. art. 4, § 24; Government Code, § 14420.

9. Statutes 🔑118(1)

Statute declaring that any officer or employee of department of public works who corruptly performs any official act to injury of state is guilty of felony is not in violation of constitutional provision requiring that subject matter of statute be expressed in title. Const. art. 4, § 24; Government Code, § 14420.

10. Criminal Law 🔑13

Word "injury" as used in statute declaring that officer who corruptly performs any official act to injury of state is guilty of felony is qualified by word "corruptly", which is defined by statute as wrongful design to acquire some pecuniary or other advantage to person guilty of act or omission referred to, or to some other person, and consequently does not render statute too vague, indefinite and uncertain to constitute penal legislation. Const. art. 4, § 24; Government Code, § 14420; Pen.Code, § 7, subd. 3.

11. Torts 🔑5

The word "injury" means a wrongful invasion of legal rights.

See publication Words and Phrases, for other judicial constructions and definitions of "Injury".

12. Jury 🔑143

Where two alternate jurors were sworn four days after original jury was sworn, and it did not appear that any evidence had been introduced prior to selection of alternates and that alternates had served from very inception of proceedings beginning with opening statement and introduction of evidence, and that their selection had been in same manner as original twelve jurors, essential elements of number, impartiality and unanimity of jurors were preserved, and there was no error.

13. Criminal Law 🔑173

Where two alternate jurors were sworn four days after swearing of original jurors, but no evidence was introduced until after swearing of alternates, and selection of alternate jurors and excusing of juror was in accordance with statute relating to possible protracted trials in felony cases, defendants were not in jeopardy until after alternate jurors were sworn, and failure to submit pleas of once in jeopardy and former acquittal to jury was not error. Pen.Code, § 1089.

14. Criminal Law 🔑739(4), 1173(2)

Where issue of former acquittal or once in jeopardy is based on questions of fact, issue of jeopardy is for jury, but when question is one of law it is matter for decision by court, and failure to give mandatory instruction to jury thereon is not prejudicial error.

15. Conspiracy 🔑48

In prosecution for conspiracy to embezzle public moneys, brought against state right of way agents and realty broker on ground of improper approval by agents of contract for purchase of realty, instruction that right of way agents for Division of Highways were clerks, servants and employees of state and that signature of such agent on right of way contract, recommending its approval, was one step in procedure for causing state to pay out public money, and that agents did therefore have measure of control over state money sufficient to satisfy requirements of statute relating to embezzlement by public officials, was not error. Pen.Code, § 950.

16. Conspiracy 🔑48

In prosecution for conspiracy to embezzle public moneys, wherein it appeared that state right of way agents had approved contract of purchase from realty broker for price $4,500 in excess of that which broker had paid for property but short time prior to approval, instruction in effect that fair market value need not be considered under one theory of state, but conviction was warranted on belief beyond reasonable doubt that defendants knew of prospective purchase by state and that state could have purchased for $4,500 less than amount paid, except for conspiracy, was warranted by evidence. Pen.Code, § 950.

17. Criminal Law 🔑1172(1)

In prosecution for conspiracy to embezzle public moneys, wherein it appeared that state right of way agents had approved contract of purchase from realty broker for price $4,500 in excess of that which broker had paid for property but short time prior to approval, instruction relating to state's theory of case, that as result of conspiracy between defendants state had been compelled to pay sum in excess of fair market value for property involved, which required that jury determine fair market value and which informed jury that knowledge that state was going to acquire property was immaterial if conspiracy had result of compelling state to pay amount in excess of fair market value, was not prejudicial error.

18. Criminal Law 🔑790

In prosecution for conspiracy to embezzle public moneys, wherein it appeared that state right of way agents had approved contract of purchase from realty broker for price $4,500 in excess of that which broker had paid for property but short time prior to approval, admonishment to jury that, if they were convinced beyond reasonable doubt that crime of embezzlement was committed, any civil rights which state might or might not have exercised or had right to exercise became wholly immaterial, was proper, since civil rights, if any, possessed by state were foreign to issues in criminal prosecution.

19. Indictment and Information 🔑171

Proof of a conspiracy may be presented with reference to offense charged in indictment or information even though conspiracy itself is not charged.

20. States 🔑81

Where indictment charges offense of corrupt performance by employee of official act to injury of state, corrupt agreement between parties in connection with performance of such official act to injury of state may be proved without charging it in indictment, and it is not necessary that participants in such alleged corrupt agreement be charged and tried for offense of criminal conspiracy, since agreement is but probative fact in relation to offense charged. Government Code, § 14420.

21. Criminal Law 🔑29

Where conduct of defendant comes within purview of statute under which criminal prosecution is brought, that defendants might have been prosecuted under another criminal statute does not militate against right of prosecution under statute under which commenced. Government Code, § 14420; Pen.Code, §§ 67½, 68.

22. Criminal Law 🔑780(3)

In prosecution for conspiracy to embezzle public moneys, instruction concerning testimony of accomplice, that jury might give such testimony weight to which it felt testimony to be entitled after examining it with care and caution and in light of all evidence in case, was proper statement of law, and it was not essential that words "if any" be inserted between words "entitled after".

23. Conspiracy 🔑47

A conspiracy may be proved by direct evidence or circumstantial evidence or by both, and in determining whether conspiracy has been established it is necessary to take into consideration all facts and circumstances shown by evidence.

24. Conspiracy ⚷48

In prosecution for conspiracy to embezzle public moneys, wherein it appeared that state right of way agents had improperly approved purchase by state from real estate broker of property which broker had purchased through innocent participant, instruction that if jury found that named third party had purchased property at time when he did not know whether state was going to take it over it should acquit accused was properly refused.

25. Criminal Law ⚷822(1)

Instructions should be considered in their entirety and not singly.

26. Criminal Law ⚷338(4)

In prosecution for conspiracy to embezzle state moneys, wherein it appeared that state right of way agents had approved purchase by state from real estate broker of property which broker had just recently purchased for amount $4,500 less than price approved, objection was properly sustained to testimony on direct examination of witness as to value of her property located in same block as parcel involved and which had also been sold to state for purpose of same right of way, since such testimony was not admissible on direct examination, but was admissible for limited purpose of impeachment only.

27. Criminal Law ⚷338(1)

In prosecution for conspiracy to embezzle public moneys, wherein it appeared that state right of way agents had approved purchase by state from real estate broker of property which broker had just recently purchased for amount $4,500 less than price approved, objection was properly overruled to question to supervising right of way agent concerning practice of state to buy property below appraised value, and whether witness, had he known of sale of property involved two days before date of appraisal by defendants, would have approved such allotment appraisal.

28. Criminal law ⚷1166½(12)

In prosecution for conspiracy to embezzle public moneys, wherein it appeared that state right of way agents had approved purchase by state from real estate broker of property which broker had recently purchased for amount $4,500 less than price approved, record established that interruptions made by trial judge of argument of attorney for defendant did not constitute error prejudicial to defendants.

29. Constitutional Law ⚷55
Criminal Law ⚷978

Statute restricting right of trial judge to grant probation to any defendant who shall have been convicted of robbery or to any public official who, in discharge of duties of his public office of employment, embezzled money, does not violate Constitution by attempting to affect right of courts to issue writs or impair exercise of their trial or appellate jurisdictions.

◆

Russell E. Parsons, Los Angeles, for appellants Hess and Rose.

Morris Lavine, Los Angeles, for appellant Greer.

Fred N. Howser, Atty. Gen., Henry A. Dietz, Asst. Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

Defendants were indicted by the grand jury of Los Angeles County in an indictment containing six counts. Subsequently, an amended indictment was filed containing four counts. The first count charged a conspiracy to violate sections 424 (embezzlement, misappropriating, making profit out of public moneys by public officers, etc.) and 504 of the Penal Code (fraudulent appropriation or secretion of public property by officer of the state, etc.), and section 14420 of the Government Code (corrupt performance of an official act to the injury of the state). Ten overt acts were alleged.

Count II charged violation of section 504 of the Penal Code.

Count III charged violation of section 424 of the Penal Code.

Count IV charged violation of section 14420 of the Government Code.

Defendants moved to quash the amended indictment on the grounds that (1) there was no reasonable or probable cause for the indictment; (2) no proper endorsement thereof; (3) the offenses charged were barred by the statute of limitations; (4) the indictment was vague, indefinite and uncertain and does not state a public offense; (5) was in violation of the 14th Amendment to the Constitution of the United States, and (6) that section 14420 of the Government Code is vague, indefinite, uncertain and unconstitutional.

Defendant Greer moved to set aside the amended indictment on the ground that it was not found, endorsed and presented as prescribed by the Penal Code. All defendants demurred to the indictment. The motion to quash the indictment under section 995 of the Penal Code was denied, the demurrers were overruled, and each defendant entered his plea of not guilty to each of the offenses charged in the amended indictment.

The indictment was amended for a second time, deleting from Count I the charge of violation of section 424 of the Penal Code, making certain deletions of and additions to the overt acts charged under Count I, and striking Count III from the indictment.

All defendants demurred to the second amended indictment and defendant Greer also made a motion to set the same aside on the ground that it was not endorsed and presented as prescribed by the Penal Code. A motion was also made under section 995 of the Penal Code to set aside the second amended indictment. The demurrers were overruled and the motions were denied.

The cause proceeded to trial before a jury on Counts I, II and IV of the second amended indictment, resulting in verdicts finding the defendants guilty as charged on all counts. Each defendant moved for a new trial, which motions were denied.

From the judgments of conviction and the order denying their motions for a new trial defendants prosecute this appeal.

Judgments were pronounced against defendants Hess and Rose, but as to defendant Greer the proceedings were suspended and he was granted conditional probation. Therefore, as to him, the attempted appeal from the judgment must be dismissed and his appeal determined only upon the correctness of the order denying him a new trial

The offenses charged in the second amended indictment were the outgrowth of a transaction in which appellants allegedly participated relative to the purchase by the State of California of certain property located at 800–802½ North Ardmore Avenue, in the City of Los Angeles (hereinafter referred to as parcel 307), for the right-of-way of the Hollywood Parkway or Freeway in said city.

Appellant Greer is a real estate broker engaged in business in the city of Los Angeles since 1935. Appellants Hess and Rose were California state right-of-way agents.

The procedural steps employed to acquire rights-of-way through negotiation by the Department of Public Works, Division of Highways, State of California, and particularly in acquiring rights-of-way for the aforesaid Hollywood Parkway or Freeway were set forth in detail in the case of People v. Hess, 104 Cal.App.2d 642, 234 P.2d 65, 75, 76, to which case reference is made for a statement of such procedure.

Epitomizing the evidence which gave rise to this prosecution the record reflects that in October, 1945 Leroy Brigham, an attorney, had a "For Sale" sign on the aforesaid parcel 307 in behalf of an estate in which he had an interest. One James W. Schollenberger, first met appellant Greer about 1940 or 1941 and occasionally visited him socially. They were apparently on friendly terms. In March, 1942 Schollenberger entered the Air Corps service where he remained until discharged on terminal leave which became final on November 25, 1945. The latter part of August of that year, while he was still in military service, Schollenberger contacted appellant Greer with a view to obtaining an apartment. In the latter part of September, 1945 he received a telephone call from appellant Greer telling him that he could buy a 3-unit place and evict one of the tenants. Subsequently, Schollenberger told Greer that at the time he did not have enough money to buy the property but Greer told him "not to worry about it, that he would take care of everything".

The first time that Schollenberger knew the State of California was interested in purchasing the property in question was in October, 1945, at which time he signed the right-of-way contract.

The record reflects that at all times after November, 1943 it was the plan of the State Highway Department to include parcel 307 in the Hollywood Freeway project. There was no change in the design of the freeway with reference to the acquisition by the State of said parcel from 1943 to 1946.

In November, 1943, an alignment map was prepared by the State of California for parcel 307. In January, 1944, a title report relating to the acquisition by the state of said parcel and listing the aforesaid Leroy Brigham as owner, was submitted to the Division of Highways.

In February, 1944 copy of a grant deed relating to parcel 307 was prepared for the signature of Mr. Brigham.

In March, 1945 appellants Hess and Rose initialed the "double transfer letter", in which all state right-of-way agents were cautioned against dealing with third parties rather than with the owners of property, at the expense of the state.

On September 19, 1945, appellants Hess and Rose went on a field review of the Hollywood Freeway in the area between Vermont and Western Avenues with Messrs. Cortelyou, District Engineer, E. N. Whittemore, District Right-of-Way Agent, and Mr. Phillips, a State Highway Engineer.

This field review included four fringe parcels among which was the aforesaid parcel 307. Cortelyou instructed Hess and Rose to purchase said parcel in its entirety. Whittemore made notations on the work map as follows: "Take all, 9–19–45 E. N. W.". He made these notations after he had received Cortelyou's instructions and while in the field. He made similar notations as to the other parcels involved.

On or about September 19 or 20, 1945, Whittemore had a conversation with appellants Hess and Rose, instructing them to open up negotiations for the purchase of parcel 307.

On October 23, 1945, appellant Greer applied for and purchased a cashier's check for $500 payable to the aforesaid James W. Schollenberger.

On or about October 13, 1945, when the escrow was first opened in Schollenberger's name, it was appellant Greer and not Schollenberger who told Mr. Cookman, manager of the bank in which the escrow was pending, that he had located an excellent buy and that he knew that the state was going to purchase that property. Appellant Greer instructed Mr. Cookman to type out the Brigham-Schollenberger escrow instructions. Appellant Greer also gave all the necessary information pertaining to the escrow instructions and took the same out of the bank to secure the signature of Schollenberger. The latter was not with appellant Greer at the bank when the escrow was opened. Appellant Greer informed the bank manager that no moneys had been paid out of scrow. Appellant Greer later returned to the bank with the signature of Schollenberger on the escrow instructions and deposited in the escrow the aforesaid $500.00 cashier's check which then contained the endorsement of Schollenberger.

About October 15, 1945, appellant Greer came into the bank and told the manager that he would need a bank loan to complete the purchase of the property and that he had definite information that the state would purchase the property for $14,500 in a very few months. The bank manager advised appellant Greer that it would be necessary for the bank to appraise the property and that Schollenberger's signature would be required on a financial statement. He also informed appellant that the bank would want definite confirmation of the fact that the state would pay $14,500 for the property.

A day or so later, about October 16, appellant Greer returned to the bank in company with appellant Hess. The latter presented his card to the bank manager and assured the latter that the state was definitely going to buy parcel 307 and was going to pay $14,500 for it within two or three months. The bank manager informed appellant Hess that he would require written confirmation from the state, and a few days later he received a letter from appellant Hess, dated October 19, 1945, reading in part as follows:

"In answer to your inquiry relative to the property located at 800–802½ North Ardmore Avenue, which is legally described as Lot 27 of Charles S. Mann's Melrose Avenue Tract, we wish to advise you that this property is located in the path of the Hollywood Parkway, a state highway to be constructed between downtown Los Angeles and Hollywood.

"The California Highway Commission has passed a resolution authorizing this department to acquire the property, and we will be in a position to make acquisition of same within the next 90-day period at a figure disclosed by you to be the sales price in your current escrow. If there is any further information relative to this matter, we shall be happy to return the same by return mail."

Appellant Greer brought Schollenberger into the bank to sign the financial statement.

The bank manager could not recall having had any conversation with Schollenberger regarding the application for a loan. It was necessary of course for the loan to be in Schollenberger's name because the property was purchased in his name.

On November 26, 1945, appellant Greer purchased a cashier's check payable to the California Bank in the sum of $3,125, which was deposited in the escrow. Appellant Greer did not have sufficient funds in his account with which to purchase the aforesaid cashier's check and obtained an emergency loan from the bank in the sum of $750. It is noteworthy that Schollenberger invested none of his own funds in the aforesaid transaction.

Notwithstanding the assurances given the bank by appellant Hess about October, 1945, that the state would pay $14,500 for the property, the record discloses that appellants Hess and Rose did not actually make any appraisal of the property until November 16, 1945, a month after appellant Hess had advised the bank manager that the state would definitely pay $14,500 for the property.

Appellant Hess testified that when he and appellant Rose made out their work sheet with reference to an appraisal they would date it "at the time they did the work, at the time they made the inspection", and that when the appraisals were finally made up, they were given the date that the said right-of-way agents had placed thereon.

About a month after appellant Hess had talked to the bank manager with reference to the price the state would pay he and appellant Rose prepared the allotment appraisal sheet for parcel 307, appraising the same at $14,500 and listing Schollenberger as owner of the property.

The escrow did not close until November 27, 1945, on which date Schollenberger for the first time became legal owner of the property, and on November 29, 1945, appellants Hess and Rose submitted for approval by their superiors their allotment appraisal for parcel 307, appraised by them in the sum of $14,500.

Neither appellants Hess nor Rose told any of their superiors that the property had been sold through an escrow for $10,000 on November 27, 1945, just two days before the date of their allotment appraisal, and according to the record, neither Messrs. Whittemore, Wagner or Cortelyou had any knowledge of the prior sale of the property for $10,000 on November 27, 1945, and testified that they had been so advised they would not have approved the allotment appraisal of appellants Hess and Rose for $14,500.

Raymond S. J. Pianezzi, Assistant Chief Right-of-way Agent of the State Highway Department, whose approval was the final one, said he approved the allotment appraisal on the basis of the recommendations of appellants Hess and Rose who submitted it to him as being the fair market value of the property.

Appellants Hess and Rose both testified that they had no knowledge of the purchase of the property through escrow for $10,000, that the first time they learned of that transaction was in the latter part of 1947 when they read it in the newspapers.

On December 16, 1945, appellant Rose recommended to his superiors the approval of the right-of-way contract wherein the state agreed to purchase parcel 307 for $14,500. These superior officers testified that none of them would have approved the right-of-way contract had they known about the prior sale of the property for $10,000.

On December 18, 1945, appellant Rose prepared a memorandum to Mr. Cortelyou in which he recommended the acquisition of parcel 307 for $14,500. On February 26, 1946, appellant Rose approved the release to Schollenberger of the state warrant for $8,030.40, and on the same day he approved the release to the California Bank of the state warrant in the sum of $6,469.60 (the latter warrant was in payment to the bank for the loan of $6,375, plus interest, which loan had been previously arranged for by appellant Greer. The two sums, $8,030.40 plus the $6,469.60 total the price paid by the state in the sum of $14,500.

On the last mentioned day Schollenberger met appellants Greer and Hess at lunch and signed a number of documents, including a state warrant.

With reference to the signing of these documents the witness testified, "I would sign, and Mr. Hess (appellant) would just flip them back, like that, for my signature all the way through."

On the same day, February 26, 1946, the state warrant for $8,030.40 was cashed and appellant Greer deposited $6,930.40 in his commercial account at the California Bank, First and Vermont Branch. Appellant Greer then gave appellant Rose $1,000 which he deposited in his bank account. Appellant Greer himself gave appellant Hess $1,000 on March 6, 1946, which was deposited by appellant Hess in a bank account bearing the name of his father and brother.

Appellant Greer later called Schollenberger on February 26, 1946, about an hour after the latter had left the former and appellant Hess at the restaurant. Appellant Greer asked Schollenberger to meet him at the bank where Schollenberger received $900 in cash from appellant Greer. Upon making inquiry as to what the money was for appellant Greer informed Schollenberger it represented profit on the foregoing transaction. Schollenberger asked appellant Greer where the latter came in on the deal, but Greer said nothing. Appellant Greer also told Schollenberger that if anyone asked him anything about the deal to say that he had paid $3,500 out of escrow to Brigham (the former owner), since Brigham had died, and there would be no way of checking on it.

In February, 1947, Schollenberger received a telephone call from appellant Greer inviting him to have lunch. At the meeting appellant Greer inquired of Schollenberger as to whether he had noticed anything in the papers regarding trouble on the Hollywood Freeway deals. Appellant Greer told Schollenberger that if the latter was questioned about the deal with which we are here concerned, to say that the property was bought for $13,500 from Brigham and sold for $14,500. Appellant Greer also told Schollenberger that if any inquiry was made of the latter he should not state that he met appellant Hess through Greer, but should state that appellant Hess had contacted him directly.

About a week before he testified before the Grand Jury and while he was attending a university outside the state, Schollenberger received a telephone call from appellant Greer in which the latter inquired as to why Schollenberger had not contacted him before leaving. He further inquired of Schollenberger as to whether the property transaction here in question had any bearing upon it. Appellant Greer informed Schollenberger that there was a possibility that the latter might be called back to California to testify in regard to the property but that he (Greer) would do everything possible to keep Schollenberger from being called. Appellant Greer asked Schollenberger if the latter had been called to the District Attorney's office and was informed that he had. Appellant Greer inquired as to what Schollenberger had stated at the District Attorney's office and was informed that the latter had "told them the truth" of what he knew about the deal. Appellant Greer expressed regret that Schollenberger had not contacted him before appearing at the District Attorney's office. Mr. Schollenberger said that he was taken to the District Attorney's office at 8 o'clock in the morning and had no time to contact anyone. Appellant Greer then said to Schollenberger, "Well, why didn't you tell Mr. Black (a representative of the District Attorney) that you wanted to see a lawyer or somebody like that before you went down?" to which Schollenberger replied that he did not think it was necessary.

There was considerable expert testimony given by qualified appraisers who testified that the value of the property during October and November, 1945 ranged from $10,500 to $16,500.

As grounds for reversal appellants first contend that the jury was illegally constituted and not constituted in conformity with the laws of the state of California. That the jury was not a fair cross section of the community and therefore, violated both the constitution and statutes of this state and the 14th Amendment to the Constitution of the United States.

The same contention, based upon similar grounds, was urged and exhaustibly treated in the case of People v. Hess, supra, 104 Cal.App.2d 642, 234 P.2d 65, 81. Upon the grounds and for the reasons therein stated, appellants' claims herein must be resolved against them.

It is next asserted that no public moneys were involved, appellants contending "the money in this case, like that in the Wheeler case, People v. Hess, supra, was not public money. Once it was paid by the State of California to the seller of the property and became his property, it ceased to be *public money* and therefore, was not subject to the charge under section 504 of the Penal Code".

[1, 2] In the case last cited it was held that the moneys therein involved were public moneys. People v. Hess, supra, 104 Cal.App.2d 642, 234 P.2d 65, 85. In the instant case, appellants Rose and Hess, in their capacity as state right-of-way agents, knew that parcel 307 must be acquired by the state to build a freeway long before it was acquired. They appraised the property, but did not, as they were required to do, approach the owner in an effort to obtain the property for the state at its actual value. Instead, they worked in conjunction with appellant Greer. It is only reasonable to assume that their appraisal was influenced by the knowledge that they were to share in the profit made over and above the $10,000 paid by appellant Greer through a "dummy" purchaser to the owner Brigham. A review of the evidence hereinbefore narrated reveals a course of conduct on the part of appellants teeming with fraud against the state, and replete with intrigue, deception and duplicity. It was reasonable for the jury to infer that had appellants Hess and Rose approached the owner as their duty required them to do, the state could have purchased the property for $10,000 instead of paying $14,500 therefor. Under the facts and circumstances present in the instant case, to say that the evidence is insufficient to establish a violation of section 504 of the Penal Code "would exalt form and ignore substance" as we said in People v. Hess, supra, 104 Cal.App.2d 673, 234 P.2d 65, 86. Through the fraudulent and wilful dereliction of duty on the part of appellants Hess and Rose, acting in conjunction with appellant Greer, the state paid $4,500 more for parcel 307 than it would have been required to pay had appellants Hess and Rose been faithful to their trust. When such so-called excess profit was appropriated to the use and purpose of appellants, their actions came squarely within the language of section 504 of the Penal Code.

Appellants next challenge the sufficiency of the indictment to charge a public offense and in support of such claim assert that the pleading and each count thereof was fatally defective in that (a) It charged in Count I that appellant Greer caused other persons to violate the statute; (b) It charged in Count II corrupting of themselves by Hess and Rose; and (c) It charged in Count IV the causing of other persons in the state to embezzle public money by performing a required duty of recommending a purchase.

[3] These claims on the part of appellants cannot be sustained. Count I is not vulnerable to the interpretation placed upon it by appellants. It specifically alleged, not that appellant Greer did not commit the

crime himself but caused others so to do, but that appellant Greer, acting in concert with appellants Hess and Rose wilfully and unlawfully entered into a corrupt agreement, the object of which was to cause officers of the state to corruptly perform official acts by reason of which other state officers innocently caused the misappropriation of state funds to the use and benefit of appellants Hess, Rose and Greer, the alleged conspirators, all to the injury of the state. When viewed in conjunction with the overt acts charged, the allegations of Count I were sufficient to inform the accused of the charges they would be required to meet at the trial. Section 950, Penal Code. The transcript of the testimony before the Grand Jury upon which the indictment was founded furnished appellants with the particular circumstances of the offense charged against them. Penal Code, section 925.

[4, 5] Count II charges appellants with a substantive offense, to-wit, the embezzlement by them of trust funds of the state in the control of appellants Hess and Rose. As was stated by this court in People v. Hess, supra, 104 Cal.App.2d 672, 234 P.2d 85, "To constitute embezzlement it is not necessary to show actual possession of the money or the property. It is sufficient to show that while an accused was not in actual possession of the money it was under his control in the sense that it was under his direction and management. People v. Knott, 15 Cal.2d 628, 631, 104 P.2d 33, 128 A.L.R. 1367". Count II charges that appellants Hess and Rose, "as deputies, clerks and servants of an officer of the State of California, with the advice, encouragement, and aiding and abetting, counseling and advising of the defendant, Frank O. Greer, did fraudulently appropriate to uses and purposes not in the due and lawful execution of the trust of the said defendants, John K. Hess and William E. Rose, public moneys in the sum of Four Thousand Fire Hundred Dollars ($4,500.00), which said public moneys had been and was then in the possession and under the control of the said defendants, John K. Hess and William E. Rose, by virtue of the official trust reposed in the said defendants, John K. Hess and William E. Rose." Count II was framed substantially in the words of section 504 of the Penal Code and was sufficient to state a public offense.

[6] Count IV charges appellants with a violation of section 14420 of the Government Code in that appellants Hess and Rose, as officers and employees of the State Department of Public Works, counseled, aided and abetted by appellant Greer, did corruptly perform an official act to the injury of the state by recommending the approval of the purchase of the aforesaid parcel 307. The charging part of this count specifically alleged that appellants Hess and Rose were officers and employees of the Department of Public Works of this state and then, in the language of section 14420 of the Government Code alleged that aided and abetted by appellant Greer they did corruptly perform an official act which resulted in injury to the state. As heretofore pointed out, the particular circumstances upon which the charge was predicated, were furnished appellants through the medium of the transcript of the testimony adduced before the Grand Jury.

Under our simplified forms of criminal pleading, the amended indictment was not deficient in any of the essentials of a valid accusation. People v. Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506; People v. Gordon, 71 Cal.App.2d 606, 610, 163 P.2d 110.

[7] It is next contended by appellants that the verdicts are contrary to law and the evidence, and that the evidence is insufficient to sustain the verdicts. Appellants' claim that the money involved was not public money was, as hereinbefore pointed out, decided adversely to them in People v. Hess, supra, 104 Cal.App.2d 642, 234 P.2d 65, 85, 86. Having heretofore summarized the testimony concerning the various transactions upon which the verdict of the jury were founded we shall not here repeat them. Suffice it to say that under our holding in People v. Hess, supra, 104 Cal.App.2d 642, 234 P.2d 65, 85, 86, there was substantial evidence in the instant case to support the guilty verdicts returned by the jury. While appellant Greer was not a public official, nevertheless, if he aided and abetted appellants Hess and

Rose who were public officials, he was chargeable as a principal in the commission of the alleged offenses.

[8, 9] Appellants urge that section 14420 of the Government Code is unconstitutional in two respects. (1) It is in violation of Article IV, section 24 of the Constitution of the State of California which requires that the subject matter of a statute be expressed in the title; and (2) that the statute is also too vague, indefinite and uncertain to constitute penal legislation in that the word "injury" as used therein is not defined. It is well settled that the aforesaid constitutional provision must be construed liberally to uphold legislation reasonably included within the general subject indicated by the title. It cannot be said that the details of the liability provided for in the statute must be expressed in its title. The title to an act is not expected to be an index to all its provisions so long as the provisions themselves are germane to the subject matter of the title. Evans v. Superior Court, 215 Cal. 58, 8 P.2d 465. A review of the provisions of section 14420 of the Government Code and the legislative history of the act of which it is a part readily suggests that it is included in the field of legislation encompassed by the text of the act.

[10, 11] As to appellants' second complaint that the word "injury" being undefined, is too vague, indefinite and uncertain to constitute penal legislation, it should be noted that the section in question provides that "Any officer or employee of the department who *corruptly* performs any official act to the *injury* of the state, is guilty of a felony" (emphasis added).

The word "corruptly" qualifies the act denounced and is defined by section 7, subd. 3 of the Penal Code as, "* * * a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person".

When the word "injury" is read with the context of the offense charged, its meaning appears clear and free from uncertainty or ambiguity. It is well recognized that in law the word "injury" has acquired a well defined and equally well understood definition. It simply means a wrongful invasion of legal rights. It is not concerned with the hurt or damage resulting from such invasion as is evidenced by the familiar phrase "damage without injury". It is an actionable wrong as distinguished from a physical hurt, or damage to a specific article of property. And in the instant action the word "injury" means a wrongful act which causes loss or damage to the state. See People v. Smith, 36 Cal.App.2d Supp. 748, 752, 92 P.2d 1039. Section 14420 of the Government Code cannot therefore be strictured as having a double meaning or forcing anyone at his peril to speculate as to whether certain actions transgress it. The statute in question has no constitutional infirmities as claimed by appellants.

[12] Appellants next assert that the court erred in swearing two alternate jurors four days after the original jury of twelve as empaneled was sworn. Appellants do not contend that any evidence was taken prior to the time the alternate jurors were empaneled and sworn. Penal Code, section 1089. The record reveals that on May 17, twelve jurors were sworn to try the cause. A request by the district attorney for alternate jurors was denied. The cause was continued due to the absence of a juror until May 20. On that morning a sworn statement was received by the court from the absent juror's physician. It read: "It is my opinion that Mrs. Beatrice V. Anderson is physically unfit at the present time to serve daily as a juror. Her condition indicates the necessity for a daily treatment which deems it advisable that she be excused."

The juror in question was present in court and in answer to interrogatories by the judge stated, "I am not feeling well"; that her condition "has been much worse" since she was seated in the jury box; that "although my X-rays were negative as far as cancer is concerned there is something there which needs further study and further observation and treatment". After further colloquy between the court and juror as to the latter's condition of health the court asked, "Is it your request that you be excused from jury duty?" to which the juror responded, "I would like it very much". Preceding the foregoing and before any evidence was taken the court stated, "I do now change the order which I made denying the request of the district attorney for alternates, and I can very conscientiously say, after what has happened, that this will be a protracted trial; and I do order two alternate jurors chosen". Two alternate jurors were thereupon selected, qualified and seated.

In connection with excusing the regular juror, the following Minute Order appears in the clerk's transcript: "The Jury is in attendance as heretofore. Pursuant to her request, Mrs. Beatrice V. Anderson is ordered excused from further jury service. A sworn statement of Doctor E. W. Demarec regarding the physical condition of Mrs. Beatrice V. Anderson is filed. Alternate Juror, Mrs. Dorothy B. Letts, is called and substituted in place of Mrs. Beatrice V. Anderson. Each of the defendants John K. Hess, William E. Rose and Frank O. Greer enters his plea of once in jeopardy and former acquittal. Defendants' motion to discharge the jury on the ground of former jeopardy and former acquittal is denied." The first witness was then sworn on behalf of the prosecution.

No claim is made that the alternate juror seated was not in fact a fair and impartial person to act as a juror. The same proceedings were had in the selection of the alternate juror as in the case of the first twelve who took their places in the box.

We fail to perceive any invasion of appellants' substantial rights or any resultant prejudice to them in directing the selection of two alternate jurors in the manner aforesaid. They were selected prior to the introduction of any evidence and before the district attorney made his opening statement. They sat from the very inception of the proceedings that began with the introduction of the evidence; they had all the opportunities that were possessed by the regular jurors to see and hear the witnesses, and were bound by the same oath that was taken by the others to "well and truly try the matter in issue and a true verdict render according to the law and the evidence". The three essentials and substantive attributes or elements of a trial by jury, viz., number, impartiality and unanimity, were preserved. The inviolability of trial by jury was not therefore impinged upon or outraged. For the reasons stated in People v. Hess, supra, 104 Cal. App.2d 642, 234 P.2d 65, 90, appellants' contention that it was error to excuse Juror Anderson under the circumstances here present cannot be upheld.

[13] Appellants urge that the failure of the court to submit the pleas of once in jeopardy and former acquittal to the jury requires a reversal of the judgments. We are not in accord with this contention. If, as we have held, the selection of the alternate jurors and the excusing of Juror Anderson were substantially in accordance with the provisions of section 1089 of the Penal Code, it necessarily follows that jeopardy did not attach until after the alternate jurors were sworn and therefore, appellants faced but one jury. People v. Burns, 84 Cal.App.2d 18, 189 P.2d 868.

[14] As to appellants' claim that the court was guilty of prejudicial error in failing to submit the pleas of once in jeopardy and former acquittal to the jury, it undoubtedly is the law that where the issue of jeopardy is *based on questions of fact*, it is for the jury to decide. People v. Frank, 134 Cal.App. 211, 214, 25 P.2d 486; People v. Lachuk, 5 Cal.App.2d 729, 731, 47 P.2d 579. However, while generally speaking former jeopardy is a question of fact and hence should be passed on by the jury, in certain circumstances it may become purely a question of law. People v. Gelardi, 77 Cal.App.2d 467, 474, 175 P.2d 855. In the instant case, a pure question of law was presented to the trial court. Under the circumstances here present, had the court submitted the issue of jeopardy to the jury, no evidence having been introduced in support thereof, and the question being purely one of law, it would have been the duty of the trial judge to instruct the jury to find for the prosecution on the special pleas. People v. Newell, 192 Cal. 659, 668, 221 P. 622; People v. Gelardi, supra, 77 Cal.App.2d at page 475, 175 P.2d

855; People v. McNeer, 8 Cal.App.2d 676, 683, 47 P.2d 813. Manifestly, the failure to give such an instruction did not prejudice appellants.

[15] Appellants predicate error on the giving and refusing to give certain instructions. In this regard, it was not error for the court to instruct the jury that appellants Hess and Rose, as right-of-way agents for the Division of Highways, were clerks, servants and employees of the State of California in the Department of Public Works within the meaning of Penal Code section 504. No error was committed in advising the jury that on the question of control of state money, the signature of a right-of-way agent on a right-of-way contract, recommending its approval, "is one step in the procedure for causing the state to pay out public money for the purchase of real property for highway purposes". That, "therefore, Rose and Hess as right-of-way agents did have a measure of control over state money", and that "this was sufficient control to satisfy the requirement of section 504 of the Penal Code". Identical instructions were held not to be erroneous in People v. Hess, supra, 104 Cal.App.2d 642, 234 P.2d 65, 90, 91.

Appellants earnestly urge that the court erred in giving an instruction reading as follows:

"There has been considerable evidence admitted in this case which was introduced by both the People and the defendants concerning two subjects: (1) The fair market value of the property; (2) knowledge, or the lack of knowledge, on the part of the defendants, that they knew on October 13, 1945 (opening of the Brigham-Schollenberger escrow) that the state was going to purchase the property.

"To enable you to properly evaluate this evidence and to determine whether the defendants caused the state to pay more for the subject property than was necessary it is necessary for me to relate to you the two theories of the People's case, either of which is entitled to your consideration.

"The People's first theory is that pursuant to, and as a direct result of, the alleged conspiracy between the defendants, Greer, Rose and Hess, the State was compelled to pay $4500.00 more for the property than it otherwise would have had to. Under this theory of the case it is unnecessary for you to consider any of the evidence concerning fair market value because, if you believe beyond a reasonable doubt that the State could have purchased the property for $10,000 and that as a result of the alleged conspiracy the State was compelled to pay $14,500, it becomes wholly immaterial that the fair market value of the property equalled, was less than, or even exceeded the amount the State was compelled to pay. Under this theory the question of knowledge or the lack of it, on the part of the defendants on October 13, 1945, that the State was going to purchase the property, becomes important in your determination as to whether or not the State could have purchased the property for $10,000.

"The People's second theory is that as a result of the alleged conspiracy between the defendants, the State in acquiring the property was compelled to pay a sum which was in excess of its fair market value. Under this theory all of the evidence concerning fair market value must be considered by you, because you must necessarily determine the fair market value of the property before you can consider whether or not the State paid a sum for the property which exceeded its fair market value. Under this theory, it is unnecessary for you to consider any evidence concerning knowledge or the lack of it by the defendants on October 13, 1945, that the State was going to acquire the property, because if you believe beyond a reasonable doubt that as a result of the alleged conspiracy the State was compelled to pay more for the property than its fair market value, this particular knowledge or lack of it on the part of the defendants on October 13, 1945 becomes wholly immaterial."

[16] Appellants insist that the portion of the instruction embodying "The People's first theory" is purely hypothetical and speculative, and asks the jury to speculate on what the State might have done if they had negotiated with Mr. Brigham at the

time he owned parcel 307. A review of the evidence which we have hereinbefore set forth, dispels any assertion that the instruction was entirely speculative in its theory and scope. The evidence clearly warranted the following inferences: (1) That Hess and Rose knew the state was going to acquire parcel 307 on September 20, 1945; (2) That Hess and Rose entered into a conspiracy with Greer and advised Greer of the prospective purchase of parcel 307 by the state; (3) That Hess and Rose knew that Greer purchased the property in the name of Schollenberger as a convenient "front" for $10,000 when it was purchased and knew he was going to purchase it; (4) That the $1,000 that Hess and Rose each received from Greer was their share of the embezzled funds according to agreement.

If appellants Hess and Rose had followed the instructions given them on September 20, 1945 to acquire the property from the then owner (Brigham) instead of acting in concert with appellant Greer, it would seem only logical to conclude that the state could have purchased the property at the price of $10,000 because that was what appellant Greer paid for it through a "dummy" purchaser. There was evidence that appellant Greer received information from appellants Hess and Rose that the state would buy the property for $14,500, the precise amount for which the last-named appellants as state right-of-way agents appraised it.

[17] The so-called "second theory" contained in the instructions is also challenged by appellants as being untenable and incorrect because fair market value they say, "has nothing to do with a negotiated sale". We are inclined to the belief that the amount paid by the state is not controlling. That if appellants entered into a corrupt agreement and made a profit therefrom, that profit was illegal and appellants Rose and Hess were guilty of embezzlement since it was wrong for them to make such profit while occupying positions of trust and confidence with the state. And, if appellant Greer knowingly became a party to said agreement and aided and abetted in its accomplishments he too was equally guilty as a co-conspirator and principal. People v. Hess, supra, 104 Cal. App.2d 642, 234 P.2d 65, 86. Furthermore, the second portion of the instruction was justified by the evidence as well as by the fact that the "fair market value" of the property was made an issue in the trial and so treated by appellants who also introduced evidence thereon. We find no prejudicial error in the giving of this instruction.

[18] The court committed no error in admonishing the jury that if convinced beyond a reasonable doubt that the crime of embezzlement was committed, any civil rights the State of California may or may not have exercised or had a right to exercise became wholly immaterial. The proposition that a duty rested upon the state to institute civil proceedings to rescind its contract with Schollenberger for the purchase of the property was attempted to be injected into the trial by appellants. What civil rights the state possessed or did not possess were foreign to any issue involved in the criminal prosecution.

Appellants challenge the correctness of an instruction given with reference to Count IV wherein the court stated that, "If Rose and Hess in appraising the subject property at $14,530.00 and if Rose in recommending that the state buy the property for $14,500.00, did so under an agreement with Greer that they would receive from Greer a secret profit or fee for so doing and if this caused injury to the state, Rose and Hess are guilty of the offense charged in Count IV of the second amended indictment."

[19–21] Appellants contend that Count IV did not charge corrupt performance by appellants Rose and Hess "under an agreement with Greer that they would receive a secret profit for so doing", and thereby causing injury to the state. That such a concert or agreement was not charged in the indictment. However, to prove a conspiracy it need not be charged in the indictment or information. The corrupt agreement may be proven without charging it in the indictment. It is but a probative fact. It is not necessary that the participants in such alleged corrupt agreement should be charged and tried for the offense of criminal conspiracy. People v. Descant, 51 Cal.App.2d 343, 348, 124 P.2d 864. The indictment however, did charge that appellants Hess and Rose were aided and abetted by appellant Greer. The fact that appellants might have been prosecuted under sections 67½ or 68 of the Penal Code does not militate against the right of the prosecution to proceed under section 14420 of the Government Code when, as here, the alleged conduct and actions of appellants come within the purview of the last-mentioned statute.

[22] Appellants challenge the correctness of the court's instruction on the subject of accomplices wherein it was stated: "You must give it (testimony of an accomplice) the weight to which you feel it to be *entitled after* examining it with care and caution and in the light of all the evidence in the case". It is appellants' claim that the court should have inserted the words "if any" between the words "entitled" and "after" to which we have added emphasis in the above quoted portion of the instruction. We are cited to no authority in support of appellants' contention, but assuming, as stated by them, that it is customary to phrase the instruction as they suggest, it does not appear to us as material, nor does it change the meaning of the instruction or add anything to it. The instruction as given is an exact duplicate of instruction 829 set forth at pages 653 and 654 of CALJIC.

[23] Contrary to appellants' contention, the court properly instructed the jury that a conspiracy may be established by circumstantial evidence. The courts have repeatedly held that a conspiracy may be established by circumstantial evidence alone and that the question presented was whether the conspiracy had been established. The court correctly told the jury that the establishment of a conspiracy might be proved by direct evidence or circumstantial evidence or by both, and that in determining whether or not a conspiracy had been established it was necessary to take into consideration all the facts and circumstances shown by the evidence. The court further advised the jury that their first duty was to find whether or not a criminal combination or agreement did in fact exist, and that if it did, which, if any of the defendants were parties to such conspiracy.

We come now to a consideration of appellants' contention that the court erred to their prejudice in refusing to give certain instructions submitted by them. Appellants' proffered instructions numbered 9, 13, 20, 21, 22, 23, 28, 29, 31 and 33 were properly refused upon the authority of People v. Hess supra, 104 Cal.App.2d 642, 234 P.2d 65, 91, 92, 93. Furthermore, the subjects of some of the instructions just enumerated were covered by other and correct instructions given.

Equally without merit is appellants' claim that the court erred in refusing their proposed instructions reading: "If you find that Mr. Schollenberger bought this property at a time when he did not know whether the State was going to take it over you should acquit the accused."

[24] It was not contended at the trial nor was there any evidence that Schollenberger had any knowledge whatsoever of the agreement entered into by the appellants. The evidence clearly shows that he was an innocent participant in the entire transaction, used by appellant Greer as an unsuspecting conduit for the accomplishment of the purposes and designs of all the appellants. If the law was as declared in appellants' proposed instruction, the guilty would escape punishment by simply routing their perfidy through the medium of an innocent person as an instrumentality for the accomplishment of their unlawful purposes. To state the proposition is to answer it.

[25] Remembering that instructions should be considered in their entirety and not singly, People v. Hess, supra, 104 Cal. App.2d 642, 234 P.2d 65, 92, a perusal by us of all the instructions given satisfies us that the jury was fully, correctly and fairly advised of the kind, quality and degree of proof requisite to a conviction under all counts of the indictment. Nothing further was required.

[26] Giving consideration to appellants' contention that the court erred in the ad-

mission and exclusion of evidence, we are satisfied that an objection to the proffered testimony *on direct examination* of the witness Mrs. Alamay Smith as to the value of her property located in the same block as parcel 307 and which she had sold to the state for the Hollywood Freeway was properly sustained. The testimony was not admissible on direct examination of the witness. City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 436, 437, 34 P. 1083; City of Los Angeles v. Cole, 28 Cal.2d 509, 518, 170 P.2d 928. Such testimony is admissible for a limited purpose only—impeachment.

[27] No error was committed in overruling objections to questions propounded to Supervising Right-of-way Agent E. F. Wagner concerning the practice of the State to buy property below the appraised value, and whether, had the witness Wagner known of the sale of parcel 307 for $10,000 two days before the date of the allotment appraisal by appellants Hess and Rose, he would have approved such allotment appraisal. People v. Hess, supra, 104 Cal.App. 2d 642, 234 P.2d 65, 86.

Appellants next assert that the court was guilty of prejudicial misconduct during the argument to the jury by one of appellants' counsel. In this connection the record reflects that while Attorney Lavine, counsel for appellant Greer, was addressing the jury he read from the transcript certain remarks made by the court during the trial with reference to what the prosecution contended. The court interrupted counsel's argument to remark, "I did not say those facts were true", to which Attorney Lavine replied, "I understand that". Then the following ensued:

"The Court: You are not arguing to the *jury* that I have told them already that those facts were true or that agreement had been made?

"Mr. Lavine: No.

"The Court: And from what you read from the transcript prior to that I think it is perfectly clear to the jury that my statement was that this is one theory of the prosecution. Go right ahead."

Thereupon, another portion of the court's remarks was read by Attorney Lavine which he sought to answer when the court interrupted saying:

"The Court: I did not say that on this question of knowledge: and I would like to ask you to discuss this question. You have spent fifteen minutes yesterday afternoon and all this morning on pointing out the evidence as to the time the defendants acquired knowledge that the State was going to purchase this property. And you have argued, I take it, that on and at all times prior to October 13, 1945, that none of the defendants knew the State was going to purchase this property.

. "I am sure they did because that is the date they went into escrow, the date the escrow instructions were signed—I am not sure whether Mr. Brigham signed them that day or not; but the contract is the escrow instructions in this case. I am wondering what your ideas are as to whether it is sufficient for the jury to find that the defendants did not know that the State was going to buy this property on the date the contract for sale was made, when it is undisputed that before the sale was completed, and in order to finance the purchase of this property, and not later than October 16, 1945, the defendants all knew that the State was going to buy the property, the sale not having been completed until after that date because the money was not available, was not paid even though the contract had been made.

"I would be interested in hearing your discussion as to what difference it would make if the jury find that the defendants did not learn of the proposed sale to the State until October 16th, in view of the fact as I have just stated it, that the purchase price was not paid and the financing was not arranged.

"It is just about time for recess, if you want to think over that proposition.

"Mr. Lavine: I will state my position now and answer fully after recess.

"The Court: All right.

"Mr. Lavine: It is my position that without any knowledge when they commenced the transaction, dating back to October 3rd, when the cashier's check was bought, that once the escrow was commenced and the deal was started it would not make any difference what knowledge was acquired afterwards, because specific performance for that contract could have been made—the terms of the escrow date back to the beginning of the escrow, as a matter of law; and it is my position that that shows the complete innocence of the defendants. I will discuss it after recess."

The jury was then excused and counsel for appellants and respondent engaged in a discussion of what the court had stated during the trial. During this discussion Attorney Lavine assigned as misconduct the interruption by the court "to argue matters with me in the presence of the jury", and requested the court to instruct the jury "to disregard the statements made by Your Honor in the middle of my argument". After further discussion the court said, "Frankly, I have been considering my instructions on this point, and I am considering that, and I am asking your assistance now with a view as to what instructions I will give, because it is not my policy to let an attorney make an argument which is entirely contrary to the instructions which I give, because that puts the attorney in really a bad light with the jury and his client; and I don't want any attorney who is arguing before a jury in my court to be embarrassed by arguing a theory which involves propositions of law which I knock out completely on my instructions; and I was attempting to save that embarrassment on your part * * *. Now, I have never been accused of being unfair to counsel when I have advised them ahead of time of the things that are in my mind; and for the first time I have heard counsel object to my doing it, on questions of law.

"I still think that it is fair to give you the opportunity to argue to the jury anything that you want to in regard to that, after I determine what instructions of law I will give to the jury on that."

Then there follows a discussion concerning contemplated instructions to be given to the jury. When the jurors were returned to the courtroom the trial judge admonished them as follows: "Ladies, we have had considerable discussion since you left and have not as yet reached the point where we can proceed with the argument. I don't want you to draw any inferences from any of the questions which I asked Mr. Lavine as to what I think the law is or is not in connection with the question which I asked him. I shall attempt in my instructions to give you the law on that point. I shall attempt to advise the counsel as to what instructions I expect to give, so that they may continue their arguments to you in the light of those instructions. But I haven't intended to intimate what my view of the law is or the importance of these two dates, or knowledge that the State was going to buy this, knowledge on the part of the defendants prior to the 13th of October as distinguished from on or before the 16th."

At the outset it should be remembered that the statements originally made by the court and to which Attorney Lavine was referring in his argument to the jury involved only questions of law and at the time they were made no exception was taken to them. It appears that appellants' chief complaint goes to the interruptions of the court rather than to what the trial judge had to say. The foregoing excerpts from the record would indicate that the statements made by the court in the presence of the jury were intended to correct a possible erroneous impression that the court was attempting to invade the province of the jury as triers of fact and to clarify the issues so that appellants' counsel might not be embarrassed by instructions which the court intended to give of its own motion. The admonition given the jury was specifically to that effect and was sufficient to remove any contrary belief on the part of the jury.

[28] We have read the record carefully and cannot say that the court transcended the line of its duty in the management and trial of the cause. We perceive no conduct of the trial judge that might be attributed to a purpose to throw his judicial weight into the scales against the accused on trial before him. We find nothing in the record that would justify the assumption that at any time the trial judge directly

or indirectly assumed the guilt of the appellants or implied language or phrases, equivocal or otherwise, which might leave such an impression. We are satisfied that in the instant case it cannot justly be said that the conduct of the trial judge was so grossly improper as irresistibly to lead to no other conclusion than that the rights of appellants were thereby seriously prejudiced, and they, therefore, denied a fair and impartial trial according to the law of the land. For these reasons, the result reached in the court below cannot be set at naught.

Contrary to appellants' contention, the record herein as above set forth, contains substantial evidence to justify a conclusion by the jury of guilty knowledge upon the part of all appellants.

[29] Finally, appellants Rose and Hess urge that insofar as section 1203 of the Penal Code restricts the right of the trial judge to grant them probation following their conviction of embezzling public money in the discharge of their duties in public office or employment, it is unconstitutional. A similar contention was urged by these appellants in the case of People v. Hess, supra, 104 Cal.App.2d 642, 234 P.2d 65, 92, and determined adversely to them. Therefore, the similar contention made in the instant case must be held to be without merit.

From a consideration of the voluminous transcript in this case containing 1,674 pages and the briefs made up of 368 pages we are convinced that appellants received a fair and impartial trial and that their conviction rests upon legal and substantial evidence.

For the foregoing reasons, the judgments and the orders denying a new trial as to defendants Hess and Rose are, and each is affirmed. The attempted appeal of defendant Greer from the judgment is dismissed and the order denying his motion for a new trial is affirmed.

DORAN and DRAPEAU, JJ., concur.

38 Cal.2d 52

JOLLIE et al. v. SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY et al.

L. A. 21987.

Supreme Court of California, in Bank.

Nov. 16, 1951.

Petition for a writ of prohibition by Cletus H. J. Jollie, and another against the Superior Court of the State of California in and for the County of Los Angeles, Honorable Caryl M. Sheldon, Judge thereof, wherein Sophie Anna Fischer, individually and as administratrix of the estate of Frederick Fischer, deceased, was the real party in interest. The Supreme Court, Schauer, J., held that in action to set aside a judgment and order of probate on ground of fraud and to have court award plaintiff a larger percentage of the profits of partnership than she was named to receive in the judgment and probate order, four persons who were named in original judgment as receiving certain percentages of profits of partnership were not indispensable parties to have judgment and probate order set aside, and therefore prohibition would not lie to restrain trial until the four persons were brought in as parties to action.

Alternative writ discharged, peremptory writ denied, and respondents' motion to strike and petition and motion to quash dismissed.

1. Prohibition ⚿3(5)

The fact that a remedy of appeal from a proposed judgment would entail a large expenditure of time and money was insufficient to support a petition to secure a writ of prohibition.

2. Judgment ⚿457

Prohibition ⚿11

In action to have a judgment and order of probate court set aside on ground of fraud and to have petitioner awarded a certain percentage of partnership profits rather than a lower percentage under the judgment and probate order, four persons who were named in original judgment as receiving a certain percentage of partnership profits were not indispensable parties to action to have judgment set aside, and therefore prohibition would not lie to restrain trial of action until the four persons were brought in as parties.

Knight, Gitelson, Ashton & Hagenbaugh and Alfred Gitelson, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondents.

Marion P. Betty and Lionel T. Campbell, Los Angeles, for real party in interest.

SCHAUER, Justice.

This is a petition for a writ of prohibition, in which a hearing was granted by this court and the alternative writ issued after denial of the petition, without opinion, by the District Court of Appeal. The real party in interest (Mrs. Fischer, individually and as administratrix of the estate of her deceased husband) has filed an answer, demurrer, motion to strike, petition and motion to quash the alternative writ, and consolidated points and authorities, all of which are adopted by respondents superior court and the Honorable Caryl M. Sheldon, judge thereof, as their return to the alternative writ.

The petition alleges: In 1947 the Los Angeles Superior Court, in action 525286, rendered a judgment which has become final. The action was by petitioner Jollie (the surviving partner of Frederick Fischer, deceased) against Mrs. Sophie Anna Fischer (Fischer's widow and administratrix of his estate). The judgment was entered pursuant to stipulation between Jollie and Mrs. Fischer and their respective counsel, John M. Dvorin (Jollie's attorney, and one of petitioners herein) and N. E. Youngblood (Mrs. Fischer's attorney). It ordered Jollie to "wind up" the partnership (conducted under the fictitious name of Loyola Village Construction Company) and to pay 60% of the "net profit" therefrom to Jollie, 30% to Mrs. Fischer as administratrix, and 2½% each to Dvorin, Youngblood, Samuel L. Kurland, and Dave Young. Kurland is an attorney who was representing both Jollie and Mrs. Fischer in other matters, and Young was construction superintendent of the Loyola Village Construction Company. Only Jollie and Mrs. Fischer were parties to the action but the judgment is conceded to be at least prima facie valid in favor of each of the persons to whom it makes an award.

In 1948 the superior court, in proceeding 260204, the probate of Fischer's estate, made an "Order Approving Compromise" which has become final. This order, made on petition of the administratrix, approves her stipulation and the judgment in action 525286, and approves acceptance by her of 30% of the "net profit" of the partnership as the full interest of the Fischer estate in such partnership.

In 1949 the administratrix filed action 561185 against Jollie only (and this is the action proceedings in which are sought to be interrupted by the pending petition for prohibition), seeking to have the above described judgment in action 525286, the order in probate proceeding 260204, and the stipulation on which they were based, set aside on the ground of fraud, and to have the court award to her 50% of the "net profit" of the partnership rather than the 30% she was to receive under the judgment and the probate order she was attacking. Jollie demurred on the ground that the four persons to whom the 2½% payments were ordered in the judgment in action 525286 were indispensable parties.[1] The demurrer was overruled. Jollie was also denied permission to file a cross-complaint in the new action (No. 561185) bringing in the four persons. Over Jollie's objections to proceeding without the four persons, the case was tried on its merits, and petitioners (Jollie and Dvorin) now seek prohibition to restrain the superior court from filing findings of fact and conclusions of law, and entering judgment, against Jollie. Such proposed judgment by its terms would set aside the prior judgment and order (in action 525286 and probate proceeding 260204) and the stipulation on which they were based, enjoin Jollie from asserting their validity or attempting to enforce them, decree that the partnership business "has now been finally wound up and" is dissolved, and award the administratrix certain sums of money to be paid to her by Jollie. Petitioners do not allege that the four persons to whom the 2½% payments were ordered under the judgment in action 525286 had not already received such amounts prior to the commencement of action 561185. They merely state that by the judgment in action 561185 the court proposes to award to Mrs. Fischer, the administratrix, 50% of the net profits of the partnership, instead of 30%, thus diminishing the percentage which Jollie himself is to retain out of the total (100%) of such profits. They claim, nevertheless, that the four persons to whom the 2½% payments (i.e., 10% total) were ordered by the earlier judgment are indispensable parties to action 561185, that the court is therefore without jurisdiction to render the proposed judgment, and that prohibition will lie. (See Bank of California v. Superior Court (1940), 16 Cal.2d 516, 523, 106 P.2d 879.)

Respondents, in their answer[2] to the petition for the writ allege: The judgment in action 525286 was "procured by the extrinsic fraud, threats, coercion, economic pressure and undue influence practiced and exerted upon" Mrs. Fischer by Jollie, "all as set forth in Findings of Fact and Conclusions of Law in action No. 561,185, signed and entered by the [respondent] trial Court below on May 16, 1951," and that such judgment as well as the stipulation and probate order have "been set aside and held for nought as between" Mrs. Fischer and Jollie "by the Judgment * * * signed and entered[3] by the trial Court below on May 16, 1951 in cause No. 561,185."

Respondents further allege that "since the very date of" Fischer's death Jollie "by gross fraud, coercion, threats, economic pressure, and breach of trust did deprive" the administratrix of "her rightful share in the partnership business, assets and profits * * * and that in further pursuance of his design and scheme to continue to deprive her of her just rights * * * the pending Petition * * * was filed merely for the purpose of delay and to enable * * * Jollie, to cover up and dispose of assets"; that each of the four persons who was to receive a 2½% interest under the judgment in action 525286 "was a donee and recipient of a gift of money by" Jollie "which rightfully belonged to" the administratrix "which was done by said Jollie as a part of" his "fraud, coercion, pressure and undue influence"; that each of the four persons had notice of action 561185 "but neither sought nor desired to become parties"; that Kurland, Young and Youngblood each was a witness for plaintiff in such action and Dvorin was a witness for Jollie, each of them was "fully examined * * * on matters concerning the issues of extrinsic fraud, coercion and threats leading up to" the stipulation and judgment in action 525286, and none of them objected for failure to be joined as a party defendant in action 561185 or requested such joinder; that Youngblood, Mrs. Fischer's attorney in action 525286, had assigned to her his 2½% interest under the judgment in that action; that (as set forth in the findings in action 561185) Dvorin, Kurland, Young and Mrs. Fischer (as assignee of Youngblood) have each received some $6,000 on account of the respective 2½% interests and that "said sums represent amounts taken out of the 50% share [of the partnership business] rightfully belonging to the" administratrix and for which none of the four persons had given consideration; that the money judgment entered in favor of the administratrix in action 561185 includes the amounts "paid out wrongfully" by Jollie to Dvorin, Kurland and Young. The parties agree that the trial in action 561185 consumed seventy-nine days.

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[1] See section 389, Code of Civil Procedure.

[2] The answer incorporates by reference the allegations of respondents' petition to quash the alternative writ.

[3] The findings, conclusions and judgment of May 16, 1951, were vacated by the trial court after a hearing on the petition for writ of prohibition had been granted by this court.

[1] In support of the petition for the writ, petitioner Jollie contends that his remedy of appeal from the proposed judgment in action 561185 would be inadequate in that it would entail a large expenditure of time and money. As declared in Mitchell v. Superior Court (1950), 98 Cal.App. 2d 304, 305, 219 P.2d 861, "This is insufficient."

However, Jollie's remedy by appeal would not avail petitioner Dvorin. On the merits of the question as to whether Dvorin and the other three persons who have been awarded a 2½% interest under the judgment in action 525286 are indispensable parties in the second action (No. 561185), it appears from the record that the controversy in the second action is essentially between only Mrs. Fischer and Jollie, and that, notwithstanding the allegations relating to the four persons not parties to that action, the (proposed) judgment in such action could and would adjudicate only the respective percentages and rights of Mrs. Fischer and Jollie as between themselves in the profits of the partnership business. Petitioners themselves allege that the effect of the (proposed) findings and judgment in action 561185 would be to award to Mrs. Fischer 50% of the profits, thereby leaving 50% to be shared by Jollie and the four persons who were to receive the 2½% interests. Also, Mrs. Fischer's charges of fraud, threats, coercion, etc., are directed only at Jollie; and the purpose of her action 561185 appears to be to recover only the 50% interest in the partnership profits to which her deceased husband would have been entitled, leaving intact the 50% interest to be shared by Jollie and the other four persons (or, the other three, in view of Youngblood's alleged assignment to Mrs. Fischer of his 2½% interest) and not affecting in any way the judgment in action 525286 insofar as it adjudicates the rights of Dvorin, Kurland, Young and Youngblood (or his assignee).

In Morrow v. Superior Court (1935), 9 Cal.App.2d 16, 48 P.2d 188, 50 P.2d 66, petitioners for a writ of prohibition had, as plaintiffs, sued to recover one-half of the royalties and profits from oil lands which stood in the names of the successors in interest of one Ochsner. After filing their action they discovered that the Medallion Oil Company claimed the entire interest in such lands as against plaintiffs, Ochsner, and the latter's successors in interest. Plaintiffs thereupon moved in the trial court for an order bringing Medallion into the suit as a party defendant, the trial court denied the motion, and plaintiffs sought prohibition to compel the trial court to join Medallion as a party before proceeding with trial of the case. This (Supreme) court, in its opinion denying a hearing after opinion by the District Court of Appeal denying the peremptory writ, stated: "In denying the petition for hearing in the Supreme Court, after decision by the District Court of Appeal, we think it appropriate to say that the record fails to show that there will be any excess of jurisdiction of respondent court in proceeding, as it threatens to proceed in the action, while at the same time it refuses to grant the motion of petitioners to order the Medallion Oil Company brought in as party defendant. If the trial court had found, or the record indisputably showed, that 'a complete determination of the controversy cannot be had without the presence of other parties' (sec. 389, Code Civ.Proc.), then the provisions of the cited section 389 would be mandatory. This court has held that in such case the question would become one of jurisdiction *in that* the court would be without authority to proceed without bringing in said party, and that if, nevertheless, it assumed to do so it could be subjected to the prohibitory writ *quousque,* that is to say, until the performance of a certain act, or the happening of a certain event—in this case the bringing in of said party, Medallion Oil Company (Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 671 [284 P. 445]).

"But here the court did not find and the record does not indisputably show that in the pending action in the court below, the controversy cannot be completely determined without the presence of Medallion Oil Company. In that action the court has not assumed control of the *res,* the property, or undertaken to determine its ownership against all the world. The action is simply one to determine adverse claims as between the plaintiff and the named defendants. While in such an action additional parties ordinarily may be brought in so as to include a settlement of their adverse claims, it is not our view that the controversy now before the court between the original parties may not be determined without prejudice to the rights of the oil company. Certainly those rights might be determined and the decree so drawn that it will save the rights, if any, of the excluded party. On the facts appearing, the question is not one of jurisdiction, and the court has jurisdiction to proceed without bringing in such party if in its discretion it shall decide upon that as the proper course." (Pages 26–27 of 9 Cal.App.2d, pages 66–67 of 50 P.2d.)

In Bank of California v. Superior Court (1940), supra, 16 Cal.2d 516, 522, 106 P.2d 879, after first reviewing cases in which various persons were held to be "indispensable parties," this court declared that "The other classification ['necessary parties'] includes persons who are interested in the sense that they might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them; but nevertheless their interests are so separable that a decree may be rendered between the parties before the court without affecting those others. These latter may perhaps be 'necessary' parties to a complete settlement of the entire controversy or transaction, but are not 'indispensable' to any valid judgment in the particular case. They should normally be joined, and the court, following the equity rule, will usually require them to be joined, in order to carry out the policy of complete determination and avoidance of multiplicity of suits. But, since the rule itself is one of equity, it is limited and qualified by considerations of fairness, convenience, and practicability." It was held that in an action to enforce the provisions of an alleged contract by which a decedent agreed to leave her entire estate to the plaintiff, in which summons was served only upon the executor of decedent's last will and upon the residuary legatee and devisee to whom the will left the bulk of the estate, the other legatees under the will were not indispensable parties and prohibition would not lie to restrain trial of the action until they should be brought in. And in First Nat., etc., Bk. v. Superior

Court (1942), 19 Cal.2d 409, 415, 121 P.2d 729, in which it was contended that all asserted beneficiaries of a trust were indispensable parties to an action against the trustee in which plaintiff sought to establish herself as beneficiary of one-half of the trust income, prohibition was denied with the statement, among others, that "it is not shown that the portion of the income from the fund claimed by the plaintiff in the pending action, if the same be granted to her by the final judgment, will necessarily purport to diminish any share or income to which persons not now ordered to be brought in may become entitled under the terms of the trust."

[2] We may assume that the four persons to whom the 2½% interests were ordered paid by Jollie under the judgment in action 525286 would have been "proper" parties to Mrs. Fischer's action 561185 against Jollie, but, nevertheless, we conclude that they were not "indispensable" thereto in the sense that an adjudication of any rights they may claim under the judgment in action 525286 was essential to a determination of action 561185. Further, although the proposed judgment in action 561185 by its terms purportedly "cancels" the earlier judgment and probate order and restrains Jollie from asserting their validity, such proposed judgment does not, and the parties now before us agree that it could not, adjudicate the rights of the four persons as declared in the judgment in action 525286. In other words, as stated hereinabove, this controversy appears to be, and can be determined as, one between only Mrs. Fischer and Jollie, in which the rights of the four other persons need not, and in their absence as parties cannot, be determined or affected. Any judgment to be entered in action 561185 should, of course, preferably be so drafted as not to purportedly and vainly grant relief against persons who are not parties to the litigation before the court; as to them the court is without jurisdiction in the cause.

In view of our conclusion that petitioners have failed to show themselves entitled to the peremptory writ, it becomes unnecessary to consider the issues presented by respondents' motion to strike, and petition and motion to quash the alternative writ, and such motions will therefore be dismissed.

The alternative writ is discharged, the peremptory writ is denied, and respondents' motion to strike and petition and motion to quash are dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

38 Cal.2d 102

SELINSKY v. OLSEN.

L. A. 22002.

Supreme Court of California, in Bank.

Nov. 27, 1951.

Max Selinsky sued A. W. Olsen for personal injuries sustained in an automobile collision. From an order of the Superior Court, Los Angeles County, Otto J. Emme, J., granting plaintiff's motion for a new trial, after verdict for defendant, on ground that an instruction on the last clear chance doctrine should have been given, defendant appealed. The Supreme Court, Carter, J., held, inter alia, that the last clear chance doctrine was applicable.

Order affirmed.

Prior opinion, 229 P.2d 392.

1. Appeal and Error 🔑933(4)

On appeal from order granting plaintiff a new trial on ground of refusal to give instruction on last clear chance doctrine, the Supreme Court would view the evidence most favorable to the contention that the doctrine was applicable.

2. Negligence 🔑83.4

The elements of the last clear chance rule are that plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care, either because of physical impossibility or unawareness of danger, and that defendant has knowledge that plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and that defendant has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise such care, and accident results thereby, and plaintiff is injured as proximate result of such failure.

3. Negligence ⚷83.5

The negligence of plaintiff is one of the factors that brings into play the doctrine of last clear chance.

4. Automobiles ⚷245(91)

In action for injuries to driver of automobile sustained when automobile stalled as driver was leaving parking space at right-hand curb and was struck by defendant's automobile, under the evidence, whether plaintiff was incapable of extricating himself before collision, and whether defendant knew or should have known that driver could not escape, and whether defendant had last clear chance to avert the collision were questions for the jury.

5. Automobiles ⚷227(1)

In action for injuries to driver of automobile, which stalled when driver was leaving parking place, and which was struck by defendant's automobile which was traveling in the same general direction driver had been traveling, the last clear chance doctrine was applicable even if defendant's negligence consisted of failure to keep a proper lookout ahead to observe vehicles in his path.

Crider, Runkle & Tilson and E. Spurgeon Rothrock, all of Los Angeles, for appellant.

Edward Mosk, Hollywood, for respondent.

CARTER, Justice.

A motion for a new trial after judgment for defendant on the ground of refusal to give an instruction on the last clear chance doctrine was granted to plaintiff and defendant appeals.

[1] We must view the evidence most favorable to the contention that the doctrine is applicable in reviewing the order appealed from, since plaintiff is entitled to an instruction thereon if the evidence so viewed could establish the elements of the doctrine. Bonebrake v. McCormick, 35 Cal. 2d 16, 215 P.2d 728; Alberding v. Pritchard, 97 Cal.App.2d 443, 217 P.2d 1012; 19 Cal.Jur. 745.

Plaintiff's car was parked heading north, parallel to the curb in the parking lane on the east side of Crenshaw Boulevard, a north-south street with four traffic lanes and two parking lanes. It was about a half a block north of 8th Street, which crosses Crenshaw. One car was parked five or six feet in front and another at least twenty-five feet behind his. Plaintiff testified that he entered his car, looked through the rear view mirrors, one inside and the other outside the car, and the only cars he observed were westbound standing on 8th Street at the intersection waiting for the traffic signal to change. He pulled away from the curb and when the left front end of his car was protruding two feet into the outside traffic lane his motor stalled and his car stopped. About five seconds later, according to plaintiff, and a minute according to another witness, and while plaintiff's car was still stopped, defendant, proceeding north on the outside traffic lane on Crenshaw, collided with the left front of plaintiff's car. Defendant testified that he did not see plaintiff's car until he was fifteen feet behind the front of it, but admitted, and the evidence shows, that his view was unobstructed between the 8th Street intersection and plaintiff's car; that he was looking straight ahead and could have seen a car protruding as plaintiff's did for a distance of fifty feet to the south of it; and that he was traveling twenty to twenty-five miles per hour. He testified first that he tried to swerve to the left and later that he did not remember, and that he applied his brakes when he saw plaintiff's car.

[2] The elements of the last clear chance rule are "[1] That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where

it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; [2] that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and [3] has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917.

[3, 4] Defendant contends that the doctrine is not here applicable because plaintiff was aware of his dangerous position and could have saved himself by the exercise of ordinary care; that is, the first element is lacking. Further in that connection, the rule is asserted to be that there can be no recovery where the negligence of the injured party was contemporaneous, concurrent, continuing and contributory up to the moment of the impact. While the foregoing statement may be correct when properly applied, considerable confusion has arisen from it because it has been applied where the last clear chance doctrine has been unsuccessfully relied upon. In effect, it merely means that one of the elements of the doctrine is lacking; or that plaintiff's contributory negligence is a bar to his recovery. Girdner v. Union Oil Co., supra, 216 Cal. 197, 13 P.2d 915. It does not mean that the doctrine is unavailable when plaintiff is negligent up to the time of the collision, for his negligence is one of the factors that brings it into play. Girdner v. Union Oil Co., supra, 216 Cal. 197, 13 P.2d 915. It may be true that plaintiff was negligent in pulling away from the curb and was aware of his dangerous position, but when his car was protruding into the lane of traffic, his motor stalled, and the jury could infer that he was incapable of extricating himself by the exercise of ordinary care. Plaintiff's car was stopped from five seconds to a minute before the collision. There is a conflict on that point but it should have been left to the jury under the last chance doctrine instruction. We hold, therefore, that the first element finds support in the evidence.

The second factor is lacking, urges defendant, because there is no showing that defendant was aware of plaintiff's perilous position or knew he could not escape therefrom. That depends upon the view one takes of the evidence. It is true that defendant testified that he did not see plaintiff's car until he was directly behind it, when plaintiff drove his car into the line of traffic in front of him, and that plaintiff's car was in motion at the time of the impact. Other evidence shows, however, that defendant was looking straight ahead as he approached plaintiff's car and his view was unobstructed. It may be inferred therefrom that he saw plaintiff's motionless car extending into the line of traffic. Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68; Hellman v. Bradley, 13 Cal.App.2d 159, 56 P.2d 607; Handley v. Lombardi, 122 Cal. App. 22, 9 P.2d 867; Baird v. James A. Hill Construction Co., 138 Cal.App. 410, 32 P.2d 390; Galwey v. Pacific Auto Stages, Inc., 96 Cal.App. 169, 273 P. 866. Thus we do not have a case in which plaintiff's car was in motion or suddenly appeared in defendant's path as existed in the authorities relied upon by defendant. The jury could have inferred also, that defendant knew or should have known, in the exercise of ordinary care, that plaintiff could not escape Under the evidence most favorable to plain tiff, defendant could have seen plaintiff's car standing in the road ahead of him for a minute before the impact and thus could, by the exercise of ordinary care, have avoided the accident.

The third element was not established, says defendant, because he could not have avoided the collision, having neither time nor means to do so. It was for the jury to determine whether in the space of time involved he could have avoided the collision. From a photograph of Crenshaw Boulevard, put in evidence, and which is pertinent to the issue, Huetter v. Andrews, 91 Cal.App.2d 142, 146, 204 P.2d 655, it appears that the distance between the cars parked along the curb and the first white line between the two traffic lines, defendant could have swerved to the left without crossing that line to avoid colliding with plaintiff's car. Moreover, it will be remembered that Crenshaw Boulevard had two lanes for northbound traffic. Defendant could have swerved left over to the lane next to the center line. True, defendant testified that there was a car traveling in that lane slightly to his rear, but the jury could have disbelieved that testimony. It was vague. Defendant said he did not see the car; that he was "conscious" of it—"possibly heard" it. He also said there was not enough room to avoid plaintiff's car without crossing the white line, but when shown the photograph, stated that it "looked wider." Thus, we believe it was a matter for the jury to determine. We cannot say as a matter of law that he did not, by exercising ordinary care, have the last clear chance to avert the collison—something more than a split second possible chance.

A case clearly similar is Girdner v. Union Oil Co., supra, 216 Cal. 197, 13 P.2d 915, in which the doctrine was held applicable. There plaintiff had his car moving in an intersection and was oblivious of defendant's approach thereto in a truck. The latter first saw plaintiff's car when forty to fifty feet from it and was traveling about twenty miles per hour. Here it may be inferred that defendant saw plaintiff's car standing and obstructing the traffic line for a distance of about fifty feet, and at that time defendant was traveling twenty to twenty-five miles per hour. See also Bonebrake v. McCormick, supra, 35 Cal.2d 16, 215 P.2d 728; Giorgetti v. Wollaston, 83 Cal.App. 358, 257 P. 109; Podeszwa v. White, 99 Cal. App.2d 777, 222 P.2d 683; Yates v. Morotti, 120 Cal.App. 170, 8 P.2d 519.

[5] The negligence of defendant could have consisted of his failure to keep a proper lookout ahead to observe vehicles in his path, which negligence was the proximate cause of the accident.

The order is affirmed.

GIBSON, C. J., and SHENK, and EDMONDS, JJ., concur.

TRAYNOR, SCHAUER and SPENCE, JJ., concur in the judgment.

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38 Cal.2d 60

DABNEY v. PHILLEO et al.

DABNEY et al. v. McDONALD.

DABNEY et al. v. WESTENGARD et al.

DABNEY et al. v. DABNEY et al.

L. A. 21893, 21890, 21891, 21892.

Supreme Court of California, in Bank.

Nov. 20, 1951.

Clifford R. Dabney and Alice M. Dabney brought suit against Milton H. Philleo, individually, Milton H. Philleo, as executor of the estate of Louise E. Dabney, deceased, and Milton H. Philleo, as executor of the estate of Joseph B. Dabney, deceased, and others to establish a constructive trust with respect to certain oil properties, and Rebecca F. Boughton and others intervened, and Clifford R. Dabney and Alice M. Dabney brought action against W. T. McDonald, an action against James R. Westengard and others, and an action against Florence G. Dabney and another for declaratory judgments and for reformation of assignments. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment adverse to the plaintiffs, and they appealed. The Supreme Court, Schauer, J., held that complaint in first action sufficiently alleged existence of a constructive trust, and that complaints in the three other actions sufficiently alleged facts entitling plaintiffs to a declaratory judgment.

Reversed and remanded with directions.

1. Trusts ⚷371(2)

Complaint alleging that in a joint enterprise to which nephew made substantial contributions, uncle took title to oil properties in his own name, and that uncle fraudulently promised, contrary to his secret intention, that he would hold a one-half interest therein in trust for nephew and his wife, and that he kept control thereof while fraudulently representing to nephew and his wife that the properties had become worthless and that he had abandoned them, and that after death of uncle his widow took the properties with knowledge of fraud of the uncle and not for the value, sufficiently allege a cause of action to establish a constructive trust. Civ.Code §§ 2223, 2224.

2. Limitation of Actions 🔑179(2)
Trusts 🔑365(5)

In action to establish a constructive trust as to certain oil properties, on ground that one of the plaintiffs entered into a joint enterprise with his uncle to acquire oil properties, with title in name of uncle, but that uncle fraudulently represented that the properties had become worthless and that he had abandoned them, though he had not done so, allegations that plaintiffs did not become aware of facts which would make a reasonably prudent person suspicious until shortly before the action was instituted and that it was not until one of the plaintiffs overheard executor of estates of uncle and his deceased widow mention one of the oil properties, that plaintiffs became aware of the facts, sufficiently showed that action was not barred by three-year limitations or by laches. Code Civ. Proc. § 338, subd. 4.

3. Trusts 🔑371(2)

In action to establish constructive trust as to certain oil properties, complaint alleging that according to plaintiff's best information and belief the oil properties involved 105 described parcels of land, and that plaintiffs did not know the exact nature of the oil interests in such lands because records of complicated dealings were in exclusive possession of defendants, and requested leave to amend to include more exact descriptions when plaintiffs discovered the precise nature of the described lands, sufficiently excused and explained want of allegations describing with more particularity the interest originally acquired by plaintiffs.

4. Trusts 🔑371(2)

Complaint alleging that in a joint enterprise to which nephew made substantial contributions, uncle took title to oil properties in his own name, and that uncle fraudulently promised, contrary to his secret intention, that he would hold a one-half interest therein in trust for nephew and his wife, and that he kept control thereof while fraudulently representing to nephew and his wife that the properties had become worthless and that he had abandoned them, and that after death of uncle his widow took the properties with knowledge of fraud of the uncle and not for the value, stated no cause of action involving a resulting trust, since a resulting trust arises to enforce the inferred intent of the parties.

5. Trusts 🔑366(4)

In action to establish a constructive trust with respect to oil properties, assignees of defendants were properly permitted to intervene on ground that they asserted an interest in the matter in litigation. Code Civ.Proc. § 387.

6. Declaratory Judgment 🔑318

Complaint in action for declaratory judgment alleging that defendant claimed that by virtue of assignment by plaintiff, defendant owned, not only plaintiff's interest in estate of plaintiff's aunt as an heir, but also all claims of every kind which plaintiff had against estate of aunt, and that agreement of plaintiff and defendant was merely that defendant was to buy fractional share of plaintiff's interest as an heir only, but by mutual mistake written assignment did not embody such agreement, and that plaintiff at date of execution of assignment was ignorant of fact that estate of his aunt claimed property or income which belonged to plaintiff, sufficiently alleged justiciable controversy, and trial court should have expressly declared rights of the parties, where assignment did not precisely define interest transferred, but repeatedly referred to plaintiff's distributive share as heir, and transferred his interest in all property distributed "or otherwise paid" from the estate.

7. Declaratory Judgment 🔑313

Fact that complaint in declaratory judgment action contained allegations from which it appeared that plaintiff was advancing erroneous contention of law in controversy with defendant, did not deprive plaintiff of right to have the controversy determined.

8. Declaratory Judgment 🔑329

In action for declaratory judgment, defendant was entitled to present contention that assignment by plaintiff to defendant of plaintiff's interest in estate of plaintiff's deceased aunt conveyed to defendant all of plaintiff's interest as heir and also all plaintiff's interest adverse to the estate, which would include the right of plaintiff to maintain action against the estate to establish constructive trust, and in the alternative defendant was entitled to present contention that plaintiff could not maintain claim adverse to estate of plaintiff's aunt in action to establish the constructive trust.

9. Reformation of Instruments ⚿19(1)

Where alleged mutual mistake in assignment of part of the interest of assignor in the estate of his aunt, was the ignorance of the assignor and the assignee that the estate claimed property to which assignor and his wife had a claim adverse to the estate under alleged constructive trust, and assignment contained representation that assignor was entirely familiar with the value of his interest in the estate, that he had made his own investigation concerning such value, and that he considered the purchase price paid by assignee to be the fair and reasonable market value of his interest in the estate, assignor was not entitled to reformation of the assignment. Code Civ. Proc. § 1962, subds. 2, 3.

10. Assignments ⚿104

Where nephew assigned part of his interest in wife's estate, believing that he had only an interest as an heir, and after the assignment it appeared that the nephew and his wife had a possible claim against the estate as beneficiaries of a constructive trust, any claim of nephew's wife in property assigned would be at most an undisclosed equitable interest which could not be asserted against bona fide assignees for value. Civ. Code, §§ 856, 2243.

◆

C. Paul DuBois and John E. Sisson, Los Angeles, for appellants.

Dolley, Knight, Woods & Hightower, Roy P. Dolley, Tuttle & Tuttle, Edward W. Tuttle and Franklin L. Knox, Jr., all of Los Angeles, for respondents.

SCHAUER, Justice.

These are consolidated appeals, by plaintiffs Clifford R. Dabney and his wife, in four cases affecting plaintiffs' asserted interest in certain properties which are inventoried in the estate of Louise E. Dabney, deceased. The trial court sustained demurrers to the various complaints without leave to amend, made orders of dismissal in three cases, and rendered judgment that plaintiffs take nothing in the fourth. The main action (L.A. 21893) is against Milton H. Philleo, individually and as executor of the estate of Louise, and others. The amended complaint in that action, according to its title, is for "Declaratory Relief, Constructive Trust, Resulting Trust, Accounting, Quiet Title, Appointment of Receiver and Injunction"; it sets forth plaintiffs' claims, adverse to the estate, based on the alleged fraud of Joseph B. Dabney, predeceased husband of Louise and uncle of Clifford. Actions L.A. 21890, 21891 and 21892 are against persons to whom Clifford assigned fractional shares of his interest in all property which he "is, or will be, entitled to have distributed or otherwise paid to him from the * * * estate"; in these three actions plaintiffs seek declaratory relief and reformation of the assignments to limit the interest assigned to that of Clifford as heir of Louise. The trial court permitted the assignees to intervene in the main action, and plaintiffs filed cross-complaints against them which are identical with the complaints in actions L.A. 21890, 21891 and 21892.

[1] We have concluded that the complaint in the main action states a cause of action; that the complaints and cross-complaints against the assignees show a justiciable controversy as to the effect of the assignments; that this controversy should be disposed of by judgments on the merits rather than by mere orders of dismissal; and that the controversy appears on the present record to be one which should be resolved in the light of the testimonies of the parties to the assignments as to the circumstances under which they were executed.

In substance the pertinent allegations of the amended complaint in the main action are as follows: In 1920 Clifford and

Joseph made "an oral arrangement" under which Clifford was to expend time and effort in locating and toward procuring "valuable oil lands or valuable oil interests" in the vicinity of the Signal Hill oil field, to send prospective transferors of such properties to Joseph in order that the properties might be acquired, and to contribute one-half the cost of acquisition; because of Joseph's vast resources and knowledge of the oil business, record title to the properties and their proceeds was to be vested in him and he was to finance their development; plaintiffs were to have an undivided one-half interest and Joseph an undivided one-half interest in the properties and their proceeds. Joseph did not intend to perform his undertakings and did intend to defraud plaintiffs. Clifford diligently performed until June, 1927; Joseph charged Clifford's account with about $40,000 which was "expended by * * * Joseph * * * in the purchase * * * of said oil lands, * * * interests * * *, and in the exploitation of the oil * * * from the same"; Joseph took legal title to and developed the properties, rendered written accountings to Clifford and regularly paid plaintiff "purportedly one-half of the amount accounted for." In June, 1927, Joseph falsely told Clifford that the properties were worthless, in some instances because of fatal clouds on title thereto and in other instances because they had become non-productive and that Joseph was quitclaiming or abandoning the interests. Plaintiffs believed Joseph's misrepresentations. As Joseph knew, Clifford at all times concerned had implicit faith and complete confidence in him as a relative, friend and skilled business advisor, and in all their relations and transactions relied unqualifiedly on him; such absolute faith and confidence continued until on or about October 15, 1949, and "plaintiffs had not any information to the contrary prior to said time." Joseph ostensibly quitclaimed or abandoned the interests but kept control of and developed them for his own benefit. He operated through companies and agents controlled by him and there were many dealings with the properties which were not of public record. Plaintiffs were not experienced in business practices of the types allegedly resorted to by Joseph in the handling of the properties and for the concealment of plaintiffs' interests and Joseph's fraud in respect thereto. Joseph's fraud was known to his wife Louise and his business representative Philleo. They too had the complete confidence of plaintiffs, as they knew, and they too concealed the fraud from plaintiffs. On Joseph's death intestate in 1932 control of the properties passed to Louise and Philleo, co-administrators of the estate of Joseph. On Louise's death in 1945 control of the properties passed to Philleo, executor of her estate; thereafter he continued to use and operate them for the benefit of the estate.

The alleged circumstances of plaintiff's discovery of the fraud are as follows: In October, 1949, Clifford was in Philleo's office and heard Philleo, in a telephone conversation with a person unknown, state that he, as executor of the estate of Louise, would join as lessor in execution of an oil lease covering property called the Weber leasehold. Clifford recalled that an interest in the Weber leasehold had been one of the properties acquired under the oral arrangement with Joseph. Philleo observed Clifford's interest "at the mentioning of such joining as lessor, and forthwith became red of face and neck, and became confused, and * * * proceeded to terminate said telephone conversation abruptly." Philleo's manner and conduct at that time aroused Clifford's suspicions and as a result of his subsequent investigations of public records he learned of the fraud.

Statute of Limitations and Laches in the Main Action

[2] Defendants rely on the doctrine of laches, and also contend that the statute of limitations (three years; Code Civ. Proc., § 338, subd. 4) had run because plaintiffs should have discovered the fraud many years before they filed the main action (on February 1, 1950). The statute began to run when plaintiffs became

"aware of facts which would make a reasonably prudent person suspicious"; and in a case such as this, which involves a fiduciary relationship, "facts which would ordinarily require investigation may not excite suspicion, and * * * the same degree of diligence is not required." (Hobart v. Hobart Estate Co. (1945), 26 Cal. 2d 412, 438, 440, 159 P.2d 958; Wilkerson v. Seib (1942), 20 Cal.2d 556, 561, 127 P.2d 904.) Defendants argue that no reasonable man would accept without inquiry Joseph's statement in 1927 that all the properties had become worthless or had fatal defects in title and that all the interests were being released or abandoned, when examination of the properties would have disclosed producing wells thereon and examination of public records would have disclosed the state of the titles. It cannot be held, as a matter of law, in the face of the detailed factual allegations hereinabove quoted or summarized, that Clifford was unreasonable in believing and relying on the statements of his uncle, whose relationship to Clifford was fiduciary in character and who was (it is alleged, apparently affectionate, interested in Clifford's personal and business welfare, and highly skilled in the oil business.

Defendants also rely upon matters which appear in the proceedings for probate of the estates of Joseph and Louise. These matters they say, conclusively show that Clifford was put on notice at least by December, 1946, that some of the properties in question were listed as assets in the estate of Louise and were not valueless. Defendants ask that we take judicial notice of these matters (see Hammell v. Britton (1941), 19 Cal.2d 72, 75, 119 P.2d 333; Willson v. Security-First Nat. Bk. (1943), 21 Cal.2d 705, 712, 134 P.2d 800.) to support a determination that the statute of limitations has run. The facts on which defendants rely are the following: Clifford was an heir of Joseph and received a small inheritance when his estate was distributed. He was an heir of Louise, requested special notices in the probate of her estate, and appeared in person and by counsel in opposition to the executor's administration of the estate. In December, 1946, the inventory and appraisement in the estate of Louise were filed, and Philleo caused copies thereof to be mailed to the heirs, including Clifford. Properties which plaintiffs claim adversely to the estate, with their appraised values, are there listed as assets of the estate. These facts do not, as a matter of law, show that a reasonable person, in the circumstances alleged by plaintiffs, who was interested in the estate as an heir should have read the inventory and appraisement and discovered that he had an interest adverse to the estate in properties claimed by it. The mere passage of time and the deaths of his uncle and aunt and the scheduling of the assets claimed by the estate were not circumstances which would necessarily have caused a reasonable man, who 19 years previously had accepted the misrepresentations of the trusted uncle and who had continued to believe in him implicitly, to probe into the administration of the estate of the trusted aunt in an investigation of the truth of the particular misrepresentations which are alleged to have been made.

Since we cannot as a matter of law reject plaintiffs' explanation of their delay in discovering the facts, we conclude that on the face of their pleading their cause of action did not arise until October, 1949. There has been no unreasonable delay[1] and no change in circumstances prejudicial to defendants since plaintiffs' discovery of the facts. Therefore, the cause of action does not appear to be barred either by limitations or by laches.

Uncertainty of Allegations which Describe the Oil Interests

[3] The amended complaint in the main action does not allege exactly what interests in what properties are claimed by plaintiffs. It alleges that "according to plaintiff's best information and belief, the oil lands, oil interests and oil leases * * * acquired * * * pursuant to said oral arrangement * * * affect, concern and involve" 105 described parcels of land; that plaintiffs do not know the exact nature

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[1] As noted above the original complaint in the main action was filed February 1, 1950.

of the oil interests in such lands because the records of the complicated dealings therewith by Joseph, Louise, Philleo, and their companies and agents, are in the exclusive possession of defendants; that many of these transactions were not recorded; that the statements furnished by Joseph during the time he was apparently performing under the oral arrangement appeared regular and complete but Joseph secretly withheld interests. Plaintiffs ask leave to amend to include more exact descriptions when they discover the precise nature of their interests in the described lands and also, should they discover that they are entitled to interests in other lands, to include descriptions of such interests.

Defendants urge that from the vagueness of the description of the interests it is apparent that plaintiffs cannot state a cause of action because they do not know what properties they claim. The allegations of the complaint last above summarized sufficiently excuse and explain the want of allegations describing with more particularity the interests originally acquired under the oral arrangement and tracing these interests into their present form.

Nature of the Cause of Action in the Main Action

The complaint in the main action purports to state four "causes of action." The first is entitled "Constructive Trust," and the complaint does allege, sufficiently as against general demurrer, a cause of action for imposition of a constructive trust; i. e., in a joint enterprise to which Clifford made substantial contributions Joseph took title to properties in his own name; he fraudulently promised, contrary to his secret intention, that he would hold a one-half interest therein in trust for plaintiffs; he kept control thereof while fraudulently representing to plaintiffs that the properties had become worthless and that he had abandoned them; and Louise took with knowledge of the fraud and not for value. (Civ. Code, §§ 2223, 2224; Simpson v. Gillis (1934), 1 Cal.2d 42, 54, 32 P.2d 1071.)

[4] The so-called "Second Cause of Action" is entitled "Resulting Trust." No such cause of action is stated. A resulting trust arises to enforce the inferred intent of the parties. Here, plaintiffs have alleged that defendants at no time had an intent to hold the properties for plaintiffs' benefit but, rather, have claimed adversely to them; therefore, defendants hold as constructive rather than resulting trustees. (Johnson v. Clark (1936), 7 Cal.2d 529, 533, 61 P.2d 767; Bainbridge v. Stoner (1940), 16 Cal.2d 423, 428, 106 P.2d 423.)

The so-called "Third Cause of Action" and "Fourth Cause of Action" are entitled, respectively, "Declaratory Relief" and "Quiet Title." Each incorporates by reference the allegations of the "First and Second Causes of Action" and neither adds any new allegations of significant facts. Only one cause of action is stated in the amended complaint (see Ephraim v. Metropolitan Trust Co. (1946), 28 Cal.2d 824, 833, 172 P.2d 501; Jackson v. Lacy (1940), 37 Cal.App.2d 551, 561, 100 P.2d 313) and, if plaintiffs can establish that cause of action, enforcement of the constructive trust remedy, with such incidental relief as may be necessary, will effect what plaintiffs desire.

Assignees' Right to Intervene

[5] Plaintiffs urge that the assignees had no direct interest in the matter in litigation in the main action; that the assignees' interest was "consequential" and, therefore, they should not have been allowed to intervene. (Jersey Maid Milk Products Co. v. Brock (1939), 13 Cal.2d 661, 663, 91 P.2d 599; Allen v. California Water & Tel. Co. (1947), 31 Cal.2d 104, 109, 187 P.2d 393). In this plaintiffs are mistaken. The controversy in the main action is as to the ownership of certain property; the assignees assert "an interest in the matter in litigation" and were properly allowed to intervene. (Code Civ. Proc., § 387; Goes v. Perry (1941), 18 Cal.2d 373, 376, 115 P.2d 441.

Causes of Action Against the Assignees: Declaratory Relief

The material allegations of the complaint in action L.A. 21890 are as follows: In March, 1949, Clifford, by written assignment which was entitled and numbered in the proceeding for probate of the estate of Louise, transferred to defendant McDonald "one-fourth of his right * * * to all of the property * * * to which Seller [Clifford] is, or will be, entitled to have distributed or otherwise paid to him from the * * * estate, including also one-fourth of every other right and benefit of Seller in and to said estate." McDonald paid $10,000 for the assignment. It contains the following provisions:

"Seller hereby warrants and represents to Buyer that he has not sold, assigned, pledged, mortgaged or encumbered said one-fourth interest in said estate, or any portion thereof; that the same is his sole and separate property, and that his interest therein is free and clear of attachments, executions and other liens.

"Seller is entirely familiar with the value of his interest in said estate; that he has made his own investigation concerning such value, and considers the purchase price herein paid to be the fair and reasonable market value of his interest in said estate. Buyer has also made his own investigation concerning this purchase and Seller has made no representations to Buyer in connection therewith other than those set forth above."

The complaint further alleges: McDonald claims that by virtue of the assignment he owns not only Clifford's interest as an heir but also all claims of every kind which Clifford has against the estate of Louise. The agreement of Clifford and McDonald was that McDonald was to buy a fractional share of Clifford's interest as an heir only, but by mutual mistake the written assignment did not embody this agreement. The "mistake was made in that plaintiffs as of the date of execution of said assignment were ignorant of the fact that the Estate of Louise * * * claimed property or income therefrom or the re-investment proceeds therefrom, which said property belonged to plaintiffs." Defendant refuses to correct the mistake and threatens to interfere with plaintiffs' prosecution of their claim against the estate. Plaintiffs ask a declaration of rights under the assignment and reformation thereof to limit the interest transferred to that of Clifford as heir.

[6] The other two actions against assignees of Clifford (L.A. 21891 and L.A. 21892) are materially similar to the above summarized complaint in L.A. 21890. In each case the trial court sustained a demurrer without leave to amend and ordered: "Motion of defendant to dismiss complaint * * * is granted." The failure to declare the rights of the parties under the assignments was error. It is apparent that there was a justiciable controversy between plaintiffs and Clifford's assignees. The trial court should have expressly declared their rights. (Essick v. City of Los Angeles (1950), 34 Cal. 2d 614, 624, 213 P.2d 492.

[7] The position alleged in plaintiffs' complaints against the assignees is inconsistent with that taken by plaintiffs on oral argument before the trial court and this court. From the allegations of the complaint it would seem that plaintiffs were erroneously[2] contending that the assignments transferred only Clifford's interest as an heir in the estate of Louise as such estate may be diminished by plaintiffs' recovery in the main action. But from the oral argument on plaintiffs' behalf before the trial court and this court it appears that plaintiffs are contending that the assignments conveyed Clifford's share as heir in what the parties to the assignments then believed was the estate of Louise; i. e., a share in the properties claimed by the estate, undiminished by the then allegedly unknown adverse claim of plaintiffs. The fact that the complaints against the assignees contain allegations from which it appears that plaintiffs were advancing an erroneous contention of law in the controversy with the assignees does not deprive plaintiffs of the right to have that controversy determined.

[8] The assignees, in the justiciable controversy alleged in the complaints against them, continue to present, as they did before the trial court (and as ap-

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[2] The error of this contention will appear from the discussion, infra, 237 P.2d 655, of plaintiffs' attempt to state a cause of action for reformation.

pears on the face of the pleadings), two contentions which, as a practical matter, are inconsistent. First they contend, as the complaints against them allege, that the assignments by their terms conveyed to them all Clifford's interest as heir and also all his interest adverse to the estate (which would include his right to maintain the main action); second, they contend that the complaint in the main action shows that Clifford (and, therefore they as his assignees) cannot maintain the claim adverse to the estate. Of course, the assignees are entitled to present the second contention as an alternative in the event that the first is without merit. And if their first contention has merit they are nevertheless entitled to press the second and show that under their construction of the assignments they receive no more than they would under the construction urged by plaintiffs. But the bare dismissal of the complaints, if it determines anything as to these two contentions, determines that they are both correct, whereas, as shown supra, 237 P.2d 651 et seq., the second is (as the question of law on the pleadings) without merit and, as will now be shown, the first cannot be determined as a matter of law on the face of the pleadings.

The assignments do not precisely define the interest transferred. They repeatedly refer to Clifford's distributive share as heir, but they transfer his interest in all property distributed "or otherwise paid" from the estate. Whether this includes not only property received by Clifford as an heir but also property received by him as a result of establishing a claim adverse to the estate "depends upon the intention of the parties [citations], and while that intention is determined primarily from the terms of the instrument, the language of the assignment must be construed in the light of the facts and circumstances of the particular case. [Citations.]" (Austin v. Hallmark Oil Co. (1943), 21 Cal.2d 718, 730, 134 P.2d 777.) If the phrase "otherwise paid" was intended to mean "paid to Clifford because he is an heir," then the assignees (by virtue of the assignments and the representation and warranty that Clifford's interest as an heir was free from any lien, which would include the lien of a constructive trust) would be entitled to receive a share of the estate equal to what Clifford as heir would have received from an estate undepleted by plaintiffs' claim (if it is established) in the main action, but the shares of the heirs other than Clifford would still be subject to reduction by plaintiffs' successful prosecution of their alleged cause of action (the establishment of a constructive trust effective as against persons other than the assignees) adverse to the estate.

Causes of Action Against the Assignees: Reformation

[9, 10] No cause of action for reformation is stated. The alleged mutual mistake was the ignorance of Clifford and his assignees that there was property claimed by the estate of Louise to which Clifford and his wife had a claim adverse to the estate. Each assignment contains the representations that Clifford "is entirely familiar with the value of his interest in said estate; that he has made his own investigation concerning such value, and considers the purchase price herein paid to be the fair and reasonable market value of his interest in said estate," and the warranties quoted supra, 237 P.2d 654. To permit reformation of the assignments as requested by plaintiffs would allow Clifford to show that these representations and warranties are mistaken or false. This he cannot do, for there is a conclusive presumption of "The truth of the facts recited, from the recital in a written instrument between the parties thereto," and "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." (Code Civ.Proc., § 1962, pars. 2 and 3.) Any claim of Clifford's wife in the properties assigned would be at the most an undisclosed equitable interest which could not be asserted against the bona fide assignees for value. (Civ.Code, §§ 856, 2243.) The recitals and warranties, conclusive against

establishment of the claims adversely to the assignees, are, however, merely evidentiary in the litigation of such claims as against Philleo.

For the reasons above stated the judgment and orders appealed from are reversed, and the cause is remanded to the trial court with directions to permit plaintiffs to amend to meet the objections raised by special demurrer.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concur.

38 Cal.2d 91

GONSALVES et al. v. HODGSON et al.

L. A. 21675.

Supreme Court of California, in Bank.

Nov. 27, 1951.

Rehearing Denied Dec. 20, 1951.

Frank Gonsalves, Jr., and others, sued Frank W. Hodgson and others, copartners, doing business under the firm name of Hodgson-Greene-Haldeman Shipbuilders, and Frank W. Hodgson, individually and as a party in interest with plaintiffs, for breach of a contract to build a fishing vessel for the cost of labor, overhead and materials, plus 10 per cent. From judgments of the Superior Court, Los Angeles County, Frank M. Smith, J., on a jury's verdicts for plaintiffs, and from orders denying motions to vacate the judgments and enter judgments notwithstanding the verdicts, defendants appealed. The Supreme Court, Edmonds, J., held that plaintiffs' failure to return the vessel to defendants for replacement of faulty parts, as required by the contract, relieved defendants from liability for damages because of structural failure of the vessel, and that the fact that the total cost of the vessel was somewhat more than the plaintiffs expected to pay did not show injury or damage entitling them to recover for deceit in fraudulently misrepresenting such cost.

Judgments reversed, and other appeals dismissed.

Prior opinion, see Cal.App., 220 P.2d 560.

1. Trusts 🔑1, 30½(1)

A contract for construction of fishing vessel in workmanlike manner, in dependence on special knowledge and skill of one of builders, for cost of labor, overhead and materials, plus ten percent, payable in installments as construction progressed, created no trust or fiduciary relationship, as there was no divided ownership of property, such knowledge or skill was not property which might be held in trust, and parties dealt at arm's length. Civ.Code, §§ 2216, 2217, 2221.

2. Trusts 🔑1

In a "trust," as distinguished from "contract," there is always a divided ownership of property, to which trustee usually has legal title and cestui an equitable title.

See publication Words and Phrases, for other judicial constructions and definitions of "Trust" and "Contract".

3. Trusts 🔑1

"Trust property" denotes interests held in trust and includes such interests as may be subject of present transfer by outright gift, devise, bequest, or sale.

See publication Words and Phrases, for other judicial constructions and definitions of "Trust Property".

4. Property 🔑2

A man's knowledge or skill is not "property," and his agreement to communicate his knowledge and exercise his skill is not a transfer of property and is binding only if requirements for formation of contract are complied with.

See publication Words and Phrases, for other judicial constructions and definitions of "Property".

5. Contracts 🔑1
Trusts 🔑176

There is no fiduciary relation in case of debt or other contract duty, as rights and duties of parties to contract may generally be freely transferred, parties may act for their own interests during execution of contract, and they have no duty of loyal representation of opposing party, whereas trustee cannot assign his trusteeship or delegate performance of his duties.

6. Contracts ⚷327(1)

Persons contracting for construction of fishing vessel could not recover damages for builders' breach of contract, unless such persons fulfilled their own obligations under contract. Civ.Code, §§ 1436, 1439.

7. Contracts ⚷328(1)

Failure of parties contracting for construction of fishing vessel to return vessel to shipbuilders for replacement of faulty parts, as required by contract, relieved builders of liability for damages for breach of contract because of structural failure of vessel.

8. Fraud ⚷9

To recover damages for deceit, fraudulent misrepresentation relied on by plaintiff must have been as to material fact and made with knowledge of its falsity or recklessly or without reasonable grounds for believing its truth, with intent to induce action by plaintiff, who must have relied thereon justifiedly, with resulting damage or injury to him, and absence of any one of such elements precludes recovery. Civ. Code, § 1709.

9. Fraud ⚷25

The fact that total cost of construction of fishing vessel under cost plus contract was somewhat more than parties contracting therefor expected to pay did not show injury or damage entitling them to recover for deceit in fraudulently misrepresenting such cost. Civ.Code, § 3343.

10. Fraud ⚷59(3)

Parties contracting for construction of shipping vessel, which they failed to return to builders for rectification of structural defects, as required by contract, could not claim, as damages for deceit in falsely representing cost of constructing vessel, amount spent on repairs, which builders were obligated to make without charge under contract, nor amount exceeding sum which such parties expected to pay, in absence of showing that actual value of ship, properly constructed, was less than amount paid.

Hansen & Sweeney, Victor R. Hansen and J. E. Simpson, all of Los Angeles, for appellants.

Roland G. Swaffield, Long Beach, for respondents.

EDMONDS, Justice.

Frank Gonsalves, Jr., and six partners contracted with Hodgson-Greene-Haldeman Shipbuilders, a copartnership, to build a fishing vessel for them. Charging breach of the contract in many particulars, they sued the shipbuilders and a jury returned a verdict in their favor upon each of three causes of action. The appeal is from the judgments entered upon these verdicts, from certain orders denying motions to vacate them, and from orders denying motions for the entry of judgments notwithstanding the verdicts.

F. W. Hodgson is one of the partners of Gonsalves and also a partner in Hodgson-Greene-Haldeman Shipbuilders. "By reason of his adverse interests in this litigation", the complaint states, he "has been joined as a party defendant".

The contract called for the construction of the "Liberty Bell", which was to be similar in size, shape and type to the "Viking", a tuna clipper which Hodgson had built without plans or specifications. However, the new ship was to be somewhat longer than the "Viking", and "complete in all respects, including the installation of propelling machinery".

The agreement of the parties required: "The best shipbuilding practices followed in the construction of 'tuna clippers.'" It also specified that: "All work shall be done in a proper and workmanlike manner, and shall pass the customary inclination test and customary approval by a competent marine insurance surveyor for insurance purposes."

The size, shape, and details of construction were to be under the direction and control of Hodgson. "If any dispute arises during construction concerning whether or not said 'Liberty' is similar to said 'Viking', said dispute shall be referred to P. Banning Young, and his decision thereon shall be final and binding upon all parties hereto."

By other provisions of the contract, the parties agreed that the shipbuilders were to construct the vessel for the cost of labor, overhead and materials plus 10 per cent. The amount to be paid was stated as follows: "It is estimated that the cost of the construction of said vessel 'Liberty' hereunder will be approximately One Hundred Ninety Thousand Dollars ($190,000.00). It is expressly understood, however, that the Builder does not guarantee the correctness of this estimate and if said cost exceeds or is less than said sum of One Hundred Ninety Thousand Dollars ($190,000.00) Buyers shall nevertheless be bound and obligated to pay to Builder the cost of said construction as herein set forth and all other money agreed to be paid to Builder as herein set forth."

Provision was then made for the method of payment, material purchasing procedure, and insurance. The contract required an inclination experiment followed by a trial run before delivery of the vessel to the buyers. After the inclination test and trial run, the buyers could demand such changes in the vessel as might be necessary.

Delivery to the buyers was to be made at the builders' shipyard. It was agreed that delivery and acceptance of the vessel should relieve the builders of all liability except for the replacement of parts fabricated by them, provided the vessel was brought to the builders' shipyard for that purpose. The builders expressly were absolved of liability for defects in machinery, equipment or fittings manufactured and supplied by others.

The buyers were given the right of inspection by a person of their choosing. The contract then provided that the builders should be notified in writing in regard to any disputes concerning construction, the nature and character of the complaint to be stated in detail. If the parties could not settle the dispute between themselves, it was to be referred to arbitration. In the absence of any complaint in writing, "it shall be conclusively presumed that said vessel is being constructed in a manner satisfactory to Buyers and Buyers shall be precluded from thereafter raising any objections thereto".

The complaint charges that the shipbuilders breached this contract in a number of particulars. The first cause of action alleges in part: "In the building and construction of said vessel, the defendants failed and refused to follow and use the best shipbuilding practices commonly used and followed in the construction of tuna clippers and failed to do said construction work in a proper or workmanlike manner, and in said respects and particulars intentionally and purposely violated and failed to perform and carry out their fiduciary duties to the plaintiffs * * *." As stated by the pleader, "Plaintiffs believed and relied upon said representations and then and there agreed to entrust to said defendants all matters pertaining to the direction and control of the size, shape and details of construction of said vessel, and especially those matters pertaining to the use and adoption of the best shipbuilding practices in said construction work and the performance of all such work in a proper and workmanlike manner." Taken in its entirety, this cause of action appears to be for breach of a contract based upon a fiduciary relationship. The damages claimed are for asserted structural defects and the inflated costs of labor and materials.

The third count of the complaint, which incorporates portions of the first cause of action, also claims damages arising out of alleged breaches of fiduciary duty imposed by the contract. These damages have been sustained, it is said, because of the loss of profits to the crewmember buyers of the vessel during the period it was laid up for repairs.

The second cause of action declares that the contract was entered into because of the fraud of the shipbuilders. More specifically, it is said, the shipbuilders knowingly made false and fraudulent representations that they had carefully estimated and computed the cost of the vessel, whereas, in fact, they had not done so. The buyers further assert that the shipbuilders actually believed that the vessel would cost not less than $250,000, rather than $190,000.

By answer, the shipbuilders admit the execution of the written agreement. They allege that it contains the complete agreement between the parties, except as to amendments which are not here material. They deny the making of any representations other than those contained in the written agreement, and specifically allege that they did not assume any trust relationship.

The shipbuilders admit construction and delivery of the vessel. They allege that at the time of delivery the buyers executed a receipt and full release of the shipbuilders. They deny all allegations of fraud to induce the contract and specifically plead its provision stating the sum of $190,000 as an estimate not guaranteed to be correct. The pleading also asserts that, during construction, the buyers knew the cost was exceeding the estimate and subsequently ordered the construction to proceed.

As affirmative defenses, the shipbuilders allege that the buyers at all times had their representative in attendance during construction. He inspected the construction, they plead, and when the vessel was delivered to the buyers, they executed an agreement to the effect that it had been constructed as authorized. They also rely upon the contractual provisions requiring all disputes regarding similarity of the "Liberty" to the "Viking" to be submitted to arbitration. No arbitration was requested by the buyers, they say, nor were any disputes reduced to writing. They refer to the contractual provisions that, in the absence of a complaint in writing, satisfactory construction shall be conclusively presumed, and the buyers precluded from raising any objections thereafter. A further defense is that the shipbuilders' liability is restricted to replacement of defective parts, upon return of the vessel to the shipbuilders.

Evidence presented upon the trial tends to prove the following facts:

Gonsalves and two of his partners, Strumm and Kettler, closely followed the construction of the vessel and made periodic inspections of the materials and workmanship being put into it. Among other complaints made by them, they said that Hodgson was not giving proper attention to the job and the labor costs were excessive. They also declared that lumber was not properly charged to the vessel and some of it disappeared before being used. Other discrepancies in the methods of construction were called to the shipbuilders' attention, but none of the complaints was reduced to writing. At the insistence of Gonsalves, certain structural changes were made and, at one time, Gonsalves chose a hull superintendent to replace the one employed by the shipbuilders.

Weekly labor invoices and monthly material invoices were rendered by the shipbuilders during construction. These were referred to the timekeeper and material checker selected by Gonsalves and his associates in accordance with the contract. If found to be correct, the bills were paid; if not, any controversy concerning them was settled.

A trial run of the "Liberty Bell" was made pursuant to the contract, with Gonsalves, Kettler and Strumm on board. The vessel passed the customary inclination test called for in the contract and was approved for insurance purposes by a competent marine insurance surveyor.

After the trial run and while construction work remained to be done on the "Liberty Bell", Gonsalves insisted upon taking it from the shipyard. Delivery of the ship was made under protest and only upon the condition that the buyers accept the vessel as completed. In accordance with this requirement, the owner signed a receipt which states in part: "The construction authorized by Contract * * * has been complied with, and the vessel at the time of delivery was complete and shipshape * * * All machinery and operating components were in good working order and the vessel was entirely seaworthy."

Gonsalves then sailed the vessel under its own power from Long Beach to San Diego, where another shipyard performed further work upon it. Less than 30 days from the date of delivery, the ship made her maiden voyage. On this trip, certain defects in construction were discovered.

About three months later, the vessel returned to port and the shipbuilders were notified of these defects. They requested that the vessel be returned to their shipyard for inspection as required by the contract. This demand was refused, and Gonsalves obtained repairs at a San Diego drydock.

The jury found for the plaintiffs on each count. The appeal is from each of the judgments, an order denying the defendants' motion to vacate, amend or correct the judgment on the third cause of action, an order denying the motion of M. R. Mackaig to have judgment entered in his favor individually upon the first and second causes of action, an order denying the motion of F. W. Hodgson to have judgment entered in his favor individually and as a party in interest with the plaintiffs, and orders denying the motions of the defendants and of F. W. Hodgson, individually and as a party in interest with the plaintiffs, for judgments notwithstanding the verdicts.

As grounds for reversal of the judgment and of the several orders adverse to them individually and collectively, the shipbuilders assert, among other points presented, that (1) there was no fiduciary relationship; (2) the buyers failed to perform conditions precedent to liability under the contract; and (3) the contract was not induced by fraudulent representations and, even if it was, the record shows no proof of resulting damages.

In support of the jury's verdict and the rulings of the trial court, Gonsalves and his associates to take the position that (1) a trust or fiduciary relationship existed between the parties; (2) They were not required to return the vessel for correction of defects; (3) None of the controversies involved was within the scope of the arbitration clauses and, if it were, the shipbuilders had waived their right to arbitration; (4) The shipbuilders' liability was not limited to replacing defective parts; (5) They are not bound by the delivery receipt because it was obtained by undue pressure and influence; (6) There was no accord and satisfaction; (7) They were induced to enter the contract by fraudulent representations and the evidence is sufficient to sustain the jury's finding of damages caused thereby; (8) The evidence is sufficient to justify the jury's finding of damages for loss of profits; (9) The verdicts are within the pleadings, evidence and instructions; and (10) There is no misjoinder of parties or causes.

[1] The conclusion is inescapable that no trust relationship was created by the contract, or by the dealings of the parties under it. Section 2216 of the Civil Code provides: "A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another." The following section reads: "An involuntary trust is one which is created by operation of law."

[2] The distinction between a trust and a contract is stated in 1 Bogert Trusts and Trustees, section 17, as follows: "Strange as it may seem, there is occasional confusion with regard to the legal incidents of contract and trust * * *.

"One of the major distinctions between trust and contract is that in the former there is always a divided ownership of property, the trustee having usually a legal title and the cestui an equitable to the same res; whereas in contract this element of division of property interest is entirely lacking."

The Restatement of Trusts, section 74, provides: "A trust cannot be created unless there is trust property." The same requirement is made by section 2221 of the Civil Code, which declares that there must be trust property. The statute specifies that "* * * a voluntary trust is created, * * * by any words or acts of the trustor, indicating with reasonable certainty: * * *

"2. The subject, * * * of the trust."

[3] Trust property is defined by the Restatement of Trusts, section 2, comment c, as follows: "The term 'trust property' denotes the interests which are held in trust." Section 74, comment b, of the Re-

statement further defines trust property in the following manner: "Property includes such interests as may be the subject of a present transfer by way of outright gift, outright devise or bequest, or sale. Such interests can be held in trust * * *.

[4] "The knowledge or skill which a man possesses is not property. It is true that he can make an agreement to communicate his knowledge and to exercise his skill, but such an agreement is not a transfer of property and is binding only if the requirements for the formation of a contract are complied with."

Here there was no divided ownership of property. The contract called for construction of a ship, to be paid for in installments as construction progressed. Certainly the vessel was not held in trust by the builders for the buyers.

The contention of Gonsalves and his associates seems to be that a fiduciary relationship arose out of the promise to construct the vessel in a "workmanlike" manner, in dependence upon the special knowledge and skill of Hodgson. But his knowledge or skill was not property which might be held in trust. It could be the subject only of a contractual obligation.

[5] Nor was there here any fiduciary relationship between the parties. As is said in 1 Bogert Trusts and Trustees, section 17, "* * * there is no fiduciary relation in the case of debt or other contract duty. The rights and duties of parties to a contract may generally be freely transferred. The trustee cannot assign his trusteeship or delegate the performance of his duties. * * * There is no rule that parties to a contract may not act for their own interest during the execution of the contract. They have no duty of loyal representation of the opposing party in the relationship."

The parties here were engaged in a course of arms-length dealing. Hodgson was to use his knowledge and skill in the supervision of the construction. Gonsalves and his associates were given, and exercised, a supervisory check on all phases of construction. They retained rights of control which completely negative any implication of a fiduciary relationship.

[6] There being no trust or fiduciary relationship, the only breach which could have occurred would have been one of a strictly contractual obligation. Even if the shipbuilders breached their contract, as the jury impliedly found, the buyers are not entitled to recover therefor unless they have fulfilled their obligations.

Section 1439 of the Civil Code provides in part: "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; * * *." A condition precedent is defined by section 1436 as "one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

[7] Under the contract, the liability of the shipbuilders was limited to the replacement of parts. However, a condition precedent to such liability was that the vessel be returned to the shipbuilders for such replacement. Gonsalves and his associates refused to comply with that requirement.

The factual situation in Union Investment Co. v. F. M. Landon Co., 32 Cal.App. 305, 162 P. 903, involved a condition similar to the one here. In that case, a stallion was sold under a contract providing that if he did not measure up to specified standards, he would be replaced by another one upon his return to the vendor. The stallion was not returned.

In a suit by the vendor upon a promissory note given as part of the purchase price, the answer alleged failure of consideration in that the stallion did not measure up to specifications. A judgment for the vendee was reversed because, as stated by the court, "it is plainly manifest that the defendants not only wholly failed to discharge the obligation or condition to which they subscribed and bound themselves, but that they purposely refused to perform the condition. * * * A failure on the part of the vendees to return the property, as agreed, would constitute the breach of the agreement by them and so absolve the vendors from the obligation of replacing the same with other property of like kind and value." 32 Cal.App. at page 312, 162 P. at page 906.

So in the present action, Gonsalves and his associates committed themselves to an exclusive remedy in the event of structural failure. They were to return the vessel to the shipbuilders for replacement of parts which proved faulty within 30 days after delivery. This they refused to do. Failure to perform the condition precedent relieved the shipbuilders of liability under the express terms of the contract. For this reason alone, the judgments on the first and third causes of action must be reversed.

The buyers' second cause of action is for damages for fraudulent representation inducing the contract. By its terms, the cost of construction was "estimated" at "approximately" $190,000. The contract expressly provided that the shipbuilders did not "guarantee the correctness of this estimate" and Gonsalves and his associates obligated themselves to pay the cost whether it exceeded or was less than the estimate, together with "all other money agreed to be paid to Builder".

The respondents argue that the fraudulent representation was not the estimate of $190,000, which they label in their complaint as an "opinion", but a statement that the cost had been carefully estimated and computed. In fact, they do not attempt to rely on that amount but base their claim for damages on testimony that the estimated cost was about $1,000 per ton. There is a serious question as to whether such evidence was properly admitted, but in view of the conclusions which have been stated, that point need not be decided.

[8] In an action for damages for deceit, the fraudulent representation relied upon must be as to a material fact which is false and known to be false by the maker, or is recklessly made or made without reasonable grounds for believing its truth. It must be made with intent to induce action by the other party and it must have been relied upon by the other party with justification. It must result in damage or injury to the party so relying. The absence of any one of these elements will preclude recovery. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125; § 1709 Civil Code; 12 Cal.Jur. 724; Restatement of Torts, § 525.

[9] The record fails to show any damage resulting from the alleged fraudulent representation. Gonsalves and his associates contracted for, and received, a fishing vessel. The record fails to disclose its value, other than the cost of the vessel. That the total cost was somewhat more than the buyers expected to pay does not constitute a showing of injury or damage.

Section 3343 of the Civil Code provides in part: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction."

[10] Conceivably, in a situation such as that shown by the present record, the value of the vessel might be less than its cost. For example, if because of the exigencies of the fishing business the cost of the vessel, properly constructed, was exorbitant in relation to its possible earnings, it might not be worth the price paid. But to make such a showing, under the terms of the contract, the buyers would have had to return the vessel to the shipbuilders for rectification of any structural defects. They cannot claim as damages or as evidence of decreased value, amounts spent upon repairs which the shipbuilders were obligated to make without charge under the contract. Nor can they recover the amount in excess of that which they expected to pay. They must show that the actual value of the ship properly constructed was less than the amount which they paid. This they have failed to do, and for that reason the judgment on the second cause of action must be reversed.

The foregoing conclusions make it unnecessary to discuss the remaining contentions of the parties. Each of the judgments is reversed. All other appeals are dismissed.

GIBSON, C. J., and CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

107 Cal.App.2d 652

PAWLING v. MALLEY et ux.

Civ. 4199.

District Court of Appeal, Fourth District, California.

Nov. 21, 1951.

J. S. Pawling brought action against Victor Malley and wife to foreclose a mechanic's lien. A judgment was entered pursuant to a stipulation of the parties. Thereafter the defendants filed a notice and motion to vacate award of arbitrators and motion to set aside entry of judgment based on the award. The Superior Court of Riverside County, Russell S. Waite, J., entered a judgment adverse to the defendants, and they appealed. The District Court of Appeal, Mussell, J., held that the judgment based on the award of the arbitrators was not void because of failure to comply with provisions of arbitration statutes.

Judgment affirmed.

1. Appeal and Error 🔑715(2)

An appellate court must accept the record as it was presented to the trial judge, and therefore will not consider matters stated in affidavits filed in the action subsequent to the rulings of the trial court.

2. Appeal and Error 🔑882(18)

Where judgment was a decree made by consent of counsel, without fraud or collusion, it could not be set aside on appeal.

3. Arbitration and Award 🔑3, 82(1)

At common law it is competent for persons to submit any question or matter of difference between them to the decision of third persons, whether it could be the subject of an action or not, and, when they have done so, the decision will be binding on them.

4. Arbitration and Award 🔑84

Where stipulation of parties contained no reference to arbitration statutes, and there was nothing in the stipulation indicating that proceedings would be taken to confirm, vacate, modify or correct award of arbitrators in accordance with arbitration statutes, and stipulation provided that when arbitrators arrived at a decision, amount determined to be due should be entered as a judgment in favor of the party found to be entitled to such amount, and no objections were made to award or to entry of judgment thereon prior to filing of motions to vacate award and set aside entry of judgment, judgment based on the award would not be deemed void because of failure to comply with provisions of arbitration statutes. Code Civ.Proc. §§ 1280–1293.

5. Arbitration and Award 🔑84

Where judgment was entered in action to foreclose mechanic's lien by stipulation of the parties pursuant to an award of arbitrators, and complaint alleged that plaintiff was a duly licensed contractor, and no answer was filed by defendants denying such allegation, judgment would not be reversed because of failure of plaintiff to present evidence to trial court that he was a duly licensed contractor.

◆

Curtis, Knauf, Henry & Farrell, San Bernardino, for appellants.

Wing, Wing & Brown, Banning, for respondent.

MUSSELL, Justice.

Defendants appeal from a judgment entered pursuant to a stipulation in an action to foreclose a mechanic's lien. The stipulation, which was in writing, dated April 20, 1949, and filed in the action, contained recitals that plaintiff, as contractor, and defendants, as owners, had entered into a contract for the building of certain improvements in the city of Palm Springs; that during the course of construction disputes had arisen between the parties as to changes made in the building, extras furnished, charges made, alleged interference by the owners with the work, and alleged failure of plaintiff to complete the construction according to the terms of the contract; that the owners refused to pay plaintiff's claimed balance due on the contract; that plaintiff had filed a suit to foreclose a mechanic's lien on the premises; that the contractor and owners had agreed that their various disputes should be settled by arbitration and that the decision of the arbitrators should be final and entered as a judgment in the foreclosure action. It was then stipulated that the moneys due one party by the other under the contract should be determined by three named arbitrators; that upon arriving at a decision the amount determined to be due should be entered as a judgment in favor of the party found to be "entitled in the within action"; that the findings and award of the arbitrators should be written and signed by each of the arbitrators; that all items of costs and interest allowable in the event the action should have been tried before the court should be awarded to the parties entitled thereto and that all other expenses of the arbitrators should be borne equally by the plaintiff and the defendants.

The arbitrators conducted hearings, received evidence, and on July 12, 1950, submitted an award in writing in which they found in favor of plaintiff in the sum of $3633.42, with interest, filing fees $20.60, "costs in the sum of $300. Arbitrators. (2)."

The award was submitted to the attorney for the defendants and on July 19, 1950, returned by him to the attorney for the plaintiff. Apparently, no objections were made to the award by the attorney for the defendants and it was filed in the action on July 25, 1950, and on the same day the court entered judgment for the amount found due in accordance with the stipulation of the parties. Thereafter, on August 14th, the defendants filed a notice and motion to vacate the award of the arbitrators and on the same day filed a motion to set aside the entry of the judgment on the ground that no notice of motion for an order confirming the award of the arbitrators had been served on the defendants or their attorney in compliance with section 1287 of the Code of Civil Procedure. These motions were supported by affidavits in which it was claimed, among other things, that the arbitrators had failed to properly conduct the arbitration proceedings and make proper findings therein; that they failed to allow certain credits claimed by the defendants; that a mutual final and definite award upon the subject matter was not made and that the defendant Marie Malley did not sign the stipulation for arbitration. These motions were denied by the court and this appeal, which is from the judgment entered on July 25, 1950, was filed.

No reporter's transcript was filed and the record consists of the clerk's transcript and affidavits which were filed by the attorney for the plaintiff in opposition to the motions.

[1, 2] Appellants first contend that the arbitrators, in making the award, failed to comply with the directions of submission as contained in the stipulation and argue that by the stipulation the issues submitted to the arbitrators for settlement were "(a) Extras furnished and their value; (b) Unauthorized departure from plans and specifications and amount of damages of any allowable to owner for such departure; (c) Total amount remaining due on the contract or owners." The record, however, does not show a failure to consider these three issues and the total amount remaining due on the contract was definitely set forth in the award made. In this connection, it is contended that there should have been written findings on the issues set forth. The affidavits filed by plaintiff and used in the hearings on the motion indicate that findings such as contended for by the defendants were waived by the attorneys in the hearings before the arbitrators. The defendants contend that these affidavits cannot be considered as part of the record on appeal and in that connection cite Smith v. Halstead, 88 Cal.App.2d 638, 640,

199 P.2d 379, 381, as holding that "An appellate court must accept the record as it was presented to the trial judge, and therefore will not consider matters stated in affidavits filed in the action subsequent to the ruling of the trial court." We agree with the law stated. However, the appeal herein is from the judgment which was entered and filed prior to any of the hearings on the motions and it seems quite clear to us that the judgment entered was a decree made by consent of counsel, without fraud or collusion, and cannot be set aside on appeal. Newport v. Hatton, 195 Cal. 132, 142–143, 231 P. 987.

[3, 4] It is next argued that the judgment based on the award is void in that there was a failure to comply with the provisions of the arbitration sections, 1280 to 1293, inclusive, of the Code of Civil Procedure. The stipulation contains no reference to the arbitration sections of the code and there is nothing in it indicating that proceedings would be taken to confirm, vacate, modify or correct the award in accordance with the provisions of said sections. As noted, the stipulation provided that "upon arriving at a decision, the amount determined to be due shall be entered as a judgment in favor of the party found to be entitled in the within action." No objections were made to the award or to the entry of the judgment thereon prior to the filing of the motions referred to. As was said in Dore v. Southern Pac. Co., 163 Cal. 182, 189, 124 P. 817, 819: "At common law it is competent for persons to submit any question or matter of difference between them to the decision of third persons, whether it could be the subject of an action or not, and, when they have done so, the decision will be binding upon them."

[5] Finally, it is argued that the judgment based on the award is void for the reason that the respondent failed to present evidence to the trial court that he was a duly licensed contractor and in this connection the case of Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 204 P.2d 37 is cited. In that case, however, the respondents had applied to the superior court for an order confirming the award under the arbitration sections of the code and the application for confirmation did not allege that the respondents, either as a firm or individually, were licensed by the state to act as contractors at the time the work was performed. In the instant case no application for confirmation was filed. The judgment was entered by stipulation of the parties, the complaint contained an allegation that the plaintiff was a duly licensed contractor and no answer was filed denying this allegation. Under the circumstances presented, we conclude that the case cited is not controlling here. The parties herein, by mutual consent, submitted to arbitrators the determination of the amount, if any, due the plaintiff and agreed that the award when made should be entered and filed as a judgment of the court. It is our opinion that the award made is governed by the same rules that would have governed a confession of judgment had such confession been made in court by the defendants and accepted by the plaintiff, and where, as here, there is a stipulation for the entry of judgment, it was properly entered as upon a plea of confession. Under the circumstances shown, we are without power to reverse the award made.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

NORRIS et al. v. PACIFIC INDEMNITY CO., et al.*

Civ. 18664.

District Court of Appeal, Second District, Division 2, California.

Nov. 7, 1951.

As Modified on Denial of Rehearing Nov. 21, 1951.

Hearing Granted Jan. 3, 1952.

Action on automobile liability policy by David Morgan Norris and Irvin Victor Norris, a minor, by his guardian ad litem, David Morgan Norris, against Pacific Indemnity Company, a corporation. The Pacific Indemnity Company filed a cross-complaint against the plaintiffs and Zurich General Accident & Liability Insurance Company, Ltd. The Superior Court, Los Angeles County, Joseph W. Vickers, J., rendered judgment for the Pacific Indemnity Company and the plaintiffs and the Zurich General Accident and Liability Insurance Company, Ltd., appealed. The District Court of Appeal, Moore, P. J., held that under omnibus clause of automobile liability policy relating to "permission" and statute imposing upon owner liability for negligent operation of automobile with owner's permission, the permission given by owner to son to use automobile flowed on to son's companion to whom son gave permission to use automobile despite owner's restrictions, as to make insurer liable for damages arising out of accident when companion was driving.

Judgment reversed with instructions.

1. Automobiles 🔑192(6)

A "bailment of automobile for general use" implies right of general bailee to have general use of automobile as though it were his own, and "bailment of automobile for particular purpose" restricts use of bailee to a special use, within and at a designated time and place.

See publication Words and Phrases, for other judicial constructions and definitions of "Bailment of Automobile for General Use" and "Bailment of Automobile for Particular Purpose".

2. Automobiles 🔑192(6)

In the case of bailment of automobile for particular purpose, if limitations prescribed by bailor are exceeded, the bailor is exempted from liability for any damage suffered by an innocent third party through the wrongful or negligent use of the automobile by the special bailee.

3. Automobiles 🔑192(1, 6)

The statute imposing upon owner liability for negligent operation of automobile with owner's permission was enacted in public interest and cannot be rendered nugatory in case of general bailment of automobile by plea of owner that he restricted use of automobile to prescribed place or to designated time or to sole possession of general bailee. Vehicle Code, § 402.

4. Automobiles 🔑192(1)

The statute imposing upon owner liability for negligent operation of automobile was designed to protect innocent third parties from careless use of automobiles, and such protection is paramount to rights of owner who has permitted use of his automobile by others even though he, personally, was not guilty of negligence. Vehicle Code, § 402.

5. Insurance 🔑435.11

Where automobile liability insurer entered into contract of insurance with owner to protect automobile which owner bought for use by son, the law that a general bailee has the implied permission of the bailor to loan the use of the vehicle to another despite the secret inhibition of the owner became an implied clause in the policy. Vehicle Code, § 402.

6. Insurance 🔑146(1)

An insurer must be held to have assumed all risks imposed by law with reference to its contracts.

7. Insurance 🔑435.9

The term "permission" in omnibus clause of automobile liability policy has the same meaning as is given to the term in construing statute imposing upon owner liability for negligent operation of automobile with owner's "permission". Vehicle Code, § 402.

See publication Words and Phrases, for other judicial constructions and definitions of "Permission".

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* Subsequent opinion 247 P.2d 1.

8. Insurance ⇨146(3)

Any ambiguity in terms of insurance policy must be resolved against insurer, and an interpretation affording the greatest measure of protection to the assured will always be favored.

9. Insurance ⇨435.11

Under omnibus clause of automobile liability policy relating to "permission" and statute imposing upon owner liability for negligent operation of automobile with owner's permission, the permission given by owner to son to use automobile flowed on to son's companion to whom son gave permission to use automobile despite owner's restrictions, so as to make insurer liable for damages arising out of accident when companion was driving. Vehicle Code, § 402.

10. Insurance ⇨435.11

Where owner purchased automobile for use of son and son gave companion permission to use automobile, companion had implied permission of owner and was an assured under automobile liability policy containing omnibus clause containing word "permission" having same meaning as that word in statute imposing upon owner liability for negligent operation of automobile with owner's express or implied permission, and insurer's liability resulting from the implied permission should be tested by the same standards as are applied in determining statutory liability upon owners of automobiles used on the highways. Vehicle Code, § 402.

11. Equity ⇨65(2)

Where owner purchased automobile for use by son and son gave companion permission to use automobile and companion had an accident while driving, owner's automobile liability insurer could not assert that companion had such "unclean hands" as would preclude him from asserting that insurer was liable for damages arising out of the accident, by virtue of father's prohibition against the son permitting others to drive the automobile.

12. Insurance ⇨512½

Where liability policy on automobile driven by minor companion of owner's son with owner's implied permission contained clause providing for apportioning any loss caused by assured if latter was covered by other valid and collectible insurance, and another policy on automobile presumptively owned by companion's father provided that with respect to loss arising out of use of noninsured automobile the insurance should be excess insurance over any other valid and collectible insurance available to insured, the excess clause became operative and the apportionment clause was not applicable, and hence owner's insurer must stand loss arising out of accident occurring when companion was driving to limit of policy, and if such limit should be below the total loss the father's insurer must answer for excess within limits of its policy.

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Parker, Stanbury, Reese & McGee and Raymond G. Stanbury, Los Angeles, for appellants.

Stevens Fargo and Louis E. Kearney, Los Angeles, of counsel, Jennings & Belcher, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the owner can qualify the authority which he vests in a general bailee to whom he has entrusted the general use of a motor car and thereby prevent loss by his insurer when a third person is injured by such car while being driven by the permittee of the general bailee. Does the term "permission" used in the omnibus clause of an automobile insurance policy have the same meaning as is given to it in interpreting section 402 of the Vehicle Code?[1]

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[1] Section 402, Vehicle Code. "(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

There is no issue of fact. In April, 1949, one E. A. Parkford purchased an automobile and when it was delivered to his home he gave the keys to his son Geoffrey. It is referred to herein as Geoffrey's car as he had the general use thereof. Although his mother had used it infrequently and his sister had driven it once or twice a month, the ladies and the father had their several cars in habitual use. No restriction as to Geoffrey's driving was prescribed except, in the language of Geoffrey, that he "should never let anyone else drive the car." The trial court found that E. A. Parkford *permitted Geoffrey to use the automobile as Geoffrey wished to use it* when available but "at the time the said general use of said automobile was given to Geoffrey, the said E. A. Parkford specifically limited such use by Geoffrey to Geoffrey himself and specifically prohibited the said Geoffrey *from lending* or permitting the use of said automobile to or by any other person save and except the daughter, wife and chauffeur of said E. A. Parkford; that said prohibition and restriction upon the lending of said automobile was understood by the said Geoffrey and said prohibition was not violated by said Geoffrey until April 3, 1950, when Geoffrey turned over the keys of said automobile and loaned the use thereof to Irvin Victor Norris who then and there had knowledge that the use of said automobile by himself was in violation of said prohibition against said lending imposed by E. A. Parkford and without the latter's consent; that the total use of the automobile by Norris while he had it was solely for his purpose, benefit and advantage."

During the two days and nights preceding the loan of the car to Norris, the latter, Geoffrey and their two companions had been camping on the beach near Laguna. On the very day on which Norris drove the automobile the four boys had driven two cars to Newport. When the day was done, Norris desired to visit a barbershop but did not have his own car. In order not to detain himself and the other two from their engagement at Laguna, Geoffrey volunteered to loan Norris the Parkford automobile and gave him the keys with the final valedictory: "Irv, I am not supposed to loan the car. For God's sake, be careful."

While driving on the direct route from the point where he took possession of the vehicle to Laguna to rejoin his friends, Norris and the Parkford car suffered an accident and the Phillipsons, occupants of the machine with which he collided, suffered injuries. David Norris having signed Irvin's application for a driver's license thereby became liable for damages caused by Irvin's negligent vehicular operations. Vehicle Code, sec. 352. The instant action arose out of the Norris demand made upon the Pacific Indemnity Company, the insurance carrier of E. A. Parkford on the car driven by Irvin Norris at the time of the accident.

The Pacific Indemnity Company had issued its policy to Mr. Parkford, indemnifying him for loss incurred by the operation of Geoffrey's car. The policy contains the following omnibus clause: "With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission." Respondent denied liability under its policy. After suit was commenced respondent filed its cross-complaint and in addition to Irvin Norris and his father, David Morgan Norris, Zurich General Accident and Liability Insurance Company Ltd. was named as a cross-defendant which had issued to David and Irvin Norris its policy of liability insurance on a vehicle presumptively owned by Mr. Norris. Both policies were in force when Irvin collided with the Phillipson car near Laguna, April 3, 1950. As indicated, the trial court denied plaintiffs' prayer and on the cross action gave judgment in favor of respondent. This was error. From a reasonable construction of section 402 of the Vehicle Code the conclusion is unavoidable that Irvin Norris had the permission of E. A. Parkford to drive the accident car.

[1-3] There is a clear distinction between bailment of a motor car for general use and a bailment for a particular purpose. One necessarily implies the right of the general bailee to have the general use of the vehicle as though it were his own; the other restricts the use of the bailee to a special use, within and at a designated time and place. In the case of a special bailment if the limitations prescribed by the bailor are exceeded the latter is exempted from liability for any damage suffered by an innocent third party through the wrongful or negligent use of the car by the special bailee. Engstrom v. Auburn Automobile Sales Corporation, 11 Cal.2d 64, 72, 77 P.2d 1059. The same is not true in the case of a general bailee of an automobile. In the case of a general bailment the statute, sec. 402, supra, having been enacted in the public interest cannot be rendered nugatory by the plea of the owner of such a vehicle that he restricted the use of his conveyance to a prescribed place, or to a designated time or to the sole possession of the general bailee. This doctrine was established beyond question by the decision in Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, from which there has been no departure. The facts litigated were as follows: Joseph Gigli owned a sedan which the members of his family were permitted to use. He allowed his son Arthur to drive the car with John Corti as his companion with the admonition: "Don't lend the car to anyone else." The boys visited a tavern where they met two strange young ladies. On deciding to visit a dance hall, Arthur's girl refused to go in the Gigli sedan, because she had her own conveyance. He chose to ride with the girl in her Plymouth and delivered the keys to the sedan to John Corti. While following the Plymouth to the dance hall, the sedan driven negligently by Corti collided with Souza's car. In the action against John Corti and Joseph Gigli the latter disputed his liability on the ground that he had not permitted Corti to drive the sedan and permission could not be implied by reason of his having instructed Arthur not to lend it to anyone. Following a review of the authorities pertaining to the issue, Mr. Justice Shenk quoted from a New York decision as follows: "Only a narrow construction would permit us now to say that an owner placing a car in the care of members of his family to be used for their pleasure or for the family business would escape liability if wife or son or daughter should give over the wheel to the management of a friend. The ruling has been more liberal whenever the question has come up." [Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650, 54 A.L.R. 845.] Justice Shenk concluded: "In the present case the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner. Any secret restrictions imposed by him on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident. Violations of such restrictions may not be said to cause a revocation of the permission." Liability of the owner despite his secret instructions not to permit another to drive his car was thus established and the principle became fixed in the law.

In Herbert v. Cassinelli, 73 Cal.App.2d 277, 166 P.2d 377, the general bailee was absent at the time of the accident, as was Geoffrey Parkford when his car driven by Irvin Norris collided with the Phillipson vehicle. On the first trial of the case proof was not made that the owner had restricted the use of his car to his bailee. On the second trial, evidence was received to the effect that the owner had told the bailee that he should "not permit anyone else to use or drive the car." The holding was that a general use "*is not converted into a special one because the permission may have been accompanied by an express admonition not to permit anyone else to drive the car.* * * * It follows that the evidence on the second trial has not changed materially, essentially, or vitally and that the law of the case laid down in the first appeal still applies."

[4] By both quoted decisions the courts have announced a practical rule reasonably interpreting section 402. To hold that

an owner may entrust his automobile to another for general use to exercise all the privileges of an owner and by such holding to give effect to alleged restrictions upon the permittee's use would be an encouragement to the practice of defrauding injured people. The statute was designed "to protect innocent third parties from the careless use of automobiles". Burgess v. Cahill, 26 Cal.2d 320, 323, 158 P.2d 393, 394, 159 A.L.R. 1304. Such protection is "paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence." (Ibid.)

To see how harmful is the thesis of respondent, one needs but to contemplate the grand highways and beautiful boulevards of this state, congested with traffic by men and women of every degree of intelligence. Should all of them innocently venture upon the lanes, streets and freeways under the impression that every operator they meet is the owner or the permittee of the owner of the car he drives and wake from a hospital bed to be told that the wild car that drove them into a chasm was owned by a fine gentleman who had never consented that his son might loan the automobile to his boon companion? To insure such a tragical result the courts need do no more than uphold the judgment here on appeal.

If secret restrictions by the owner "do not negative the controlling fact that it was being used with the owner's permission", Souza v. Corti, supra, in an action by an innocent party against the owner, how can it be said that such secret limitations effectively forbid recovery against the owner's insurance carrier? The word "permission" as used in the statute is not chameleonized the moment it enters the omnibus clause of the insurance policy carried by the owner to save himself and family from loss for life or limb destroyed by the negligent operation of the insured vehicle. If the judgment stands, the intimate, impecunious, companion of the general bailee of a motor car may with impunity slaughter a multitude while using an insured vehicle, without any expense to the insurer. Is it possible that the authors of respondent's policy could have contemplated any such result?

[5-9] Moreover, when respondent made its contract of insurance with Mr. Parkford to protect the Geoffrey car, respondent knew the law to be that a general bailee has the implied permission of the bailor to loan the use of the vehicle to another—despite the secret inhibition of the owner. Such law became an implied clause in respondent's policy. Southern Pacific Milling Co. v. Billiwhack Stock Farm, Ltd., 50 Cal.App.2d 79, 83, 122 P.2d 650. An insurer must be held to have assumed all risks imposed by law with reference to its contracts. Respondent must have contemplated that the term "permission" would be given the meaning announced in the judicial decisions of this state, since such decisions relative to section 402 have been concerned with the use of that word in similar settings and concerning the same subject matter—an automobile owner's liability for its operation. It is no more than reasonable to hold that when Parkford and respondent entered into their contract the insurer contemplated and the insured anticipated that if it should be determined that the vehicle owner must answer to a person injured by the operation of the car, in turn the insurance company under its policy would step into the owner's shoes and discharge the liability. If the insurer intended otherwise, it was in duty bound clearly to spell out any limitations on its coverage. Any ambiguity in the terms of a policy must be resolved against the insurer. An interpretation affording the greatest measure of protection to the assured will always be favored. Fageol Truck and Coach Company v. Pacific Indemnity Company, 18 Cal.2d 731, 747, 117 P.2d 661. If the owner's statutory liability extends to those operating with the owner's implied permission, section 402, there is no valid reason why the insurance policy should not protect all persons driving his car with his consent. "Permission" within the meaning of the omnibus clause of an insurance policy has been held to mean permission "express or implied". Aetna Life Insurance Company v. Chandler, 89 N.H.

95, 193 A. 233, 237. The conclusion, therefore, is unavoidable that the permission given Geoffrey to drive the automobile flowed on to his companion within the terms of the policy.

[10] Since Irvin Norris was given implied permission to drive the Parkford car, he incurred a liability based upon such permission. Having become liable to the public for any negligent use of the vehicle he became an assured under the policy issued by respondent. Inasmuch as Irvin was covered by the policy, respondent's liability thereunder resulting from the implied permission is tested by the same standards as are applied in determining statutory liability upon the owners of motor cars used on the highways. See report of American Bar Association, Section of Insurance Law, 1941. While the state of Washington has no statute like section 402 of our Vehicle Code, the courts of that state have so construed the family car doctrine as to hold the owner liable when a member of the family entrusts the family automobile to a stranger contrary to express instructions, King v. Cann, 184 Wash. 554, 52 P.2d 900; Atkins v. Churchill, 30 Wash.2d 859, 194 P.2d 364, and in Holthe v. Iskowitz, 31 Wash.2d 533, 197 P.2d 999, 1007, it was indicated by emphatic dictum that one driving a car under such circumstances may "be acting with the permission of the named insured in a policy of liability insurance, if such a policy exists in favor of the owner."

[11] Basing its contention upon the erroneous finding that Irvin Norris was not driving the Parkford automobile with the permission of the owner, and that Irvin knew that his use of the automobile was a violation of the prohibition against Geoffrey's lending it to another, respondent asserts that appellant Irvin stands in a court of equity with unclean hands, is "a wrongdoer" and "shows no equity as against this respondent." Irvin Norris committed no crime, fraud or deceit. He did not violate a promise. He did nothing that could be deemed "unconscientious." He was the clean and hilarious companion of Geoffrey Parkford when they and their companions contemplated no evil or vicious purpose. Geoffrey had the general use of the car and cheerfully allowed Irvin to drive it upon an excellent public highway. Such act necessarily served the happiness of Geoffrey or he would not have done so. If it contributed to promote the happiness of Geoffrey to lend the car to Irvin, such act was not only "not wrongful" but actually served to effectuate the purpose that animated the father's indulgence of his son. Therefore, nothing occurred that would warrant the holding that any act of Irvin was such as to befoul his hands or to cause equity to withdraw its shield. The case Katz v. Karlsson, 84 Cal.App.2d 469, 191 P.2d 541, cited by respondent is not in point. The affidavit filed by that defendant was either false and so constituted a felony or it was true and thereby established that the divorce proceedings of the affiant were unconscionable and that he had shown disrespect of good morals and contempt for the administration of justice. Hence he had soiled his own hands and was properly denied relief. It requires neither a Solon nor a Solomon to see that the conduct of Irvin Norris did not in the slightest degree resemble the behavior of the litigant in the last cited decision.

[12] Another question posed by this controversy is whether respondent as Parkford's insurer must suffer the entire loss sustained by the injured parties, or whether Zurich as Norris' insurer must answer for all or a portion thereof. The solution of such problem depends upon an interpretation of the applicable provisions of the two policies concerned.

Paragraph 18[2] of respondent's policy provides for apportioning or pro-rating any loss caused by its assured if the latter be covered by other "valid and collectible" insurance.

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[2] "18. *Other Insurance.* If the assured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all *valid and collectible* insurance against such loss. * * *"

Paragraph 13[3] of Zurich's policy provides that "with respect to loss arising out of the use of any non-owned automobile" the Zurich insurance shall be "excess insurance over any other valid and collectible insurance available to the insured." Under this provision in the Zurich policy it is apparent that since the loss arose out of the use of a non-owned automobile the "excess clause" became operative and thereby Zurich became liable for only the amount of any loss which exceeded the limits of coverage of any other valid and collectible insurance.

It has been determined that such excess insurance is not valid and collectible. Zurich General Accident and Liability Ins. Company v. Clamor, 7 Cir., 124 F.2d 717. Accordingly, since Norris had no other "valid and collectible" insurance, Pacific's apportionment clause in its Paragraph 18 is not applicable and it must stand the loss herein to the limits of its policy. If such limits are below the total loss, Zurich must answer for the excess, within the limits of its policy.

Respondent argues that (1) the decision in Air Transport Mfg. Company v. Employers Liability Assurance Corporation, 91 Cal. App.2d 129, 204 P.2d 647, 650, compels an apportionment and pro-rating of the loss by both insurers; (2) Zurich's "excess clause" does not and cannot spring into operation because it, too, is conditioned on the presence of other "valid and collectible" insurance being available to its insured, and that under the Air Transport decision the Pacific policy did not meet this requirement since that decision held "valid and collectible" insurance to be only that providing *unconditional* and not pro-rata coverage.

The Air Transport decision is not applicable to the situation at bar by reason of the fact that the Pacific Indemnity policy involved in that case did not contain an excess clause which was rendered operative when its assured became involved in a loss arising from a non-owned automobile. There the court was concerned with a policy containing an "escape" clause by which the vehicle owner's insurer sought completely to avoid all liability whatsoever when other valid insurance was in force. The policies now before us are practically identical in form with respect to the clauses which bear upon the rights of the parties. They are Standard Form policies and seemingly complementary to each other. Both appear to have been designed to avoid arguments such as arose in the Air Transport case, and to this end they contemplate that the insurance on the car shall be primary and that on the driver excess. A pro rata contribution should be ordered only in the event that there are two or more primary carriers.

Moreover, to adopt respondent's view here would also be actually and entirely to ignore the Zurich excess clause and render it meaningless. The apportioning or prorating as urged by respondent would result if no excess clauses were present in the Zurich policy. Under respondent's construction, no excess clause would ever be effective since it is apparently universal practice for policies of insurance of all types to contain some sort of clause providing for the apportionment of loss. Indeed, policies of fire insurance must contain such a provision under Insurance Code, section 2071. See Gillies v. Michigan Millers Mutual Fire Ins. Company, 98 Cal.App. 2d 743, 748, 221 P.2d 272.

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[3] "13. *Other Insurance.* If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy *with respect to loss arising out of the use of any non-owned automobile shall be excess insurance* over any other *valid and collectible* insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise."

The judgment is reversed with instructions to enter as prayed in the complaint and to deny relief under the cross complaint.

McCOMB, J., concurs.

107 Cal.App.2d 604

KITTLE v. LANG.

Civ. 4413.

District Court of Appeal, Fourth District, California.

Nov. 19, 1951.

Rushford A. Kittle brought action against W. E. Lang alleging an oral agreement to enter into partnership and that they had entered into partnership business but that no articles of copartnership had been entered into and that plaintiff had not been given an interest in the business. The Superior Court of Inyo County, Walter R. Evans, J., assigned, entered a judgment for plaintiff, and defendant appealed. The District Court of Appeal, Griffin, J., held that judgment which in effect made an equitable distribution of partnership assets was within scope of pleadings, but that portion of the judgment ordering defendant to deliver plaintiff all sums of money held for and on behalf of plaintiff was too indefinite and uncertain as to amount to be enforced.

Reversed in part and affirmed in part.

1. Pleading 🔑49

A plaintiff may recover if his complaint states any cause of action entitling him to any relief either at law or in equity, though he has misconceived the relief to which he is entitled.

2. Appeal and Error 🔑197(3)

Where plaintiff alleged oral agreement to enter into a partnership, that parties did business as partners, and that defendant refused to enter into articles of copartnership to plaintiff's damage, and trial court construed action as an equitable proceeding and entered judgment for an equitable distribution of partnership assets, even if allegations as to, and prayer for relief for, damages, presupposed that complaint was predicated upon an action for damages for breach of oral agreement, defendant could not complain for first time on appeal that judgment was not authorized by the pleadings, in view of prayer for general relief and fact that court's decision was founded upon issues within general scope of pleadings and actually tried and to which no objection was interposed.

3. Partnership 🔑328(3)

In action against defendant who orally agreed to enter into partnership with plaintiff, wherein plaintiff alleged that they had entered into partnership business but that articles of copartnership were never executed and he was never given an interest in the business, evidence sustained finding that plaintiff was entitled to $1,352 as payment for time spent managing business as part of his contribution to partnership.

4. Partnership 🔑328(3)

In action against defendant who orally agreed to enter into partnership, wherein plaintiff alleged that they had entered into partnership business but that articles of copartnership were never executed and he was not given an interest in the business, evidence sustained finding that plaintiff was entitled to machinery, equipment, tools and supplies which he had furnished as a contribution to the business.

5. Judgment 🔑21

Trial 🔑395(2)

Findings, as well as judgment based thereon, should be definite and certain, at least enough to enable a party to comply with their requirements.

6. Judgment 🔑226

Judgment that defendant should deliver such equipment as is listed in plaintiff's exhibit, which exhibit contained list of the equipment and was accepted in evidence by defendant's stipulation, incorporated the exhibit into judgment by reference and was sufficiently clear and definite to enable defendant to comply with its requirements.

7. Judgment ⟹222

A judgment for money must be stated with certainty and should specify the amount.

8. Judgment ⟹222

Judgment that plaintiff was entitled to immediate delivery of any or all sums of money collected by defendant and by him held for and on behalf of plaintiff, based on finding that defendant had collected certain sums of money on behalf of plaintiff as would more particularly appear from defendant's testimony, was too indefinite and uncertain as to amount to be enforced.

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Kenneth W. Kearney, Independence, for appellant.

Willis Smith, Bishop, for respondent.

GRIFFIN, Justice.

Plaintiff's complaint alleges that for many years prior to October 1, 1949, he had been in the sporting goods business in Bishop, and had built up a valuable good will; that from October 1, 1948, to October 1, 1949, he managed such a store for another and earned $240 per month; that prior to October 1, 1949, defendant represented to plaintiff that he was anxious to enter into the sporting goods business; that defendant would invest his money in such a store if plaintiff would engage in business with him; that a partnership would be formed and plaintiff would have a one-half interest in the business, plus $50 per week pay to be deducted as business expense; and that profits would be reinvested in the business.

It is then alleged that it was further orally agreed that as a part of the agreement, plaintiff was to devote his full time to the business and to furnish certain equipment worth $1500, plus the good will, as his contribution to the partnership to be formed; that defendant would furnish the money, be a silent partner, and that articles of copartnership would be drawn accordingly.

It is then alleged that plaintiff believed defendant's representations, agreed to enter into such a contract; that he resigned from his position, removed $1500 worth of supplies to a building leased for the purpose of conducting the business, and devoted his full time to it; and that he was ready, willing and able to perform his part of the contract.

In paragraph V it is alleged that on October 1, 1949, the parties leased a building and started up business; that defendant furnished the money and plaintiff furnished his equipment and time; that the name of the business was Rush-Kittle's Sportman's Supplies; that business permits were issued and a profit resulted; and that plaintiff drew no pay except $868.00. It is then alleged that plaintiff demanded that defendant perform his contract; that he failed to do so; and that he failed to pay plaintiff's salary. It is then charged that in March, 1950, the parties moved to a new location; that plaintiff devoted his full time to establishing the business and performing his agreement; that since that date defendant denied that plaintiff was entitled to a one-half interest in the business, refused to pay his salary, and refused to enter into articles of copartnership; and that plaintiff offered to compromise with defendant for a salary of $50 per week and a one-fourth interest in the business but defendant refused to do so. It is then alleged that defendant was using plaintiff's name, his tools and equipment, and that upon defendant's refusal to recognize plaintiff's rights or to pay him a salary, plaintiff left the business on April 15, 1950.

In paragraph IX he alleges that prior to April, 1950, defendant orally represented that he would make plaintiff a partner; that he made the representations in bad faith with the intent to deceive plaintiff and to induce him to conduct defendant's business for him; that plaintiff believed the representations, devoted his time, tools and good will to defendant's business, and that thereafter a profitable business was established; that plaintiff was given no interest in the business, paid no salary (except $868.00) and that there was an entire failure and refusal on the part of defendant to perform his agreement. Plaintiff then prayed for damages, alleged that the business was worth $20,000 and that by being deprived of a one-half interest he was damaged in the sum of $10,000; that the profits would have been at least $10,000, and therefore he was damaged in the sum of $5,000; that defendant deprived plaintiff of his tools and equipment to his damage in the sum of $1500; that he was deprived of wages for 2320 hours to his damage in the sum of $2320; that plaintiff lost good will damaging him in the amount of $5,000. The general prayer is for damages in the sum of $23,820, and for such other and further relief as may to the court seem proper.

Defendant's answer contains general denials of the allegations contained in plaintiff's complaint and sets up as an affirmative defense that plaintiff executed and delivered to defendant a certain quitclaim deed which it was alleged constituted a release of defendant from any obligation whatsoever that might have existed between himself and plaintiff. (Plaintiff filed an affidavit denying the "genuineness of said written instrument" under sec. 448 C.C.P.) He also pleaded failure of consideration.

After trial by the court it found that about October 1st, 1949, the parties entered into an oral agreement to establish the said business; that plaintiff would devote his full time to the interest of the business and furnish certain equipment, tools and supplies owned by him, as "fully described in plaintiff's Exhibit I herein"; that plaintiff was to act as manager and receive $50 per week in addition to a salary, and a one-half interest in the business; that plaintiff performed the agreement, furnished the labor for the benefit of the business amounting to 2320 working hours; that defendant paid plaintiff $868 on account of that work but that defendant refused to comply otherwise with the terms of the oral agreement; that plaintiff continued to render services for the benefit of defendant and said business at all times prior to the removal of same to a location on Main Street, at which time plaintiff and defendant mutually agreed to terminate the purported agreement to form a partnership and that from and after the removal of said business to the new location plaintiff took over the operation and management of the bicycle repair work of said business and from and after that date defendant took over the management and operation of the sporting goods business; that at no time prior to the removal were any profits made in that business for a division between the parties; that defendant neglected to recognize any interest of the plaintiff in the business prior to its removal to its present location, and has appropriated the whole thereof to his own use and benefit to the exclusion of plaintiff; that the work, labor, and services rendered by plaintiff prior to the removal of said business were reasonably worth $2320; that $868 has been paid on this account and that there now remains owing to plaintiff for said work and labor $1452.

The court then found that defendant was in possession of "certain items of machinery, equipment * * * more particularly described in plaintiff's exhibit I herein", which are the property of plaintiff.

In addition, it found that defendant had collected "certain sums of money on behalf of plaintiff, as more particularly appears from defendant's testimony herein", and that plaintiff is entitled to any and all of said sums of money so collected by defendant.

The court then found that the allegations contained in paragraph X(d) of plaintiff's complaint, i. e., "that by said breach on the part of defendant of the contract aforesaid, plaintiff was deprived of wages and earnings for labor and services rendered to defendant for a period in excess of 2320 working hours at a reasonable wage of One Dollar per hour, all to the damage of plaintiff in the sum of Two thousand three hundred twenty ($2320.00) dollars" were true, but that the other allegations contained in paragraph X were untrue. These allegations relate to the other claimed items or damage.

In relation to the affirmative defenses alleged by the defendant, the court found that on November 15, 1949, plaintiff executed and delivered to defendant the quitclaim deed above mentioned, but that the instrument was not executed and delivered for the purpose of transferring to defendant the machinery, equipment, tools and supplies described in "plaintiff's exhibit I herein" or for the purpose of waiving any of the rights of plaintiff for compensation for work, labor and services rendered to the business conducted by the plaintiff and defendant and that thereby the machinery and supplies were not transferred to the defendant and that the plaintiff did not thereby waive his right to compensation for work as aforesaid, and that defendant was not released from his obligation to compensate plaintiff for his work or to return plaintiff the machinery and supplies aforesaid. The court then found that the defense of failure of consideration was untrue, and further found that the fourth separate defense, which included all of the allegations of paragraph I herein set forth as to the oral agreement, the execution of a quitclaim deed releasing defendant from any obligation, and that plaintiff waived any right he had under the oral contract, was untrue.

The court then concluded (1) that plaintiff was entitled to judgment against defendant in the sum of $1452; (2) that he was entitled to judgment for the immediate delivery and return "of all of the machinery, equipment, tools, and supplies listed in plaintiff's Exhibit I, which are now in the possession of the defendant"; and (3) that plaintiff was entitled to judgment for the immediate delivery "of any and all sums of money collected by defendant, and by him held for and on behalf of plaintiff". Judgment was entered accordingly, and in this same language.

It is appellant's contention that from the pleadings it is obvious that the action, as filed, was an action for damages for breach of contract which culminated in a judgment "which seems to be an effort to do some sort of sagebrush equity" and in violation of the issues involved; that the findings of fact do not follow the allegations of the complaint and that there is a total lack of evidence to support most of them.

It is true that the allegations in reference to the damages sustained and the prayer for relief might presuppose the complaint was predicated upon an action for damages for the breach of the claimed oral agreement. However, certain allegations of the complaint indicate that the parties hereto did orally agree to enter into a partnership arrangement and that certain division of the profits was to be made. It likewise appears that the parties did, in fact, under the oral agreement, carry out many of the provisions of that agreement and did, in fact, enter into a partnership venture and that the parties held themselves out as partners, doing business as such, over a period of many months. In an action against these parties for some obligation created by one or the other in the conduct of the business during this period, it would be properly held that they would be liable as partners. It should also be noted that plaintiff alleged that a profit resulted and that he was deprived of his wages in the sum of $2320, and that plaintiff furnished $1500 worth of tools and supplies "as a contribution to such business". Practically the only feature of the partnership agreement that was lacking was the execution of a *written agreement* in accordance with the oral agreement alleged and under which they apparently were operating. This is the practical effect of the finding of the court on this subject. It found that the parties mutually agreed to terminate that purported agreement and that they entered into a new and different arrangement when the parties moved to the Main Street location and that no partnership arrangement existed thereafter. It found that defendant had appropriated all of the interests of the parties acquired under the partnership arrangement to his own use and benefit and to the exclusion of plaintiff. The court, by its findings and judgment, under the prayer for general relief, has apparently construed the action as an equitable proceeding in which the parties set up their respective interests in the partnership business which was being operated as such. It determined that such partnership no longer existed and it has made what appears to be an equitable distribution of the assets and has charged defendant with a reasonable amount for time expended by plaintiff in the management and operation of the business by plaintiff over the period in question. The case, as is apparent from the record, was tried upon this theory. No objection was made to the introduction of any evidence on the ground it was not relevant to the issues presented by the complaint or by the pleadings. It should be further noted that the court assumed jurisdiction over defendant's claimed defense that a quitclaim deed, signed by plaintiff, constituted a release of the property to defendant's wife, which written instrument was claimed by plaintiff to be ineffectual, i. e., it was not genuine for the reason it was not the identical instrument it purported to be and did not appear in the exact form in which it was executed. Under the equitable powers of the trial court it took considerable testimony on the subject which showed that plaintiff was a judgment debtor in another action; that a levy of execution on the partnership property was threatened and that to defeat a recovery by this creditor defendant took the quitclaim deed without a consideration and for the purpose of falsely showing that plaintiff had no interest in the business. The court determined this issue in favor of plaintiff, insofar as it applied to defendant's claim to the tools and to his waiver of wages due under the agreement. Apparently, defendant believed the proceeding was an equitable one, or he was, at least, in doubt as to its nature, because his appeal from the judgment was to the Supreme Court, rather than to this court. (The case was subsequently assigned to this court for decision.)

[1] The general rule is stated in 14 Cal. Jur. p. 990, sec. 69, to be: "Since there is but one form of civil action under the code the court may grant any relief embraced within the issues. The fact that a party has misconceived the relief to which he is entitled does not alone justify a total denial of relief, but a plaintiff may recover if his complaint states any cause of action entitling him to any relief either at law or in equity. In other words, the court will render such judgment as the evidence and pleadings show the parties are entitled to, regardless of the form of the action or the prayer of the complaint." See, also, Fong Sing v. O'Dell, 50 Cal.App. 55, 194 P. 745; and Horan v. Consolidated, etc., Mining Co., 41 Cal.App. 333, 182 P. 813.

[2] It does not appear that defendant may now be heard to complain for the first time on appeal since it appears that there was a prayer for general relief and since the decision was founded upon issues within the general scope of the case made by the pleadings and within the issues actually tried and to which no objection was interposed. 14 Cal.Jur. p. 974, sec. 62; Poledori v. Newman, 116 Cal. 375, 48 P. 325; Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826.

[3] There was evidence that plaintiff agreed to furnish his full time and to manage the business as a part of his contribution to the partnership. Defendant took no active part in it but claims he invested as much as $21,000 in the project. Plaintiff estimated his time at approximately "12 hours per day, more or less", commencing October 8, 1949, until the dissolution of the agreement, which time totaled 2320 hours at $1.00 per hour. The court gave plaintiff credit for this amount, less the sum of $868.00, admittedly paid to plaintiff by defendant. The finding and judgment allowing plaintiff $1352 for this purpose is supported by the evidence and pleadings.

[4] The finding that plaintiff was entitled to the machinery, equipment, tools and supplies which he furnished "as a contribution to the business" has evidentiary support. However, the judgment that defendant deliver "such equipment" as "listed in plaintiff's Exhibit I", which are now "in the possession of the defendant" is somewhat lacking in definiteness. Defendant argues that it would be difficult for an enforcing officer to carry this portion of the judgment into effect under a writ of execution. Exhibit I consists of an itemized list of the equipment and its appraised value, which equipment plaintiff claimed was turned over to the partnership by him. He testified in detail as to each item, and said that defendant looked at the catalogue with him and agreed that its value was $1500. At the conclusion of this testimony counsel for

defendant stipulated that the list might be accepted in evidence and marked plaintiff's Exhibit I, and that it was the list of articles and their value which plaintiff claimed he furnished to the partnership. This exhibit is in the record before us.

[5] It is true that findings, as well as the judgment based thereon, should be definite and certain. At least they should be sufficiently clear and definite to enable a party to comply with their requirements. Kling v. Gustason, 101 Cal.App. 58, 281 P. 407; Johnson v. Farmer, 41 Cal.App.2d 874, 107 P.2d 959, 108 P.2d 945; Young v. Enfield, 217 Cal. 662, 20 P.2d 701. The judgment here involved is merely an order to the defendant to turn over to plaintiff such part of the personal property assets of the partnership now in defendant's possession as are described in Exhibit I, which exhibit is made a part of the findings and judgment by reference. Defendant admitted he still had in his possession much of this equipment but claimed title to it under the terms of the quitclaim deed, which deed the court found was ineffective as to this particular personal property.

[6] As between the parties to this action, we believe the findings and judgment, in this respect, are sufficiently clear and definite to enable defendant to comply with its requirements. Queen v. Queen, 44 Cal. App.2d 475, 112 P.2d 755; Newport v. Hatton, 195 Cal. 132, 156, 231 P. 987; 49 C.J.S., Judgments, § 80, page 203.

[7, 8] As to the finding and judgment for the payment of money, a stricter rule seems to prevail, i. e., that a judgment for money must be stated with certainty and should specify the amount. D'Arcy v. D'Arcy, 89 Cal.App. 86, 92, 264 P. 497; 14 Cal.Jur. p. 956, sec. 53; 1 Freeman on Judgments, Fifth Ed. Sec. 84, p. 148; Wallace v. Wallace, 111 Cal.App. 500, 295 P. 1061. The portion of the finding reciting that "Defendant has collected certain sums of money on behalf of plaintiff, as more particularly appears from defendant's testimony herein, and that plaintiff is entitled to any and all of said sums of money so collected by defendant", and the judgment entered thereon that plaintiff "is entitled to judgment for the immediate delivery of any and all sums of money collected by defendant, and by him held for and on behalf of plaintiff" is quite uncertain as to the amount, to say the least. It refers to the testimony of defendant on this subject. We have examined the record and find that defendant testified that the division of profits ended with the execution of the quitclaim deed on November 15, 1949; that there was "less than" or "about" $75 came in for repair work after April, 1950; that a statement for repair work amounting to $1.50 had been mailed to a school district but said bill had not been paid. He then said that plaintiff was "entitled to $6.00" and that he was willing for plaintiff to "come and get those things", and "I am willing to give it to him". It may have been clear to the scrivener of the findings and judgment how much was due plaintiff under that testimony, but it certainly is not clear to this court what amount was intended by the judgment. This portion of the judgment is too *indefinite* and uncertain to be enforced. Hand v. Twin Falls County, 40 Idaho 638, 236 P. 536; 49 C.J.S., Judgments, § 76, page 198.

That portion of the judgment ordering defendant to deliver to plaintiff "all sums of money" held by him "for and on behalf of plaintiff" is reversed. The remaining portion of the judgment is affirmed. Each party to pay his own costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

107 Cal.App.2d 581

PEOPLE v. TENEDOR.

Cr. 4667.

District Court of Appeal, Second District,
Division 3, California.

Nov. 16, 1951.

Muning T. Tenedor was convicted by the Superior Court of Los Angeles County, Clement D. Nye, J., for unlawfully recording wagers on horse races, and from the judgment and sentence thereon, he appealed. The District Court of Appeal, Vallée, J., held that the evidence supported the conviction.

Appeal from sentence dismissed, and judgment affirmed.

1. Criminal Law 🔑1023(10)

An appeal does not lie from sentence on judgment of conviction.

2. Criminal Law 🔑1166(1)

The fact that criminal case was set for trial 40 days after entry of defendant's plea of not guilty did not compel reversal of judgment of conviction, as statute providing that court shall set date for trial not later than 30 days after entry of defendant's plea is directory and mere failure to comply with its terms does not entitle defendant to new trial. Pen.Code, § 1050.

3. Criminal Law 🔑576(5)

Continuance of criminal case, at defendant's suggestion, from date set for trial thereof 40 days after filing of information until 30 days later, constituted waiver of defendant's statutory right to be brought to trial within 60 days after filing of information. Pen.Code, § 1382.

4. Criminal Law 🔑573

The right to speedy trial of criminal case, as guaranteed by Constitution and given by code provisions, may be waived by defendant. Pen.Code, §§ 1050, 1382; Const. art. 1, § 13.

5. Criminal Law 🔑576(5)

An application to dismiss criminal prosecution, as for failure to bring defendant to trial within 60 days after filing of information, must be made in trial court in first instance, and, if not made there, right to dismissal is waived. Pen.Code, § 1382.

6. Gaming 🔑98(3)

Evidence supported conviction by court for unlawfully recording wagers on horse races. Pen.Code, § 337a, subd. 4.

7. Criminal Law 🔑913(1)

Defendant, whose attorney stated that they would waive time for sentence on conviction by court, which set date five days later for judgment and sentence and, on such date, ordered continuance at such attorney's request, until one week later, for argument on defendant's motion for new trial and application for probation, which were then denied and judgment pronounced, expressly waived benefits of statute entitling defendant to new trial if judgment is not pronounced within thirty days after conviction. Pen.Code, §§ 1191, 1202, 1203.

8. Criminal Law 🔑633(1)

A defendant in criminal action may waive benefits conferred on him by statutes.

9. Criminal Law 🔑1177

The trial court's failure to pronounce judgment on conviction of crime within statutory period of 30 days because of continuance of hearing on defendant's motion for new trial and application for probation until week after date set for judgment and sentence, as requested by defendant's attorney, was not reversible error, as defendant suffered no prejudice by extension of time and no miscarriage of justice resulted from delay in pronouncing judgment. Pen.Code, §§ 1191, 1202, 1203.

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Stanley L. Avery, Edward I. Gorman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Frank Richards and Gilbert Harelson, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

[1] Defendant was convicted by the court, a jury having been waived, of a violation of subdivision 4 of section 337 of the Penal Code—unlawfully recording wagers on horse races. He appealed from the judgment and sentence. As an appeal does not lie from the sentence, that appeal must be dismissed.

Defendant's assignments of error are: (1) he was denied a speedy trial in that the court did not set the case for trial within 30 days after the entry of the plea, and in that he was not brought to trial within 60 days after the filing of the information; (2) the evidence is insufficient to support the judgment; and (3) the court erred in denying his motion for a new trial in that he was not sentenced within 30 days from the time he was found guilty.

The information was filed December 13, 1950. Defendant was arraigned and pleaded not guilty on December 15, 1950. On that date the cause was set for trial on January 24, 1951. On the latter date the cause was called for trial, the parties stipulated that a jury be waived and that the case be submitted on the testimony taken and the exhibits received at the preliminary examination with the reservation that each side could produce additional testimony, whereupon the following occurred:

"Mr. Forno [Attorney for defendant]: * * * May I suggest the 23rd of February, your Honor?

"The Court: Very well, February 23rd."

On February 23, 1951, the cause was again called, both parties submitted the case without the production of any additional evidence, and the defendant was adjudged guilty.

[2] Penal Code section 1050, in pertinent part, reads: "The court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea of the defendant. * * *" The cause was set for trial 40 days after the entry of the plea. That fact, however, does not compel a reversal of the judgment. Section 1050 does not provide that the action shall be dismissed if the case is not set for trial for a date not later than 30 days after the date of entry of the plea. The section is directory and a mere failure to comply with its terms does not entitle defendant to a new trial. Ray v. Superior Court, 208 Cal. 357, 359, 281 P. 391.

[3–5] Penal Code section 1382, in pertinent part, reads: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * *

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information. * * *"

The cause was brought to trial on January 24, 1951, within 60 days after the filing of the information. Assuming, as defendant contends, that he was not brought to trial on January 24, the continuance from that date to February 23 was at the suggestion of defendant and constituted a waiver of his right to be brought to trial within 60 days after the filing of the information. The right to a speedy trial, guaranteed by the Constitution, Art. I, § 13, and given by the code provisions, may be waived by the defendant. Ray v. Superior Court, 208 Cal. 357, 358, 281 P. 391; People v. Scott, 74 Cal.App.2d 782, 784, 169 P.2d 970. No objection was made by the defendant to the proceedings had in the trial court. The application for dismissal must be made in the first instance in the trial court; and if it is not made there, the right is waived. People v. Newell, 192 Cal. 659, 669, 221 P. 622.

Harris v. Municipal Court, 209 Cal. 55, 285 P. 699, Rice v. Superior Court, 40 Cal. App.2d 391, 104 P.2d 874, and People v. Fegelman, 66 Cal.App.2d 950, 153 P.2d 436, relied on by defendant, are not in point. In the Harris and Rice cases the defendants were not brought to trial within 60 days and they had not consented to or acquiesced in the delay. In each of the cases relied on the defendant moved to dismiss the proceeding in the trial court. There is no merit in defendant's claim that he was denied the right to a speedy trial.

[6] On November 7, 1950, defendant was the attendant in a cigar store. His activities were observed by a police officer. Several men entered the store and looked at some newspapers dated November 7, 1950, which were open at sections containing horse racing entries and selections for that day. After referring to the newspapers the men handed something to defendant who

was behind the counter. Defendant then walked to one side of the counter and ducked down behind it out of sight for a short period of time. He would then reappear, walk to the other end of the counter, open the cash register, and place something inside. One of the men, after looking at one of the newspapers, took what appeared to be his billfold from his right hip pocket, opened it, took out a piece of paper, and handed it to defendant. On two occasions defendant came out from behind the counter, walked to an automobile parked in front of the store, entered on the passenger side, leaned toward the dashboard, and then reentered the store. Defendant was then placed under arrest and immediately thereafter the officer found eight betting markers, three of which had writing thereon, behind the counter at the position where defendant had ducked out of sight. The officer found two other betting markers behind the dashboard of the automobile, each of which had writing thereon. The handwriting on the betting markers was defendant's. On one of the betting markers behind the counter there appeared the letter "B," followed by the letters "Reg," followed by a "1–1" and a "C." The "B" and the "Reg" stood for Blue Regards, a horse running in the second race at Hollywood Park on November 7, 1950. The "1–1" stood for a $1 win and $1 place wager, and the letter "C" was the initial of the better. On another of the markers there appeared the letters "W-O-D-S-I-T-E," followed by two dots, and "Rom." This represented a wager on a horse named Woodside View running in the fifth race at Hollywood Park on November 7, 1950. The writing on the other betting markers also represented wagers on horse races.

Defendant did not take the stand in his own defense nor did he offer any evidence. The foregoing evidence and the reasonable inferences which may be drawn therefrom amply support the conclusion of the trial judge that the defendant was guilty of unlawfully registering wagers on horse races.

[7–9] Defendant was adjudged guilty on February 23, 1951, whereupon the following proceedings were had:

"Mr. Forno: We will waive time for sentence and ask permission to file written application for probation.

"The Court: March 28th, 9:00 o'clock a. m. for judgment and sentence."

On March 28, 1951, the following occurred:

"Mr. Forno: In this matter I ask that the matter go over one week. I have a motion for a new trial that I wish to make at this time.

"The Court: The record will show your motion for a new trial interposed at this time and order the matter continued until April 4th for argument."

Whereupon the hearing on the motion for a new trial, the application for probation, and the time for pronouncing judgment and sentence were continued to April 4, 1951. On April 4, 1951, the motion for a new trial and the application for probation were denied and judgment was pronounced.

Penal Code section 1191, in pertinent part, reads: "After a plea or verdict of guilty * * * the court must appoint a time for pronouncing judgment, which must be within 20 days after the verdict or plea of guilty, during which time the court shall refer the case to the probation officer for a report if eligible to probation and pursuant to Section 1203 of this code; provided, however, that the court may extend the time not more than 10 days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment, or of receiving the probation officer's report made pursuant to Section 1203 of this code." Section 1202 reads: "If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in section eleven hundred and ninety-one of this code, why judgment should not be pronounced, it must thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of section eleven hundred and ninety-one of this code, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same is continued under the provisions of section eleven hundred and ninety-one of this code then the defendant shall be entitled to a new trial." Defendant asserts that it was mandatory on the court to grant the motion for a new trial because judgment was not pronounced within 30 days after he was adjudged guilty. It is apparent that defendant expressly waived the benefits of the statute. It has long been settled that a defendant in a criminal action may waive the benefits which the statutes confer upon him. People v. French, 12 Cal.2d 720, 771–774, 87 P.2d 1014. Further, defendant suffered no possible prejudice by the extension of time and no miscarriage of justice resulted from the delay in pronouncing judgment. People v. Williams, 24 Cal.2d 848, 850, 151 P.2d 244.

The appeal from the sentence is dismissed. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

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107 Cal.App.2d 624

NEWTON v. LOS ANGELES TRANSIT LINES.

Civ. 18473.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1951.

Action by Maureen Newton against Los Angeles Transit Lines, a corporation, for injuries sustained in an accident on defendant's streetcar. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered a judgment for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the evidence sustained a finding that plaintiff did not rely on any statements of defendant's agent which caused her to delay in filing in her complaint until after the statute of limitations had run.

Affirmed.

1. Appeal and Error 🔑931(1)

In determining whether conflicting evidence sustained trial court's finding, appellate court was required to presume that evidence most favorable to respondent was true.

2. Limitation of Actions 🔑197(2)

In action for injuries sustained on defendant's street car, evidence sustained finding that plaintiff did not rely on any statement of defendant's agent which lulled her into sense of security and caused her to delay filing complaint until after statute of limitations had run. Code Civ.Proc. § 340, subd. 3.

3. Witnesses 🔑248(2)

Where plaintiff claimed she was not barred by limitations because she delayed filing complaint in reliance upon representation of defendant's agent, and court asked agent whether there was anything in the meantime that refreshed his recollection overnight, answer that he only knew that if he did say anything it was only to keep plaintiff from going to an attorney until defendant had turned down her demand, and that he never told any claimant not to go to an attorney at all, was properly stricken as not responsive.

4. Appeal and Error 🔑1047(3)

In action for injuries sustained on defendant's street car, striking from the record as not responsive testimony of defendant's agent that he only made representations to keep plaintiff from going to an attorney until such time as defendant turned down her demand and that he never told any claimant not to go to an attorney at all was not prejudicial error.

5. Evidence 🔑471(5)

In action for injuries sustained in accident on defendant's street car, wherein plaintiff claimed that she failed to file action timely because of representations of defendant, question as to what plaintiff's impressions were in relation to what defendant's agent told her as to her dealings with defendant was objectionable as asking for conclusion.

6. Evidence 🔑471(1)

Generally, witnesses must testify to facts and not to their opinions or conclusions.

7. Appeal and Error 🔑205

Where question to which objection is sustained does not itself indicate that answer to it will be favorable to party seeking to introduce testimony, before ruling will be reviewed by appellate court, offer of what is proposed to be proven must first be made so reviewing court can determine whether proposed evidence would have been material and beneficial to party offering it.

8. Trial 🔑46(1)

In action for injuries sustained in accident on defendant's street car wherein plaintiff claimed that she failed to file action timely because of representation of defendant's agent, question asking plaintiff what her impressions were in relation to what defendant's agent told her as to her dealings with defendant, did not indicate that answer would be either material or beneficial to plaintiff, and hence objection was properly sustained in absence of offer of proof as to effect.

9. Appeal and Error 🔑1048(1)

In action for injuries sustained in accident on defendant's street car wherein plaintiff claimed that she failed to file action timely because of representations of defendant's agent sustaining objection to question asking plaintiff what her impressions were in relation to what agent told her as to her dealing with defendant was not prejudicial.

◆

Licker & Wallace, Los Angeles, for appellant.

Richard M. Gilliland and Robert C. Carlson, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury, in an action to recover damages for personal injuries, plaintiff appeals.

Facts: Plaintiff instituted the present action to recover for personal injuries arising out of an accident that occurred on one of defendant's streetcars on October 20, 1948.

The complaint was filed November 16, 1949. In an endeavor to avoid the bar of the statute of limitations, Section 340, subdivision 3 of the Code of Civil Procedure,[1] plaintiff alleged in substance that defendant's agent advised and assured plaintiff that the defendant was liable for the accident; that defendant would assume complete liability for the accident and reimburse plaintiff for all medical expenses, loss of income and other expenses in connection with the accident, and that it would be unnecessary for plaintiff to consult an attorney; that defendant carried on negotiations for settlement with plaintiff until October 25, 1949, and plaintiff relied upon said representations and was lulled into a sense of security and therefore did not file an action sooner.

Defendant raised the affirmative defense that the cause of action was barred by the provisions of the Code of Civil Procedure above mentioned. After taking evidence the trial court sustained defendant's defense that the statute of limitations had run and made a finding accordingly.

Questions: First: *Was there substantial evidence to sustain the trial court's finding that the statute of limitations barred plaintiff's cause of action?*

[1,2] *Yes.* There was a conflict in the evidence. Therefore we must presume that the evidence most favorable to defendant

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[1] Section 340, subdivision 3, Code of Civil Procedure reads:
"An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized indorsement."

(respondent) is true. In addition to other evidence Mr. Burgess, defendant's agent, testified (a) that his last communication with plaintiff relative to a settlement was May 26, 1949; (b) denied ever telling plaintiff defendant was liable for the accident; (c) denied telling plaintiff defendant would assume complete liability for the accident or reimburse her for special damages, pain and suffering; (d) denied telling plaintiff it would be unnecessary for her to consult an attorney. This was substantial evidence to sustain the trial court's finding that plaintiff did not rely on any statements of defendant's agent which lulled her into a sense of security and caused her to delay filing a complaint until after the statute of limitations had run.

Second: *Did the trial court commit prejudicial error in striking from the record certain testimony of Mr. Burgess?*

[3, 4] *No.* During the course of the examination of Mr. Burgess the following occurred:

"The Court: * * * Is there anything in the meantime that has refreshed your recollection overnight?

"Mr. Waters: May I say something, if your Honor please?

"The Court: After he answers my question.

"A. Well, your Honor, I only know that if I did say such a thing it was only for the purpose of keeping her from going to an attorney until such time as we turned down her $500 demand. And I have never told any claimant not to go to an attorney at all.

"The Court: That may all be stricken as not responsive to any question that I asked."

Clearly the trial court's ruling was correct. The answer given by Mr. Burgess was not responsive to the question asked by the trial judge.

Third: *Did the trial court commit prejudicial error in sustaining an objection to the following question asked plaintiff?*

"Q. What were your impressions in relation to what Mr. Burgess told you as to your dealings with the Los Angeles Transit Lines?"

[5–9] *No,* for two reasons: (1) The question called for a conclusion of the witness. There is a general rule that witnesses must testify to facts and not to their opinions or conclusions (Clapp v. Churchill, 164 Cal. 741, 747, 130 P. 1061; Parker v. Otis, 130 Cal. 322, 331, 62 P. 571); (2) Where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed by an appellate court, an offer of what is proposed to be proven must first be made to the trial court so the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it. (Estate of Hunt, 33 Cal.App.2d 358, 360 et seq., 91 P.2d 609.) In the instant case the question to which objection was sustained did not indicate the answer would be either material or beneficial to plaintiff nor was any offer of proof made.

Affirmed.

MOORE, P. J., concurs.

108 Cal.App.2d 12

WILKINS v. WILKINS.

Civ. 4196.

District Court of Appeal, Fourth District, California.

Dec. 4, 1951.

Della Louisa Wilkins sued Albert John Wilkins for a divorce. From an order of the Superior Court of San Bernardino County, Martin J. Coughlin, J., denying defendant's motion to vacate and recall a writ of execution on a decree granting plaintiff a divorce and requiring defendant to make monthly payments for the support of plaintiff and the parties' minor children, defendant appealed. Plaintiff moved to dismiss the appeal. The District Court of Appeal, Griffin, J., held that delay in perfecting the appeal because of defendant's attorney's notice to the Superior Court clerk not to transmit the transcript until ordered by such attorney to do so was inexcusable.

Motion granted.

1. Divorce ⇐283, 312.5

Where no service of copy of notice to Superior Court clerk to prepare transcript on husband's appeal from order denying his motion to vacate and recall writ of execution on divorce decree requiring him to make monthly payments for support of wife and parties' minor children was made on wife's attorney, and failure to transmit transcript to District Court of Appeal was not fault of Superior Court or clerk thereof, but result of husband's attorney's request that clerk hold transcript until such attorney ordered transmission thereof, appeal may be dismissed. Rules on Appeal, rules 5(a), 10(a).

2. Divorce ⇐285, 312.3

A divorced husband's delay in perfecting appeal from Superior Court's order, denying his motion to vacate and recall writ of execution on divorce decree for support money due wife thereunder for five years, because of Superior Court clerk's compliance with husband's attorney's request to hold transcript until ordered by such attorney to transmit it to District Court of Appeal, by reason of claimed settlement being negotiated between parties in another action or proceeding, was inexcusable so as to require dismissal of appeal on wife's motion. Rules on Appeal, rules 5(a), 10(a).

◆

Harry V. Leppek, Los Angeles, for appellant.

Waldo Willhoft, San Bernardino, for respondent.

GRIFFIN, Justice.

This case is not a stranger to this court. See Wilkins v. Wilkins, 95 Cal.App.2d 605, 213 P.2d 748; Wilkins v. Wilkins, 95 Cal.App.2d 611, 213 P.2d 752; and Wilkins v. Wilkins, 100 Cal.App.2d 730, 224 P. 2d 371.

It appears from the certificate of the clerk of the Superior Court that appellant Albert John Wilkins did, on May 10, 1951, file a notice of appeal from an order of the Superior Court entered on March 14, 1951, denyng his motion to vacate and recall a writ of execution. Notice of such order was given to the attorney for defendant by mail on the same day. On May 21, 1951, defendant gave notice to the clerk to prepare a clerk's transcript. The transcript was prepared but was not forwarded to the District Court of Appeal because of "the request of Mr. Leppek", attorney for defendant, that the clerk hold it until he ordered it transmitted to this court.

Thereafter, on November 13, 1951, plaintiff moved to dismiss the appeal on the grounds: (1) that no notice to prepare a clerk's transcript was served upon plaintiff as required by Rule 5(a) of the Rules on Appeal; (2) that appellant has not prosecuted the appeal with reasonable diligence; and (3) that the notice to prepare a clerk's transcript was not filed within the time prescribed by Rule 5(a) of said rules.

[1] Apparently no service of a copy of the notice to prepare transcript was made on the attorney for plaintiff. It appears now that counsel for the defendant is ready to file the clerk's transcript without the plaintiff having the opportunity under Rule 5 to have included in said transcript such papers and records as she might desire. It affirmatively appears that counsel for defendant did notify the clerk of the court not to immediately transmit the transcript to the reviewing court and that such failure to do so was the fault of counsel for appellant and not of the court or the officer charged with that duty. Under rule 10(a) of the Rules on Appeal, the proceeding therefore may be dismissed.

[2] Defendant endeavors to justify his delay and neglect by reason of some claimed settlement the parties were attempting to negotiate between them in another action or proceeding, and contends that he was awaiting the outcome of such a settlement before perfecting his appeal. Counsel for plaintiff states that nothing in that proceeding is dependent on the

outcome of this appeal but that the appellant in the instant action is only endeavoring to further prolong the time for collection of support money due her from 1943 to 1948 under the decree of the court, and that these several appeals have worked a hardship on her due to her being destitute and having to rely on relatives and friends to exist.

The question on appeal which appellant desires to present is whether or not the court abused its discretion in allowing plaintiff $1550 of the total amount claimed. As will appear from the facts recited in the former opinions, this litigation should terminate at some appropriate time. The delay in perfecting the appeal, under the circumstances, appears to be inexcusable and might well indicate it was instituted for the purpose of effecting a compromise or settlement or to further harass the plaintiff.

Motion to dismiss appeal granted.

BARNARD, P. J., and MUSSELL, J., concur.

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107 Cal.App.2d 642

BALES v. FARLEY et al.

Civ. 4152.

District Court of Appeal, Fourth District, California.

Nov. 21, 1951.

Action by Clarence A. Bales against Jean Farley, wherein the plaintiff recovered a judgment. The judgment being unsatisfied, plaintiff levied a writ of execution on an automobile. Orville A. Oman filed a third party claim alleging that the automobile was his separate property. The Superior Court, Orange County, Raymond Thompson, J., declared automobile to be community property, and the third party claimant appealed. The District Court of Appeal, Griffin, J., held that the evidence sustained finding that automobile was the community property of the defendant and the third party claimant, who were husband and wife.

Order and judgment affirmed.

1. Husband and Wife 🔑262(1)

Presumption that all property acquired by husband or wife after their marriage is community property, is a rebuttable one.

2. Appeal and Error 🔑1008(1)

Whether evidence, adduced to overcome presumption that all property acquired by husband or wife after marriage is community property, is sufficient for purpose is usually question for trial court to determine.

3. Husband and Wife 🔑249

Generally, where commingling of separate property with community property is such that it is impossible to trace funds, the whole will be treated as community property, upon the principle that the burden is upon spouse claiming property as separate property to establish its character as such, unless community interests or funds are inconsiderable or where separate property can still be traced. Civ.Code, §§ 170, 687.

4. Husband and Wife 🔑262(1)

Presumption is that monies borrowed during marriage become community property.

5. Appeal and Error 🔑901, 1010(1)

Findings on community interest in property are invariably accepted by reviewing court if there is some evidence to sustain them, and to prevail against them, appellant must show that there is no other inference, as a matter of law, than that the disputed property was separate property of appellant.

6. Husband and Wife 🔑264

True situation, in rebuttal of presumption that all property acquired by husband or wife after their marriage is community property, can be shown by circumstantial as well as direct evidence. Civ.Code, § 164.

7. Husband and Wife 🔑264

In proceeding by judgment creditor against judgment debtor to enforce unsatisfied judgment through levy of writ of execution on automobile, wherein defendant's husband, by marriage which took place after recovery of judgment, filed third party claim alleging that automobile was his separate property, evidence sustained finding that the automobile was community property of the husband and wife. Civ. Code, §§ 170, 687.

◆

Martell Thompson, Orange, for appellant.

Willis J. Clemons, Santa Ana, for respondent.

GRIFFIN, Justice.

Appellant Orville A. Oman married defendant Jean Farley on October 16, 1948. Prior thereto respondent obtained a judgment against defendant Farley for $1512.26, which judgment was unsatisfied. Subsequent to the marriage, on July 28, 1949, a writ of execution in that amount was levied on the automobile here involved and appellant filed a third party claim alleging that it was separate property.

The facts show that on November 3, 1948, appellant purchased a Ford automobile on contract for $1634.88, payable $600 down and the balance in monthly payments. A check for $600 was drawn on appellant's bank account which he had opened prior to the time of his marriage. There was not sufficient funds in the account to meet the check in full at that time so, on November 4, Mrs. Oman deposited $285 to that account to meet the check on its presentation. On November 17, appellant closed that account and opened a joint account with his wife in the same bank. At the time of and subsequent to the marriage, appellant was employed and had a "take-home" pay of $250–$270 per month. His wife was employed until Christmas of that year at $160 per month. All of their earnings and other monies received after marriage were deposited in the joint account. Mrs. Oman made five payments to the bank on the conditional sales contract from this checking account, which payments totaled $358.48. On May 14, 1949, Mr. Oman made the final payment of $899.70 on the contract. After hearing the trial court made an order finding that the automobile was not the separate property of the third party claimant but that it was community property of the claimant and his wife.

[1, 2] In support of the order and judgment respondent cites the well-established rule in California that the presumption exists that all property acquired by the husband or wife after their marriage is community property; that the burden is on one who disputes the application of that principle to affirmatively prove that such property is in fact separate property, and that when separate and community properties are so commingled that it is impossible to identify them or trace the funds, the whole must be deemed to be community property. Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714. The presumption is, of course, a rebuttable one. Whether the evidence adduced to overcome the presumption is sufficient for the purpose is usually a question for the trial court to determine. Wilson v. Wilson, 76 Cal.App.2d 119, 125, 172 P.2d 568.

It is appellant's position that the uncontradicted evidence shows that at least a considerable portion of the money that went into the purchase of the automobile was the separate property of appellant and, accordingly, appellant as the husband had a separate property interest in the automobile, at least to the extent of the down payment and in the proportion that the down payment bears to the total purchase price. He argues that the commingling of separate and community funds does not cause each to lose their respective characters if such funds can be traced and identified, citing Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; 3 Cal.Jur.Ten-Yr.Supp. p. 504, Sec. 26.

Appellant testified that he bought a Dodge car in 1946 for $650, and did not trade it in on the Ford car here involved because they would not allow him enough on it, and that he held it a while, fixed it up, and finally sold it to his parents for $350,—$150 down and the balance in payments "strung out"; that he deposited that money in his bank account and made payments on the Ford with it. He testified he obtained $300 from his brother; that his wife deposited $285 of that amount to his bank account to meet the $600 check issued the day before as a down payment on the Ford car; that he had about $800 before he went into the service in 1943, gave it to his parents to hold; that if he did not come back he intended it to be theirs to keep and if he did come back they should pay it back to him "as they wish"; that he sent home about $1700 in allotments and gambling winnings while he was in the service; that his parents used it and invested it in real estate; that he entrusted his brother with this money (which had been turned over to him by his parents) to go into the plumbing business with appellant, but that they never did go into business; that he received a check from his brother when he bought the car, for $300, which was a return of a portion of that money; and that he received $1100 from him when he paid off the final payment on the car in May, 1949. On cross-examination it was shown that the check for $300 was not deposited with the bank as indicated by appellant. There was a deposit of $285 on that date. Appellant's brother testified he gave appellant $1100 in May, 1949, which was money he owed him. He testified that as between his parents and his brother he kept no books or record of accounts but mentally figured that this was the amount due to appellant.

Apparently the court believed that the money turned over to appellant after his marriage was money borrowed by appellant from his brother, or that appellant did not sufficiently trace the funds deposited in the joint account which were claimed to be his separate property, or that they were so commingled with the community funds that they did not sufficiently retain their separate character.

There is considerable documentary evidence indicating that appellant and his wife treated the Ford car, as well as the Dodge car, after repairs made thereon, as their community property. Although the Ford car was purchased in appellant's name, the "purchasers or borrowers" statement to the bank gave the name of appellant's wife as a "source of other income" and stated that appellant would be assisted by her in making the contract payments. Appellant admittedly was delinquent in payments on several occasions. Appellant's wife, at appellant's suggestion, in January, 1949, wrote to the bank, to whom the contract had been assigned, stating:

"In regard to our loan, No. AD-3-7875, which is past due, we put some money into a '37 Dodge which we own, having it reupholstered. It is now for sale.

"We will send you two months payment on the loan by Feb. 3, 1949, or sooner if we sell the car.

"Regardless of whether we sell the car or not we will send you $143.40 by Feb. 3rd * * *."

Later she sent a letter to the bank as follows: "We will mail you a check by May 11, for payment on our account * * *."

In April, appellant wrote: "In regard to your request for a receipt for our license fees—we sent them in * * *. Please advise us for whatever help we may give you * * *."

Later Mrs. Oman wrote the bank and asked that "* * * our acct.—loan * * *" be changed to the "Santa Ana Branch".

[3, 4] Section 170 of the Civil Code provides that neither the separate property of the husband nor his earnings after marriage are liable for the debts of the wife contracted before marriage. Sec. 687 thereof provides that community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either. The general rule is that where the commingling of the separate property with the community property is such that it is impossible to trace the funds, the whole will be treated as community property, upon the principle that the burden is upon the spouse claiming the property as separate property to establish its character as such, unless the community interests or funds are inconsiderable or where the separate property can still be traced. Estate of Bauer, 79 Cal.

304, 21 P. 759; 5 Cal.Jur. 298, sec. 16; 3 Cal.Jur.Ten-Yr.Supp. p. 524, sec. 40. In 3 Cal.Jur.Ten-Yr.Supp. p. 535, sec. 47, the presumption that monies borrowed during the marriage become community property is discussed. It is there stated: "Money borrowed on personal security is certainly community property. But where money is borrowed upon the faith of the separate property of a husband or property is acquired with the proceeds of a loan on the credit of his separate property, it becomes his separate property"; and that property purchased with money borrowed by a married man or woman without security and repaid with community funds is deemed to be community property.

Under the confused testimony of appellant as to how he acquired the funds and as to the nature of the payments or loan by the brother to appellant, the court apparently believed the payments to be a loan, to be repaid from community funds.

[5, 6] It is true that under the evidence the trial court might well have held that the bulk of the funds used in the purchase of the car was traceable as the separate funds of the appellant. However, that is not the question before us. Findings on community interest are invariably accepted if there is some evidence to sustain them, and to prevail against them, appellant must show that there is no other inference, as a matter of law, than that the disputed property was the separate property of the appellant. Estate of Kane, 80 Cal.App.2d 256, 266, 181 P.2d 751. The true situation in rebuttal of the presumption created by sec. 164 of the Civil Code can be shown by circumstantial as well as by direct evidence, and the inferences to be drawn from the evidence are for the trier of facts to determine so long as those inferences find reasonable support in the evidence given. Nichols v. Mitchell, 32 Cal.2d 598, 609, 197 P.2d 550.

[7] We conclude that the questions involved, aided by the allowable presumptions, were factual questions for the trial court to determine. There is sufficient evidence to support the order and judgment. Estate of Kane, supra; Couts v. Winston, 153 Cal. 686, 96 P. 357; Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734; In re Boody's Estate, 113 Cal. 682, 45 P. 858; Estate of Sehabiague, 47 Cal.App.2d 793, 119 P.2d 30; Miller v. Brode, 186 Cal. 409, 199 P. 531; Opp v. Frye, 70 Cal.App.2d 478, 161 P.2d 235; Heck v. Heck, 63 Cal.App.2d 470, 147 P.2d 110.

Order and judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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107 Cal.App.2d 627

PEOPLE v. SELTZER.

Cr. 4686.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1951.

Rehearing Denied Nov. 28, 1951.

Hearing Denied Dec. 18, 1951.

Jacob Seltzer was convicted in the Superior Court, Los Angeles County, Philip H. Richards, J., of arson and of setting a fire to his store to defraud his insurers, and he appealed. The District Court of Appeals, McComb, J., held that the evidence was insufficient to sustain the conviction.

Reversed.

Arson 🔑37(1)

Evidence was insufficient to sustain conviction of arson and violation of Penal Code section prohibiting setting fires to defraud insurers. Pen. Code, § 450a.

◆

Jerome Weber, Los Angeles, Jack Altman, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty, after trial before a jury, of arson and violation of section 450a of the Penal Code[1], defendant appeals. There is also an appeal from the order denying his motion for a new trial.

Viewing the evidence in the light most favorable to the people (respondent) the essential facts are these:

On March 3, 1950, defendant was the owner of the Great Avalon Market in Los Angeles. At the time he acquired it insurance was transferred from another store which he had operated. This insurance expired on May 5, 1950. On this date defendant secured from the Northwestern National Insurance Company two insurance policies, one of which insured the equipment in the store for $2,000, the other insured the stock for $7,500. On October 26, 1950, defendant took out additional insurance in the amount of $2,500 on the stock and $4,500 on the furniture and fixtures with the Buffalo Insurance Company. On November 30, 1950, the policy on the furniture and fixtures with the latter company was increased by $1,000, thus making the total of the insurance on the furniture and fixtures $7,500 and on the stock $10,000.

On December 21, 1950 Leander Joseph Tenette, an employee of defendant, arrived for work at the store. In the afternoon defendant told him that he was going to have dinner with his son and wanted to close the store on time, which was 7 p. m.; he also told Mr. Tenette since he lived in the direction he was going he would give him a ride home. Only once before had defendant driven Mr. Tenette home. Shortly before 7:00 o'clock Mr. Tenette took the money from the cash register, put it into separate paper sacks according to its denomination, and gave the sacks to defendant who walked with it in the direction of the safe which was in the rear of the store.

Defendant was out of Mr. Tenette's sight about a minute. Defendant then went into the stockroom at the rear of the store; came out of the stockroom and went to the light switches which were located in the rear of the store below and between two mezzanine balconies; turned out some of the lights and as he left the switch he noticed that some of the lights were still on. He then asked Mr. Tenette to help him turn them off and Tenette joined him at the switches and turned off all but one light, which it was customary to leave on all night.

Defendant then went to the burglar alarm switch, which was recessed in the front end of the meat counter. This was turned on and it rang, which indicated that not all of the burglar alarm traps had been set. Mr. Tenette looked over the traps and found two of them near where he was at the check stand that were not set. He set them and told defendant to try it again and heard no further ringing of the alarm.

Defendant and Mr. Tenette then proceeded to the front door; when they got there defendant however without saying anything turned, went back into the store and in about thirty seconds returned to the door with a paper sack in his hand which Mr. Tenette had last seen on the check stand of the store. Defendant locked the store; they got into his car about 7:04 p. m.; he then drove Mr. Tenette to the corner of 46th and Avalon. About 7:13 p. m. a fire broke out at the Great Avalon Market. When the firemen arrived there were flames at the approximate center rear wall of the market in the vicinity of the light switch. One of the firemen found in the storeroom of the building, about two minutes after he arrived, a small pile of burning embers.

An expert for the Arson Bureau testified that the main fire in his opinion had its origin in some cardboard containers beneath the light switch, and that though it might have been caused by defective electrical connections, and though he could not actually determine what had caused the fire, it was his opinion that it had been caused by a flame being applied to combustiles by human hands. He also testified that his examination of the second fire led him to believe that it was the result of a flame applied to combustible cardboard containers by human hands. An examination of the burglar alarm showed that the switch was open.

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[1] Section 450a of the Penal Code reads: "Any person who willfully and with intent to injure or defraud the insurer sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any goods, wares, merchandise or other chattels or personal property of any kind, whether the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire, shall upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than five years".

At about 10:40 p. m. on the night of the fire defendant and his wife arrived at the store. He asked Mr. Tobey, a co-owner of the building in which the store was located, what had happened to which Mr. Tobey responded "Can't you see?"

Defendant stated upon questioning by an investigator that he was the sole owner of the grocery department and he had paid $7,500 as a total consideration for the store including fixtures. He also told of the increase in insurance which he had made, stating that he grossed around $6,000 a month and took $400 to $450 monthly from the business. The fireman then asked defendant if he would like to walk into the store and see where the fire had occurred to which he replied that he would.

Defendant led the way into the store walking down the aisle in front of the meat department; he proceeded to a spot directly opposite the second fire and looked down at the floor, which had been cleaned of any evidence of fire except a bit of char on the wall. They asked what he was stopping for and he said, "I don't know; I am just stopping." He was asked what he was looking at and he said, "I don't know; I am just looking."

Defendant was further interrogated as to his income and his income tax return, and finally he said, "Gentlemen, if you want any other information you can talk to my accountant Efron." After consultations the accounts disclosed that there were discrepancies between actual figures and the statements made to the firemen by defendant. Also defendant had stated to the investigators that he had closed the burglar alarm switch before leaving the store on the night of the fire.

Question: Was there substantial evidence to sustain the verdict of guilty and the judgment predicated thereon?

No. While there is some competent evidence in the record which would with more tangible proof warrant a conviction, a reading of the record discloses no fact or combination of facts which would justify a finding that defendant caused in any manner either or both of the fires which took place in his store. Therefore the verdict and judgment are predicated upon mere suspicion and conjecture. The record is devoid of substantial evidence to sustain the judgment.

Reversed.

MOORE, P. J., concurs.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

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107 Cal.App.2d 635

PEOPLE v. DARLING.

Cr. 4663.

District Court of Appeal, Second District,
Division 3, California.
Nov. 21, 1951.

William F. Darling was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of incest and from an order denying his motion for a new trial and from the judgment defendant appealed. The District Court of Appeal, Parker Wood, J., held that refusal of trial judge to suspend criminal proceedings and to submit to jury in a special trial the issue of defendant's sanity was not an abuse of discretion.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law 🔑625

Under statute providing that if at any time during pendency of an action and prior to judgment a "doubt" arises as to sanity of defendant, court must order question of his sanity determined by a trial, and, from time of such order, all proceedings in criminal prosecution shall be suspended until question of sanity of defendant has been determined, "doubt" referred to is a doubt which arises in mind of trial judge, rather than in mind of a third person. Pen.Code, § 1368.

See publication Words and Phrases, for other judicial constructions and definitions of "Doubt".

2. Criminal Law ⚿625

Under statute providing that if at any time during pendency of action and prior to judgment a doubt arises as to sanity of defendant, court must order question of his sanity determined by a trial and, from time of such order, all proceedings in criminal prosecution shall be suspended until question of sanity of defendant has been determined, in absence of doubt which arises in mind of trial judge, rather than in mind of third person, trial judge is not warranted in ordering special proceeding. Pen. Code, § 1368.

3. Criminal Law ⚿1152(1)

Under statute providing that if at any time during pendency of an action and prior to a judgment a doubt arises as to sanity of defendant, court must order question of his sanity determined by a trial and from time of such order, all proceedings in criminal prosecution shall be suspended until question of sanity of defendant has been determined, trial judge's determination as to whether such doubt has arisen will not be disturbed on appeal except under circumstances where a doubt may be said to appear as a matter of law, or where there has been an abuse of the discretion which is vested in the trial judge. Pen.Code, § 1368.

4. Criminal Law ⚿625

Under statute providing that if at any time during pendency of action and prior to judgment a doubt arises as to sanity of defendant, court must order question of his sanity determined by a trial and, from time of such order, all proceedings in criminal prosecution shall be suspended until question of sanity of defendant has been determined, "insanity" referred to is insanity in sense that defendant is not capable of understanding nature and object of proceedings against him and cannot conduct his defense in a rational manner. Pen.Code, § 1368.

See publication Words and Phrases, for other judicial constructions and definitions of "Insanity".

5. Criminal Law ⚿625

Where attorney for defendant did not assert at any time during trial that defendant was incapable of understanding proceedings against him or that defendant could not conduct his defense properly, and it did not appear that a doubt arose in mind of trial judge as to present sanity of defendant, in view of statements of physicians to effect that defendant was of normal intelligence, and of testimony of defendant at preliminary examination and all other evidence, refusal of trial judge to suspend criminal proceedings and to submit question of defendant's sanity to a jury in a special trial was not an abuse of discretion. Pen.Code, § 1368.

6. Criminal Law ⚿311

A person charged with a crime is presumed to be sane until contrary is established by a preponderance of the evidence.

7. Criminal Law ⚿494

Although physicians who had examined defendant were of opinion that defendant was insane at the time the offenses were committed, trial judge was not required to accept those conclusions. Pen.Code, § 1368.

8. Criminal Law ⚿494

The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion.

◆

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with the crime of incest in two counts. He pleaded not guilty and also not guilty by reason of insanity. Trial by jury was waived. He was adjudged guilty on both counts. Evidence was then received on the issue of insanity, and the court found that defendant was sane at the time of the commission of the offenses and at the time of trial. Defendant appeals from the judgment, sentence, and order denying his motion for a new trial.

Appellant contends that the court erred in not submitting the issue of appellant's insanity "to a special trial" as directed by section 1368 of the Penal Code. He argues, in substance, that there was substantial evidence to create a doubt as to defendant's sanity at the time of trial and therefore the court was required to suspend the criminal proceedings and to order the question as to defendant's present sanity be determined in the manner provided in said section 1368.

At the time defendant entered his plea of not guilty the court appointed a physician, pursuant to section 1871 of the Code of Civil Procedure, to examine the defendant and report his findings to the court. Said section provides in part that whenever it shall be made to appear to the court, either before or during trial, that expert evidence will be required the court may appoint one or more experts "to investigate and testify" relative to the matter as to which such expert evidence will be required. About three weeks after entering the plea of guilty, defendant entered the additional plea that he was not guilty because he was insane at the time he was alleged to have committed the offenses. The court thereupon appointed a physician from the medical staff of a state hospital, pursuant to section 1027 of the Penal Code, to examine the defendant as to his sanity and to make a report regarding his mental condition to the court. At the trial the complaining witnesses, who were daughters of the defendant, were called as witnesses by the People and testified, in substance, that the defendant had acts of sexual intercourse with them on or about the dates charged in the information. The defendant did not testify. By stipulation, the testimony of the defendant given at the preliminary hearing was read into the record on behalf of the People. That testimony was, in substance, that defendant wished to waive the preliminary hearing and to plead guilty; that he had talked the matter over with his attorney who advised him as to his constitutional rights; he (defendant) was acting freely and voluntarily; and that he had had acts of sexual intercourse with the daughters at the times alleged in the information. Then the court adjudged defendant guilty as charged in both counts. The court then said, "Now we come to the defense interposed of not guilty by reason of insanity." It was stipulated that the medical reports of the two physicians, who had been appointed by the court, might be considered by the court "with the same force and effect" as if the physicians had appeared in court and testified.

The judge thereupon said that he had read the conclusions in one of the medical reports and that the conclusions of that physician were that the defendant was insane at the time of the commission of the crimes and also at the time of the examination by the physician. The court then read from said report as follows: "The defendant has a serious defect of judgment. His offense is suggestive of sexual psychopathy but is not so much a psychological deviation as a moral deviation which signifies mental deterioration. He should have a spinal fluid examination because there is a possibility of syphillitic paresis." It appears from a reference to other portions of that report (which report is in the original file in the county clerk's office) that defendant was depressed but his orientation and memory were normal, he had no delusions or hallucinations and his intelligence was probably normal. The judge then referred to the other medical report, which had been made by the physician from the state hospital, and read therefrom the physician's opinion which was as follows: "That this defendant is insane at the present time. He shows moderate to severe emotional and mental depression accompanied by agitation. It is further the examiner's opinion that this man was irresponsible and did not fully appreciate the difference between right and wrong, the nature and consequences of his acts at the time of the alleged crimes. He could be classified as a sexual psychopath under the provisions of Section 5500 of the Welfare and Institutions Code as he is afflicted in such a form predisposing to commission of sexual offenses and in a degree constituting him a menace to the health or safety of others due to his mental disease or disorder. He is in need of supervision, care and treatment in a hospital setting. He is certifiable as mentally ill."

Counsel for the People and for the defendant then presented arguments to the court regarding the weight which should be given to said medical reports. Counsel for defendant stated that the physician from the state hospital is a recognized psychiatrist and that he thought his conclusions should be given great weight, but that if there was "any doubt in the court's mind, I think that these doctors should be called to testify and perhaps another doctor appointed, but I don't think that their findings should be rejected without further testimony." The court then directed counsel for the People to subpoena the physician from the state hospital and continued the trial on the issue of insanity to a later date.

Thereafter, upon the further trial of that issue, the said physician, who is the medical director of the Norwalk State Hospital, was the only witness. He testified in substance, regarding the medical report he had made, as follows: All the facts which he set forth in his report were obtained from the defendant; defendant stated he finished high school and studied engineering 1½ years in a correspondence school; defendant stated that the last job he had was with a plumbing and heating company where he worked as a draftsman, mechanical engineer, and estimator; that defendant's personal history, as shown by the witness' report, does not indicate insanity but it "goes to show" that defendant did not make a good adjustment—at an early age he was "in court" and in a state school for boys, he then was "taken" by an aunt but he ran away, and his military record was not good—"he deserted"; those things show a maladjustment in personal stature but not insanity; there was nothing of significance in the portion of the witness' report relating to diseases and injuries which would indicate insanity; defendant was a "bit evasive" about sex history, and the witness was not too well satisfied with defendant's response; the defendant's actions were influenced by several factors —one factor may have been an absurd sort of rationalization on the part of defendant that, as he told the witness, he had the incestuous relations to keep the daughters from running around with boys; the witness asked the defendant whether he thought the relation was right or wrong, and the defendant "agreed he should not have done it, but he did not want to lose his daughters"; the witness believed that the defendant, in a mechanical sort of way, knew the relation was wrong; due to the defendant's mental disease the witness thought that the defendant is dangerous in a sex way; and in the opinion of the witness the defendant was insane at the time the witness examined him. He testified further that it would be hard for the witness to say definitely that the defendant had been insane for the past 10 years (the period during which the defendant, according to the testimony of one of the daughters, had committed the offenses against her); defendant's history is that of a rather unstable individual and the witness would say that for the past few years the defendant was abnormal enough to be spoken of as a psychopath individual, even perhaps insane; the defendant also has some symptoms of an organic brain disease, such as memory defect,—that the defendant definitely has some difficulty with his memory. The witness testified further that he was not much in doubt as to defendant's intelligence—he has good intelligence. The judge then asked the witness the following question: "If it were not for this peculiar and abnormal activity, sex activity, would you still say he was insane?" The witness replied as follows: "If I didn't have a chance to talk to him relative to the way he faced the sex situation, and the way he handled it, I doubt—in other words, I mean that the sex feature of this, the nucleus of this whole thing, his sex activity, his abnormal behavior—in that way I doubt that I would have called him insane. I would have said that he was definitely depressed and probably suffering from involution psychosis, but I doubt I would have said he was insane." The court then heard further arguments by counsel, and it found that defendant was sane at the time of the commission of the offenses and at the time of trial.

[1–5] As above stated, appellant contends that the court erred in not submitting the issue of appellant's insanity "to a special trial" as directed by section 1368 of the Penal Code. Section 1368 of the Penal Code provides as follows: "If at any time during the pendency of an action and prior to judgment *a doubt arises* as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined, and the trial jury in the criminal prosecution may be discharged, or retained, according to the discretion of the court until the determination of the issue of insanity." (Italics added.) The "doubt" referred to in that section is a doubt which arises in the mind of the trial judge, rather than in the mind of a third person. People v. Lindley, 26 Cal.2d 780, 789, 161 P.2d 227. In the absence of such doubt the trial judge is not warranted in ordering the special proceeding. People v. Hettick, 126 Cal. 425, 428, 58 P. 918. The judge's determination as to whether such "doubt" has arisen will not be disturbed on appeal except under circumstances where a doubt may be said to appear as a matter of law, or where there has been an abuse of the discretion which is vested in the trial judge. People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123. It is necessary that a defendant be mentally able to present his defense. There is a difference, however, between the medical view of insanity and the view upon which the statute is founded. In re Buchanan, 129 Cal. 330, 333, 61 P. 1120, 50 L.R.A. 378. Insanity referred to in said section 1368 is insanity in the sense that defendant is not capable of understanding the nature and object of the proceedings against him and cannot conduct his defense in a rational manner. See People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123. In the case just cited, it was said at page 399 of 14 Cal.2d, at page 565 of 94 P.2d: If a defendant "is capable of understanding the nature and object of the proceedings against him and can conduct his defense in a rational manner, he should be deemed sane for the purpose of being tried, though on some other subjects his mind may be deranged or unsound." The two physicians were of the opinion, as above shown, that the defendant was insane when the examinations were made. It does not appear, however, that the insanity referred to by them was insanity in the sense (referred to in section 1368) that the defendant was not capable of understanding the proceedings and could not conduct his defense in a rational manner. One physician said that defendant had "good intelligence," and the other physician said that defendant had no delusions or hallucinations and his intelligence was "probably normal." A person might be insane according to many definitions of the word and still be capable of understanding the nature and object of the proceedings against him and be able to conduct his defense in a rational manner. The attorney for the defendant did not assert at any time during the pendency of the action in the trial court that defendant was incapable of such understanding or that he could not conduct his defense properly. It does not appear that a doubt arose in the mind of the trial judge as to the present sanity of the defendant. In view of the statements of the physicians to the effect that defendant was of normal intelligence, and in view of the testimony of defendant at the preliminary examination and all the other evidence, it cannot be said, as a matter of law, that a doubt should have arisen in the mind of the trial judge that defendant was presently insane in the sense that word is used in section 1368 of the Penal Code. The trial court did not abuse its discretion in not suspending proceedings under the provisions of said section 1368.

[6–8] It seems that appellant is also contending that the evidence is insufficient to support the finding that he was sane at the time the offenses were committed. "[A] person charged with a crime is presumed to be sane until the contrary is established by a preponderance of the evidence." People v. Chamberlain, 7 Cal.2d 257, 260, 60 P.2d 299, 300. Although the physicians were of the opinion that defendant was insane at the time the offenses were committed, the trial judge was not required to accept those conclusions. As stated in People v. Martin, 87 Cal.App.2d 581, at page 584, 197 P.2d 379, at page 380: "The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion."

The purported appeal from the sentence is dismissed. See People v. Tallman, 27 Cal.2d 209, 215, 163 P.2d 857.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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107 Cal.App.2d 790

COLLINS v. NEAL et al.

Civ. 18404.

District Court of Appeal, Second District,
Division 2, California.

Dec. 3, 1951.

Action by Ivie Neal, also known as Ivie Anderson, against Marque Neal and another, to quiet title, establish a trust and partition realty held in joint tenancy. Upon plaintiff's death, Walter Collins, administrator of the estate of Ivie Collins, also known as Ivie Anderson, deceased, was substituted as party plaintiff. The Superior Court of Los Angeles County, Walter R. Evans, J., entered judgment in favor of defendant and an order denying a new trial, and plaintiff appealed. The District Court of Appeal, Per Curiam, held that findings that when original plaintiff executed grant deed conveying her realty to herself and defendant as joint tenants, she knowingly intended to convey a joint tenancy interest to defendant and that defendant had made no representations with intent to defraud or mislead her were supported by the evidence, notwithstanding presumption that grantor, who later obtained annulment of marriage, would not have executed deed had she known marriage to defendant was invalid.

Judgment affirmed and purported appeal from order denying new trial dismissed.

1. Joint Tenancy 🔑3

In action to quiet title, establish a trust and partition realty held in joint tenancy, findings that when plaintiff executed joint tenancy deed to defendant and herself, referred to therein as husband and wife, she knowingly intended to convey a joint tenancy interest to defendant and that defendant had made no representations with intent to defraud or mislead plaintiff, were supported by the evidence.

2. Deeds 🔑31

Reference in joint tenancy deed to grantees as husband and wife, whereas their marriage was invalid, was merely descriptive and surplusage and did not invalidate the deed by which owner conveyed realty to herself and supposed husband as joint tenants.

3. Appeal and Error 🔑1011(1)

In action to quiet title, establish a trust and partition realty held in joint tenancy, presumption that plaintiff, who subsequently obtained an annulment of marriage, would not have executed deed conveying her realty to defendant and herself as joint tenants, had she known their marriage was invalid, merely created a conflict in the evidence which showed that plaintiff knowingly intended to convey a joint tenancy interest to defendant, and trial court's determination of such conflict in defendant's favor was conclusive on appeal.

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Geo. W. Rochester, Chas. W. Rollinson, Los Angeles, for appellant.

Crispus A. Wright, Los Angeles, for respondent.

PER CURIAM.

This is an action to quiet title, establish a trust and to partition real property held in joint tenancy. From a judgment in favor of defendant, plaintiff appeals. There is also a purported appeal from the order denying a new trial.

The suit was originally instituted by Ivie Neal, also known as Ivie Anderson. Subsequent to the filing of the action she married Walter Collins. Before the cause could be brought to trial Ivie Anderson died and her husband was appointed administrator of her estate and was thereafter substituted as party plaintiff.

Plaintiff contends that the judgment is contrary to the evidence and against the law.

Defendant and Ivie Anderson entered into a purported marriage in Arizona on May 11, 1942. Ivie had been previously married to one William Johnson and at the time of her marriage to defendant, an interlocutory decree only had been entered in her divorce action against Johnson. She applied for and obtained a final decree of divorce from Johnson on December 4, 1942.

For some years prior to her marriage to defendant, Ivie Anderson had owned the property involved in this action. On March 5, 1946, she executed a joint tenancy deed, placing title therein in Marque C. Neal and Ivie Anderson Neal, husband and wife, as joint tenants. At about the same time two houses then on the premises were sold and removed and Ivie and defendant entered into a building contract for the erection of an apartment house. A down payment of $17,929 was made, the funds therefor having been withdrawn from their joint savings account, and a note for the unpaid balance secured by a trust deed was executed by Ivie and defendant. The furniture and furnishings were also paid for by monies withdrawn from the same joint account. After the building was completed rents received were deposited in that account and payments made on the trust deed note and on the purchase price of the furniture and monies for taxes and expenses were withdrawn from the joint account. Ivie and defendant separated in May, 1948, and on August 23, 1948, she obtained a judgment annulling their marriage.

Plaintiff asserts that all of the monies used in the construction of the apartment house and in purchasing the furniture and furnishings were Ivie's separate property; that all funds deposited in the joint savings account were traceable to either the proceeds of the sale of her separate property or her earnings as a singer and entertainer; that the joint tenancy deed executed by Ivie to herself and defendant as husband and wife "was clearly made under a misapprehension or mistake of law as to her marriage status"; that she was "led to believe" she was legally married to defendant and she relied upon defendant's representations that they would have a valid marriage if they were married outside the State of California; that the filing of the instant action "establishes an incontrovertible intent from which no other conclusion can be drawn other than that Ivie would never have signed the joint deed had she known the true legal status of her marriage and separate property;" that the fact she sought and obtained an annulment creates an undisputed presumption that she thought she had been legally married to defendant; since she believed they were married at the time she executed the joint tenancy deed to herself and defendant as husband and wife, it must be presumed she would not have executed the deed had she known the marriage was invalid.

Defendant testified he first met Ivie Anderson in 1940; he came to California from New York in 1941, and in June, 1941, he opened a restaurant which was known as "Ivie's Chicken Shack"; he paid the rent and made the down payment on the fixtures with his personal funds, executing a note in the amount of $1,600 for the balance; he and Ivie maintained a joint savings account and he opened a commercial account which he used in the operation of the restaurant; he operated the restaurant until the latter part of November, 1944, when it was sold for $8,000 plus the inventory of between $500 and $600; the purchaser paid $5,000 into escrow and after the expenses were deducted there remained a balance of approximately $3,000 which he deposited in the joint account; thereafter the purchaser paid $400 a month on the balance of the purchase price plus interest, which was also deposited in the joint account; the restaurant showed a net profit in excess of $7,000 for the years 1943 and 1944; profits of the restaurant were reflected in both accounts; at various times he transferred funds from the commercial account to the joint savings account; Ivie Anderson was a professional singer; he acted as her manager and accompanied her on at least three tours; there were periods of time when she was not working; one year she worked only nine weeks and another but four weeks; at various times when she was on tour she sent home to him sums of money which represented her salary less her expenses and these sums were deposited in their joint account; there was also deposited in the joint account $2,700 representing the net proceeds from the sale of certain real property owned by Ivie, the sum of $3,100 received from the sale of the two houses which were moved, and $800 which was received from the sale of Ivie's automobile.

Defendant testified he did not tell either of the friends who accompanied Ivie and him to Arizona at the time of their marriage that he knew they could be married outside the State of California and the marriage would be valid, and they did not discuss that matter on the trip; he did not think there was anything illegal about the circumstances under which they were married; in their dealings with the construction company they represented themselves as husband and wife and during the negotiations Ivie inquired as to how she would be protected in case of defendant's death and Mr. Mendell said: "Well, a joint tenancy deed is about the best way under that. Under the state laws on joint tenancy if he died you would get it without any contest, and vice versa." She then signed the deed; they both read it before it was signed.

The office manager of the construction company testified the contracts and other papers were prepared under his supervision; that "when our title report came in showing it was in Ivie Anderson's name they settled between them it should be in both names."

Witness Sheffield testified he had a conversation with Ivie Neal regarding the joint tenancy deed; that they were "sitting at the dinner table and she mentioned the fact about how hard Neal was working in the restaurant and she felt that they should have a will drawn, and I mentioned the fact it wasn't necessary if they had a joint tenancy deed."

[1] This evidence supports the finding of the court that defendant opened a restaurant known as "Ivie's Chicken Shack" with his personal funds and that he operated the restaurant from about June 13, 1941, until it was sold about November 20, 1944; that the proceeds from the sale thereof and profits from its operation were deposited in the joint savings account; that defendant did not represent to Ivie Anderson that if they went to Arizona and were married the marriage would be valid; that at the time Ivie Anderson executed the grant deed she intended to convey a joint tenancy interest to defendant and had full knowledge thereof; that defendant did not make any representations with the purpose and intent of defrauding and misleading Ivie Anderson so that she unknowingly vested title to the property in the name of herself and defendant as joint tenants.

[2, 3] It is immaterial that in the deed defendant and Ivie Anderson are referred to as "husband and wife," whereas in fact their marriage was invalid, since the term was merely descriptive and surplusage. McWhorter v. McWhorter, 99 Cal. App. 293, 295, 278 P. 454. The presumptions cited by plaintiff merely create a conflict in the evidence and the trial court having decided such conflict in defendant's favor its determination must be accepted as conclusive by this court.

Judgment affirmed. Purported appeal from order denying new trial dismissed.

107 Cal.App.2d 592

In re COOPER'S ESTATE.

SMITH v. HAGE et al.

Civ. 7968.

Sac. 6158.

District Court of Appeal, Appellate District, California.

Nov. 19, 1951.

Proceeding on the final account and petition for distribution of the estate of Oscar Joseph Cooper, also known as Oscar J. Cooper, also known as O. J. Cooper, deceased, wherein Minnie Smith, legatee, filed objections opposed by Miss Peggy Hage, also known as Arleth Jeanette Haig, beneficiary, Louis E. Jones, executor, and H. J. Warneke, legatee. The Superior Court, Placer County, Lowell L. Sparks, J., rendered an adverse judgment and denied a motion for new trial, and the objector appealed. The District Court of Appeal, Schottky, J. pro tem., held that under a will bequeathing "that certain Hudson automobile now owned by me", sale of the automobile owned at time will was executed and purchase by testator of another vehicle of the same make but later model was not an ademption.

Judgment affirmed, and appeal from order dismissed.

1. Executors and Administrators ⟹221(5)

Evidence sustained probate court's finding that claimant, a neighbor, had performed services at special instance and at request of decedent for which he had promised to pay stated sum per day.

2. Work and Labor ⟹4(2)

When work is done by one for benefit for another with his knowledge or approbation, law will imply promise to pay for it unless it appears that there was an understanding that no compensation should be given.

3. Limitation of Actions ⟹49(2)

Where services of neighbor included in claim against estate were performed for decedent in his lifetime at his request and decedent in return promised to pay stated sum per day from May 1, 1947 to August 31, 1948, obligation to pay arose when services were completed.

4. Limitation of Actions ⟹83(2)

Where services of neighbor were performed for decedent in his lifetime at his request and decedent in return promised to pay stated sum per day, time in which to assert claim was extended by death for one year after letters testamentary were issued. Code Civ.Proc. § 353.

5. Wills ⟹764

In determining whether ademption has resulted and legacy must fail, fundamental and controlling factor is intent of testator at time will was drafted as expressed in will considered as a whole and in light of surrounding circumstances.

6. Wills ⟹488

Where latent ambiguity exists in language of will, it may be cured by extrinsic evidence to ascertain true intent of testator.

7. Wills ⟹767

Exchange of certain property, which has been specifically devised, for other similar property will not constitute an ademption.

8. Wills ⟹767

Under will bequeathing to named legatee "that certain Hudson automobile now owned by me", sale of automobile owned by testator at time will was executed and purchase of vehicle of same make but later model was not an ademption.

◆

F. H. Bowers, Roseville, for appellant.

Al. B. Broyer, Roseville, for executor.

Robinson & Robinson, Auburn, for respondents.

SCHOTTKY, Justice pro tem.

Minnie Smith, sister of the testator and residuary beneficiary under his will, filed objections to the final account and petition for distribution filed by the executor, praying that the claim of H. J. Warnke be disallowed and that the proposed distribution of the 1948 Hudson Sedan automobile be disapproved.

Following a trial upon said objections the probate court found that the claimant Warnke performed services at the special instance and request of decedent, for which decedent promised to pay $5 per day; that the reasonable value of said services was $1437.00 and that there was a balance of $1272.00 due claimant Warnke. The court also found that it was the intention of the testator at the time the will was drafted that the word "now" as used therein should refer not to the date of the making of the will but to the date of the testator's death, and that "Miss Hage" should receive the automobile owned by him at the time of his death. This appeal is from the judgment entered in accordance with said findings.

[1] Appellant first contends that there was no substantial evidence to support the Warnke claim. However, the following summary of the evidence by the trial judge is fully sustained by the record:

"The claim filed by Warnke was as follows:

"'To services full time, re doing light work around house and aiding Mr. Cooper, 5 months, May 1, 1947, to September 31, 1947 at $5.00 per day	$ 765.00
October 1, 1947 to August 31, 1948, doing light work around house and aiding Mr. Cooper, part time at $2.00 per day	672.00
	$1437.00
September 8, 1947, paid on account	15.00
Balance due on claim	$1422.00'

"The evidence showed that claimant was a neighbor, and during the deceased's rather lengthy invalidism had performed services for him. These consisted generally of giving him baths, shaving him, assisting him in and out of bed, running errands, taking care of the yard, and staying with him during the day and until bed time. Although the evidence is somewhat conflicting as to the extent of the services performed, there can be no question from the evidence as a whole that claimant did perform many services for the deceased and spent much time with him.

* * * * * *

"The evidence here showed that although Mr. Cooper had a practical nurse attending him, that he nevertheless sent for claimant, and that the services were at his special instance and request. It also showed that the reasonable value of the services were the amounts claimed.

"As noted in the portion of the claim quoted above, the services rendered were divided into two periods. The evidence showed, however, that during the first period the deceased was in the hospital for about a month. During this time claimant performed no services for the deceased personally, but testified that he took care of the yard and aired out the house. After the deceased returned from the hospital a discussion was had between the two, and the deceased paid to and claimant accepted the sum of $15.00 for the month's work. Under such circumstances he may not now claim further payment of the same.

"In conclusion, it is the Court's opinion that the services which were rendered were not gratuitous and went far beyond what might be termed kindly offices performed by a neighbor. The evidence also showed that there was a definite expectation of compensation on the part of claimant. The services therefore having actually been performed and being at the special instance and request of the deceased, and the amounts demanded therefor being reasonable, there shall be allowed to claimant, either on the basis of an express oral agreement or on an implied contract to pay the same, the amount allowed on the claim, with the exception of $150.00 which shall be deducted for the month the deceased was in the hospital."

[2] The claimant asserted that he had an oral agreement with deceased for compensation; but even in the absence of an express agreement the rule is as stated in the early and frequently approved case of Moulin v. Columbet, 22 Cal. 508, at page 510: "When work is done by one for the benefit of another, with his knowledge or approbation, the law will imply a promise to pay for it, unless it appear that there was an understanding that no compensation should be given * * *." See, also, Wescoatt v. Meeker, 63 Cal.App.2d 618,

623, 147 P.2d 41; Collier v. Landram, 67 Cal.2d 752, 757, 155 P.2d 652.

[3, 4] Appellant next contends that part of the claim of Warnke is barred by the statute of limitations. Although this contention is open to the objection that it is urged for the first time on appeal, we have considered it and find it to be utterly lacking in merit. Decedent died on January 14, 1949. The claim was presented to and approved by the executor on June 7, 1949. The services included in the claim were performed from May 1, 1947 to August 31, 1948, and under the facts here present the obligation to pay arose when they were completed. Furthermore, under section 353 of the Code of Civil Procedure, "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." As said by this court in Silva v. Superior Court, 83 Cal.App.2d 521, at page 527, 189 P.2d 314, at page 318: "Since the statute of limitations had not barred an action on the judgment prior to the death of Manuel Silva, the time to commence suit was extended by his death for one year after letters of administration were issued in his estate. [Citing cases.]"

The final contention of appellant is that the court erred in distributing the 1948 Hudson automobile to Peggy Hage. This contention involves the proper interpretation to be given to the following language of decedent's will: "Fourth: I hereby give, and bequeath the following described personal property to Miss Peggy Hage, who can be located through the Mercy Hospital, Sacramento, California: That certain Hudson Automobile, now owned by me." The will was executed October 20, 1947, and testator died January 14, 1949. It was stipulated that at the time the will was executed testator owned a 1941 Hudson. On July 4, 1948, he sold it to one Shelley for $700. On June 24, 1948, about a month before he sold the old car, he bought a new 1948 Hudson for $2,831.30, which he owned and had at his death.

Blanche Stokes, who took care of the house and helped care for decedent from May 1, 1947 to time of his death, testified that decedent bought the new car to have more room as she was unable, unaided, to get him into the old car.

Al. B. Broyer, the attorney who drafted the will, testified as follows: "My recollection is that Joe [testator] changed his will quite a bit. With reference to the car only, now, Joe said, 'My car to Miss Hage.' Joe had changed the previous will whereby he took away certain property from Miss Hage, and he still wanted her to have the car. He said, 'My car to Miss Hage.' Now, the language in the will is my own."

Appellant argues that since the testator disposed of the car which he owned at the time of making the will and acquired another one before his death, an ademption resulted and the legacy must fail.

In its memorandum opinion the trial court stated:

"* * * In resolving this question the fundamental and controlling factor is the intent of the testator at the time the will was drafted as expressed in the will considered as a whole and in the light of the surrounding circumstances. (Estate of Jepson, 181 Cal. 745 [186 P. 352]; 4 Page on Wills, Lifetime Edition, Page 101, Paragraph 1392)

"In this connection, the attorney who drafted the will testified that the testator gave him instructions as follows: 'My car to Miss Hage.' The attorney stated further that the other language of the will in reference to the car was added by himself in drafting the will. It is well settled that where a latent ambiguity exists in the language of a will, that the same may be cured by extrinsic evidence in order to ascertain the true intent of the testator. (Estate of Greenwald, 19 Cal.App.2d 291 [65 P.2d 70]). The latent ambiguity here is whether or not the testator intended that the word 'now' should refer to the date of the execution of the will, or of the date of the death. For this reason, it is the Court's opinion that it was proper to permit the attorney who drafted the will to testify and to give evidence of declarations of the testator in connection therewith, and therefore the motion to strike portions of the testimony of Al. B. Broyer will be denied.

"Furthermore, it has been held that the exchange of a certain property which has been specifically devised, for other similar property, will not constitute an ademption. For example, the exchange of specifically devised shares of stock for other shares or for bonds does not constitute an ademption. (Estate of Cline, 67 Cal.App.2d 800 [155 P. 2d 390]).

"In the Estate of Cline, supra, and also in the Estate of McLaughlin, 97 Cal.App. [485] 488, at Page 490 [275 P. 875], the case of Waldo v. Hayes (96 App.Div. 454, 89 N.Y.S. 69) was cited with approval, where it was held that the bequest of a specific diamond ring was not adeemed by subsequently applying it as part payment upon a more valuable brooch, but that the latter article of jewelry was a mere substitution which had passed by the terms of the will.

"It is the opinion of the Court that the above rules apply to the facts here, and that in accordance therewith it must be held that there was no ademption of the specific legacy, and that distribution of the Hudson automobile should be made in accordance with the petition."

[5–8] We agree with this analysis and believe that the trial court was correct in holding that no ademption resulted. In Waldo v. Hayes, supra, the will provided: "I give and bequeath to Florence Hayes * * * my diamond brooch." Another provision read: "I give and bequeath to Mrs. Lomax * * * and to her daughters * * * any jewelery not otherwise disposed of in this will." Mrs. Lomax and her daughters unsuccessfully appealed from the decree distributing a different diamond brooch to Florence Hayes. The court thus stated the facts at page 70 of 89 N.Y.S.:

"The evidence is uncontradicted that in September, 1897—more than a year prior to the execution of the will—the testatrix purchased of Tiffany & Co., New York, a diamond brooch, and paid therefore the sum of $1,500. This brooch was the only diamond brooch, so far as appears, owned by the testatrix at the time her will was executed. The court also found that in December, 1899, after the will was executed, she purchased of the same firm another diamond brooch, for which she paid $500, and that on May 23, 1900, she purchased from Tiffany & Co. a diamond brooch valued at $2,500, giving therefor the two brooches theretofore purchased by her, and paying $350 in addition thereto; that she retained this last-mentioned brooch down to the time of her death, and that it was the only one owned by her at that time. The question presented by this appeal would seem to be settled by authority. The courts of this state have uniformly held, if we understand the decisions correctly, that, as to personalty the will of a testator speaks as of the date of the death of the testator, and that any article of personal property which the testator owns at the time of his death, which answers to the description of an article bequeathed, passes under the will to the legatee named therein, although such article may not be the identical article owned by the testator at the time the will was executed.

* * * * * *

"In Tifft v. Porter, 8 N.Y. 516, 521, Judge Johnson said:

" 'The presumption is stronger that a testator intends some benefit to a legatee than that he intends a benefit only upon the collateral condition that he shall remain till death owner of the property bequeathed. The motives which ordinarily determine men in selecting legatees are their feelings of regard, and the presumption, of course, is that their feelings continue, and they are looked upon as likely to continue. An intention of benefit being once expressed to make its taking effect turn upon the contingency of the condition of the testator's property being unchanged, instead of upon the continuance of the same feelings which in the first instance prompted the selection of the legatee, requires, as it ought, clear language to convey that intention.' "

The Waldo case was quoted on the same point with approval in the later New York cases of In re Blasius' Will, 1929, 134 Misc. 753, 236 N.Y.S. 388, 393, and In re Rubinstein's Estate, 169 Misc. 273, 7 N.Y.S.2d 311, 317.

In view of the foregoing we conclude that the trial court correctly determined that the claim of respondent Warnke should be allowed for $1272.00; that the 1948 Hudson automobile should be distributed to respondent Peggy Hage, now Mrs. A. P. Leitch, and that the judgment appealed from should be and it is hereby affirmed. The appeal from the order denying the motion for a new trial is dismissed.

ADAMS, P. J., and PEEK, J., concur.

107 Cal.App.2d 727

WOOD et al. v. METZENBAUM et al.
Civ. 7993.
Sac. 6171.

District Court of Appeal, Third District, California.
Nov. 29, 1951.

J. W. Wood and others brought suit against Walter Metzenbaum and another, and the defendants filed a cross-complaint alleging that defendants were the owners of the land involved, that defendants sold the land to the plaintiffs, and that because an action had been filed by the plaintiffs claiming that defendants were agents for plaintiffs to purchase the land for the plaintiffs, a mutual mistake thereby existed which entitled defendants to rescission. The Superior Court of Sacramento County, Malcolm C. Glenn, J., entered a judgment dismissing the cross-complaint, and the defendants appealed. The District Court of Appeal, Adams, P. J., held that the cross-complaint was in fact a cross-complaint, and not a counter-claim as contended by defendants, and that it failed to allege "mutual mistake" which would entitle defendants to rescission.

Judgment affirmed.

1. Pleading 🔑138, 148

Defendants' pleading, which was denominated by them a cross-complaint, alleging that defendants were owners of land involved, that defendants sold it to plaintiffs, that because an action had been filed by plaintiffs claiming that defendants were agents for plaintiffs to purchase the land for plaintiff, and that thereby a mutual mistake existed which entitled defendants to recission, came within a statutory definition of a "cross-complaint", and would be dealt with as such, rather than as a "counterclaim". Code Civ.Proc. § 442.

See publication Words and Phrases, for other judicial constructions and definitions of "Counterclaim" and "Cross-Complaint".

2. Vendor and Purchaser 🔑104

Cross-complaint alleging that defendants were owners of land involved, that they sold it to plaintiffs, that because an action had been filed by plaintiffs claiming that defendants were agents for plaintiffs to purchase the land for plaintiffs, and that thereby a mutual mistake existed which entitled defendants to rescission, failed to allege "mutual mistake" entitling defendants to rescission, since a "mutual mistake" is one made by both parties to the same proposition.

See publication Words and Phrases, for other judicial constructions and definitions of "Mutual Mistake".

◆

Walter Metzenbaum, pro se, Newell & Chester, Los Angeles, for appellants.

John F. McCarthy, Long Beach, for respondent.

ADAMS, Presiding Justice.

Appellants, defendants and cross-complainants in the trial court, have appealed from "the order and judgment * * * dismissing the Cross-Complaint" of defendants. That judgment of the court was entered against them after they failed to amend their cross-complaint to which a demurrer had been sustained with leave to amend.

Plaintiffs instituted the action, and defendants filed their cross-complaint, alleging therein that plaintiffs, in August, 1943, agreed to purchase from them certain lands described in the complaint for $125,000, a down payment of $50,000 having been paid, the balance to be paid during a period of five years, same secured by a deed of trust on the land in favor of defendants. It was further alleged that the land sold was leased to Standard Oil Company of California, the lease reserving to the lessors a royalty of one-eighth, of which royalty one-third was reserved to defendants; that plaintiffs took possession of the land, farmed it with great profit and received their two-thirds of the royalty; that in May, 1945, plaintiffs began this suit against them, charging that in the transaction of sale defendants acted as plaintiffs' agents, and that the royalty reserved to defendants was their compensation for acting as such agents. They then alleged:

"That thereupon it was manifested that the minds of the said defendants and the plaintiff had never met and that, *if* the claim of the plaintiffs that said defendants acted as agents of plaintiffs to purchase the said land for them, was well founded and true, that a *mutual mistake* had taken place and had been made by plaintiffs and said defendants as to facts material to the contract of sale and purchase and that no actual contract had been made between plaintiffs and said defendants.

"That defendants were induced to convey the lands to plaintiffs because they believed that they were making, as they intended to make, an outright sale of the land to plaintiffs together with two thirds of said one eighth royalty and defendants never did accept and never would have accepted employment from plaintiffs as agents to purchase the land for plaintiffs as plaintiffs contend and allege in this law suit against defendants. A *mutual* mistake was made between the parties as to the conveyance of said land and the contract of purchase of August 19, 1943, and the minds of the parties never met and no contract of sale or purchase of said land, outright or as agents of plaintiffs, was ever made or consummated and the defendants elect to rescind the grant deed conveying said land to plaintiffs from defendants and to rescind the notes and deed of trust to secure same given by plaintiffs to defendants as part purchase price of said land and to rescind the conveyance and sale of said land to plaintiffs by defendants." (Italics added.)

Cross-complainants then declared that they were willing to restore to plaintiffs everything of value which they had received from them, to pay plaintiffs for betterments, taxes, etc., with interest, less profits earned by plaintiffs and royalties received by them; and that there was pending in the Superior Court of Sacramento County a suit brought by defendants to rescind the sale on the ground of mistake, which action they would ask to have consolidated and tried with the instant cause. They prayed for a dismissal of plaintiffs' action and a judgment of rescission and of cancellation of the notes of plaintiffs not yet paid, as well as the deed of trust, upon payment by defendants of the amount decreed to be paid by them to plaintiffs after a full accounting.

The demurrer filed by plaintiffs as cross-defendants was based upon insufficiency of the cross-complaint to state a cause of action, and upon the ground that the cross-complaint demonstrated that there was another action pending between the parties for the same cause.

The complaint of plaintiffs is not included in this record on appeal, which record consists of the cross-complaint, the demurrer thereto, the judgment of dismissal of the cross-complaint, a memorandum opinion of the trial court, a minute order which allowed cross-complainants 15 days to amend their cross-complaint, the notice of appeal, and a request for Clerk's transcript. No final judgment of the trial court in the action was asked for in the request to the clerk, but on its own motion this court has had same added to the record.

The final judgment, which was dated November 18, 1949, ordered that both plaintiffs and defendants take nothing; and while the present notice of appeal was filed January 17, 1950, it does not purport to appeal from that judgment, but from the order and judgment dismissing the cross-complaint filed on June 4, 1948.

A prior appeal from that judgment and order was taken in July, 1948, and this court dismissed same on the ground that the order appealed from was not a final judgment from which an appeal could be taken. See Wood v. Metzenbaum, 90 Cal. App.2d 533, 203 P.2d 105. On the face of the present record, this appeal does not differ from the one dismissed.

However, in view of the fact that a final judgment has now been entered in the action, and assuming that appellants intended to appeal therefrom, and for the purpose of terminating the litigation, we shall give consideration to the contentions of cross-complainants.

The gist of the cross-complaint, as stated by the trial court in its opinion, is: "Cross-complainants state they were the owners of the land involved; that they sold it to the plaintiffs; that because an action has been filed by plaintiffs claiming that they, cross-complainants, were agents for them to purchase the land for them, thereby a mistake exists which entitled them to rescission."

And the conclusion of the court was:

"It is true that a rescission can be had on the mutual mistake of the parties, or of one of the parties; but in the instant cross-complaint cross-complainants neither allege a mutual mistake, nor a mistake on their own part.

"The cross-complainants claim that they were actually the owners of the land and conveyed the same to the plaintiffs. They claim no injury by reason of such fact, or that they were damaged in any way by such conveyance. But, they now assert, that if, as plaintiffs claim, they were really agents, then they seek rescission. In other words, they depend upon the plaintiffs' cause of action on which to base rescission. In other words, if plaintiffs sustain their cause of action that cross-complainants were agents, then cross-complainants seek rescission because they themselves believed they were acting as principals."

[1] Appellants first contend that their pleading is not a cross-complaint, but a counterclaim, and, as such, not demurrable. It is apparent from the record before us that this is a belated or second thought on appellants' part since throughout the record the pleading is referred to as a cross-complaint; and as it seeks affirmative relief against plaintiffs it comes within the definition of a cross-complaint, as set forth in Code of Civil Procedure, section 442. Accordingly, it will be dealt with as such, as it was in the trial court.

Appellants' remaining contention is that it states a cause of action for rescission on the ground of "mutual mistake." But the allegations of the pleading are not that there was a mistake by both parties, but that "if" the claim of plaintiffs that defendants acted as agents of plaintiffs is well founded then a mutual mistake occurred. They do not assert that there was actually a mistake on their part. They merely assert that the parties diiffered as to the nature of the transaction. A "mutual" mistake is one made by both parties as to the same proposition. Because one or the other may have been mistaken does not constitute mutuality of mistake; and does not constitute ground for rescission for mutual mistake. See Harding v. Robinson, 175 Cal. 534, 541–542, 166 P. 808; Miller v. Lantz, 9 Cal.2d 544, 548, 71 P.2d 585.

Appellants cite Forest Lawn Memorial Park Ass'n v. De Jarnette, 79 Cal.App. 601, 250 P. 581, Goodrich v. Lathrop, 94 Cal. 56, 29 P. 329, and National Bank of California v. Miner, 167 Cal. 532, 140 P. 27, as holding that in order to justify a rescission a mistake need not be mutual. However, in those cases the mistakes upon which the respective parties relied were their own, and not those of the other party. Here cross-complainants argue for rescission, not because of any mistake on their part, but because of a mistake by plaintiffs. Furthermore, they pleaded a "mutual mistake" and not a unilateral one; and the final judgment of the trial court determined that plaintiffs' contention that defendants were acting as their agents was not true, since relief to plaintiffs was denied.

[2] We are satisfied that defendants did not state a cause for rescission on their

cross-complaint, and that, since they declined to amend, dismissal of their cross-complaint was justified.

Judgment affirmed.

VAN DYKE, J., and SCHOTTKY, J., pro tem., concur.

* * *

107 Cal.App.2d 614

GIFT v. AHRNKE et al.

No. 14731.

District Court of Appeal, First District,
Division 1, California.
Nov. 20, 1951.

Action by May W. Gift against Hammill & Company, a partnership; Albert L. Hammill and Hans P. Ahrnke, as individuals and as partners doing business under the firm name and style of Hammill & Company and American Bonding Company of Baltimore to recover funds of plaintiff allegedly fraudulently appropriated by defendant Hammill without knowledge or consent of plaintiff. The Superior Court, in and for County of Alameda, S. Victor Wagler, J., rendered judgment for plaintiff against Ahrnke, Hammill and American Bonding Company and Ahrnke and the bonding company appealed. The District Court of Appeal, Fred B. Wood, J., held that where brokerage partnership received proceeds of sale of plaintiff's stock, partnership owed plaintiff amount of those proceeds and mere book entry transferring part of plaintiff's account to defendant Hammill did not satisfy or pay any part of partnership obligation, nor did purported substitution of personal note of that defendant without plaintiff's consent satisfy partnership obligation and the defendant bonding company was not exonerated from liability.

The several portions of the judgment appealed from affirmed.

1. Brokers 🔑23

Where brokerage partnership received proceeds of sale of customer's stock, partnership owed customer amount of those proceeds and mere book entry transferring part of proceeds from customer's account to account of one of partners did not satisfy or pay any part of partnership obligation, nor did purported substitution of personal note of the partner without customer's consent satisfy that obligation. Civ.Code, §§ 1530–1532.

2. Novation 🔑7

A new obligation can be substituted for an old one only with consent of creditor. Civ.Code, §§ 1530–1532.

3. Partnership 🔑153(2)

Where brokerage partnership received proceeds from customer's stock and part of proceeds were transferred from customer's account to a partner's individual account without customer's knowledge or consent and partner sent his personal note to the customer, the partnership was bound for the misapplication by the partner. Corporations Code, § 15014.

4. Brokers 🔑4

Where brokerage partnership received proceeds from customer's stock and part of proceeds were transferred from customer's account to a partner's individual account without customer's knowledge or consent and partner sent his personal note to the customer, obligation of bond of brokerage partnership had been breached. Civ.Code, §§ 1530–1532; Corporations Code, §§ 15014, 25703.

5. Brokers 🔑4

Where funds were transferred from customer's account with brokerage partnership to personal account of one of partners and that partner's personal note was issued for funds without knowledge or consent of customer, bonding company was not exonerated for breach of obligation of broker's bond under statute declaring that surety is exonerated if by any act of creditor, without consent of surety, original obligation of principal is altered in any respect. Civ.Code, §§ 2819–2821; Corporations Code, §§ 15014, 25703.

6. Partnership 🔑242(5)

In action by customer against brokerage partnership for fraud, evidence sustained finding that withdrawing partner authorized copartner as agent to take necessary steps to dissolve partnership and secure release of withdrawing partner's securities deposited with bank and that by misrepresentations copartner induced customer to execute purported partnership agreement and to deposit securities with copartner which he used to effectuate release of withdrawing partner's pledged securities and that withdrawing partner retained benefits of fraudulent acts after he received knowledge thereof.

7. Partnership ⚷241

Where withdrawing partner appointed copartner as agent to dissolve partnership and to secure release of withdrawing partner's securities pledged with bank, in seeking new funds from outside sources with which to secure release of withdrawing partner's securities, the copartner was transacting business of the agency and withdrawing partner was responsible for wrongful acts committed by agent, including fraud and deceit, even though withdrawing partner actually received none of fruits of the fraud. Civ.Code, § 2338; Corporations Code, § 15035.

8. Partnership ⚷241

Where withdrawing partner appointed copartner as his agent to dissolve partnership and to secure release of withdrawing partner's securities pledged with bank, the fact that withdrawing partner was unaware of fraud committed by copartner in procuring new funds with which to secure release of withdrawing partner's securities at time of return of securities to withdrawing partner did not operate to prevent ratification by him when a few months later he learned of details of fraud and did not then disaffirm acts of copartner but continued to retain benefits of acts.

9. Partnership ⚷241

Where withdrawing partner appointed copartner his agent to dissolve partnership and to obtain release of withdrawing partner's securities pledged with bank and copartner as agent fraudulently induced another to join partnership and to furnish securities used to obtain release of withdrawing partner's securities, the withdrawing partner was liable to the defrauded party for losses sustained during subsequent conduct of business.

10. Principal and Agent ⚷131

A principal cannot split agency transaction into separate parts and take the benefits without the burdens.

11. Partnership ⚷241

Where withdrawing partner appointed copartner agent to dissolve partnership and to secure release of withdrawing partner's securities pledged with bank and the copartner as agent fraudulently induced another to join partnership and to furnish securities with which release of withdrawing partner's securities was obtained, liability of withdrawing partner to defrauded party was not limited to amount by which liabilities of original partnership exceeded its assets upon dissolution and withdrawal of securities of withdrawing partner.

◆

Huovinen & Koford, Oakland, for appellant Hans P. Ahrnke.

Thomas E. Davis, San Francisco, for appellant American Bonding Co. of Baltimore.

Bronson, Bronson & McKinnon, San Francisco, for respondent, May W. Gift.

FRED B. WOOD, Justice.

Defendants Albert L. Hammill and Hans P. Ahrnke were partners engaged in the general security brokerage business under the name of Hammill & Company. Defendant American Bonding Company of Baltimore, a corporation, was surety on the bond of Hammill & Company as a broker licensed under the provisions of the Corporate Securities Act. Plaintiff May W. Gift was a customer of and maintained a securities account with Hammill & Company.

Judgment was rendered for plaintiff for $4,000 against Ahrnke, Hammill and the American Bonding Company, and for $13,547.66 against Ahrnke and Hammill. Ahrnke and the bonding company have appealed. Hammill has not.

The Four Thousand Dollar Award.

April 11, 1947, Hammill & Company sold for respondent certain of her shares of stock and credited the net proceeds of the sale, $4,534.69, to her securities account as a free credit balance. About May 15, 1947, she was paid $400 of this sum and $4,000 was transferred from her account to Hammill's personal account with Hammill & Company. About July 16, 1947, she received a promissory note in the principal sum of $4,000, bearing interest at five per cent, payable to her, signed by Hammill, as maker, in his individual capacity.

The trial court found that the $4,000 was wrongfully and fraudulently appropriated by Hammill without the knowledge or consent of respondent; that the substitution of Hammill's personal obligation was without her authorization; that she was deceived by the misrepresentations of Hammill and, relying upon those misrepresentations, she thought and understood that her funds were safely invested by and with Hammill & Company; that said purported substitution was fraudulent and a misappropriation of funds received by the partnership in the course and scope of its business, a breach of its fiduciary obligation, and void and of no effect; that ever since April 11, 1947, Hammill & Company, Hammill, and Ahrnke and each of them had been indebted to respondent in the sum of $4,000, representing said free credit balance, and that each of them had neither honestly nor faithfully applied the funds received and had not performed their obligations and undertakings in the purchase and sale of securities. Judgment for $4,000 was rendered against Hammill, Ahrnke, and American Bonding Company, jointly and severally.

In support of their claim that these findings are not supported by the evidence, appellants direct attention to some of the testimony of respondent which tends to conflict with other testimony given by her, a conflict that was resolved against appellants by the trial court. Respondent was a widow in her sixties; had no business training or experience; depended upon the income from her securities for her livelihood; had recently suffered from a mental condition and received shock treatments therefor; placed trust and confidence in Hammill, and had always accepted his advice concerning the sale of her securities and the investment of the proceeds of sale. These facts were well known to Hammill, who had handled her investments since 1937 and was thoroughly familiar with her financial affairs. She testified that she never authorized the transfer of the $4,000 from her credit balance to Hammill's personal account; had no recollection of his requesting a loan; did not recall receiving the note; and that when she first received the note she did not know what it represented and did not understand the significance of the note until it came out in a hearing held by the United States Securities Exchange Commission in January and February, 1948. During her cross-examination she said that she understood the note represented the proceeds from the sale of her stock; that she knew that when she got the note. This last is the testimony upon which appellants rely. At most, it tends to produce a conflict, not necessarily a substantial conflict. She well may have understood that the paper she received in July represented in some way the proceeds of the sale of her stock without understanding the legal significance of the document, continuing confidently to believe that she still had a full credit balance with the firm.

Both appellants further claim that this purported loan transaction was personal to Hammill and the respondent, and resulted in the substitution of Hammill's obligation for that of the partnership. They would conclude, therefore, that Ahrnke has no legal liability as a mere partner, and the bonding company none because its undertaking was not to secure the lending of money to the partnership or to a partner and the substitution of Hammill as a debtor for the partnership as trustee was an alteration of the principal's obligation which operated as a discharge of the surety. There well might be merit in this point but for the fraud and the violation of the fiduciary relationship by Hammill.

[1–4] Commencing April 11, 1947, when Hammill & Company received the proceeds of the sale of stock the partnership owed respondent the amount of those proceeds. The mere book entry on May 15, transferring $4,000 from respondent's account to Hammill's did not of itself satisfy or pay any part of that obligation. Nor did the purported substitution in July of Hammill's personal note, under the circumstances related, do so. A new obligation can be substituted for an old one only by contract of the parties, not by any act of the debtor alone. Civ.Code, §§ 1530–1532. That, of course, means that such a substitution must be with the consent of the creditor. (See cases collected in 20 Cal.Jur. 250, Novation, § 5.) This creditor did not give her consent. The transfer on the books and the sending of his personal note to respondent was a bit of legerdemain upon the part of Hammill to cover up his misappropriation of $4,000 of respondent's moneys received by the partnership and held by it in trust for plaintiff. For such a misapplication by a partner, the partnership is bound. Civ. Code, § 2408, now Corporations Code, § 15014. Under either theory there has been a breach of the obligation of the broker's bond given pursuant to section 6 of the Corporate Securities Act (now section 25703 of the Corporations Code) "for the use and benefit of interested persons," undertaking that Hammill & Company, its agents and employees, shall strictly comply with the provisions of that act and "shall honestly and faithfully apply all funds received, and faithfully and honestly perform all obligations and undertakings in the purchase or sale of securities by said broker, his agents and employees."

[5] The appellant bonding company invokes sections 2819–2821 of the Civil Code as exonerating it. Section 2819 declares that a surety is exonerated "if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." This by its own terms would be inapplicable when, as here, no alteration or change of position occurred "by any act of the creditor."

It is true, as urged by the bonding company, that section 2820 says "That a promise by a creditor is for any cause void, or voidable by him at his option, shall not prevent it from altering the obligation or suspending or impairing the remedy within the meaning of the last section [2819]." The bonding company does not tell us how this provision applies in this case. There must be a "promise" by the creditor. Here, there was none. Moreover, the fact that a void or voidable promise "shall not prevent it" from altering the obligation or impairing the remedy (within the meaning of section 2819) falls far short of saying that such a promise in all cases operates as such an alteration or impairment. Conceivably, it might so operate when the rights of third parties intervene or other circumstances have occurred which prejudicially affect the surety. We are aware of no such circumstance here and the appellants have indicated none.

Accordingly, we find no error in that portion of the judgment which holds Ahrnke and the bonding company jointly and severally liable to respondent in the sum of $4,000.

The Thirteen Thousand Dollar Award.

[6] The judgment for $13,547.66 is based upon findings of the trial court, amply supported by the evidence, that Ahrnke contributed to the capital of the Hammill-Ahrnke partnership securities of the market value of $11,500, which formed substantially the entire capital of the partnership, were pledged to a bank as security for payment of a partnership debt of $7,000, and were subject to all the debts and liabilities of the partnership; that the withdrawal of those securities and the return thereof to Ahrnke would render the partnership insolvent; that Hammill had overdrawn his account with the partnership to the extent of $14,000; that with knowledge of these facts Ahrnke during July or early August and prior to August 8, 1947, notified Hammill he wished to withdraw as a partner and to have returned to him his capital contribution of securities; that Ahrnke then authorized and appointed Hammill as agent to take the necessary steps and proceedings in order

to dissolve and wind up the Hammill-Ahrnke partnership, to procure the release of Ahrnke's securities from the bank in which they were pledged as security of a partnership loan, and to arrange for and effectuate the return of said securities in full to Ahrnke, and Hammill agreed to do so; that Hammill, acting as such agent, did procure the release of Ahrnke's securities from the pledge and did return them in full to Ahrnke, who accepted them from Hammill. The court further found that by certain misrepresentations, concealments, and promises which he did not intend to keep,[1] Hammill falsely and fraudulently, and in abuse of his fiduciary obligation to respondent, induced respondent to execute a purported partnership agreement with Hammill for the conduct of a securities brokerage business and to deposit with Hammill securities of the value of $16,107.50; that Hammill deposited said securities with the bank in order to effectuate and did thereby effectuate the withdrawal from the pledge and the return to Ahrnke of his capital contribution to the Hammill-Ahrnke partnership; that, subsequently, Hammill increased the indebtedness to the bank from $7,000 to $11,500, and certain of respondent's securities were sold and the proceeds applied to said indebtedness in payment thereof; that thereafter, at the suit of a creditor, a judgment for $3,011.84 was satisfied through the sale of respondent's securities, and, in consequence, all that respondent ever received back from the securities entrusted by her to Hammill was the sum of $2,259.84; that respondent did not discover the falsity and fraud of Hammill's representations, concealments, and promises, until the early part of 1948; that she did not agree to or assume the debts and liabilities of the Hammill-Ahrnke partnership; that after the return of his securities to him, Ahrnke received actual knowledge of the fraud and deceit practiced upon respondent by Hammill in inducing her to enter into the purported partnership agreement so that Ahrnke's securities might be returned to him in their entirety; and Ahrnke ratified said fraud and deceit of his agent and has ever since retained the whole of his said securities, or their value, for his own use and benefit.

As conclusions of law, the trial court declared that Hammill was authorized by Ahrnke and appointed as Ahrnke's agent to liquidate the business affairs of defendant Hammill & Company and to effect the release of Ahrnke's securities from the pledge, and other liabilities of defendant Hammill & Company, so that Ahrnke's securities might be returned to him free and clear of all liabilities of defendant Hammill & Company; and Hammill undertook to do so, and in the course of said undertaking and, when acting as such agent, Hammill so defrauded and deceived respondent that as a proximate result of said fraud and deceit respondent was damaged in the amount of $13,547.66; that Ahrnke thereafter ratified the fraud and deceit of his agent, and retained the benefits of his agent's acts on his behalf, with full knowledge of said fraud and deceit; and Ahrnke thereby became liable to respondent for said damages in said amount.

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[1] Hammill's *misrepresentations* were that Ahrnke was withdrawing because of ill health, that respondent's securities would be placed in safekeeping with the bank, would be at all times perfectly safe and withdrawable by her at any time she wished; that she would assume no obligations by becoming a partner; and that the transaction was a good and safe investment for her.

His *concealments* were the failure to disclose the fact that the old partnership was being dissolved, at Ahrnke's demand, because of the small income return, that respondent's securities would not be safe or withdrawable but would be pledged for the old partnership loan of $7,000 to accomplish the withdrawal of Ahrnke's securities; that respondent was assuming the obligations of a general partner and her securities would be subject to the claims of creditors of the new firm, that any other assets of hers might become subject to such claims, that Hammill's drawing account showed a deficit of $14,000 as of August 11, 1947; that giving effect to the withdrawal of Ahrnke's securities the old partnership showed a deficit of $3,609.51, excluding the debt owed to respondent in the sum of $4,000, and including said debt a deficit of $7,609.51; that were Ahrnke's securities withdrawn the old partnership would be insolvent to the amount of $7,609.51, and that to secure the release of Ahrnke's securities from the pledge it would be necessary immediately to pledge to the bank respondent's capital contribution in order to secure the bank loan to the old partnership.

He *falsely and fraudulently promised* he would not withdraw in excess of $400 each month from the partnership business, whereas he intended to and did continue to withdraw $1,000 per month; and that he would place respondent's securities in safekeeping with a bank, whereas he intended to and did subject them to the lien of the pledge to the bank for the $7,000 debt of the old partnership, and intended to and thereafter did increase the bank loan to a total of $11,500.

[7, 8] Challenging these conclusions of law, Ahrnke starts with the premise that Hammill was the agent of Ahrnke to liquidate the affairs of the Hammill-Ahrnke partnership. He then invokes the statute which confers authority upon a partner to bind the partnership by acts "appropriate for winding up partnership affairs or completing transactions unfinished at dissolution," Civ.Code, § 2429, now Corp.Code, § 15035, and argues that such authority does not extend to and include the creation of new obligations such as the formation of a new partnership with a third person. He ignores the fact that his agency agreement with Hammill embraced as its main purpose the release of Ahrnke's securities (the principal asset of the partnership) from the pledge and the return thereof to Ahrnke, free and clear of any and all partnership liabilities. That was no mere winding up authority envisaged by the statute cited. We are not here concerned with the limited scope of the authority which that statute would have given Hammill in the absence of this agreement. The release of Ahrnke's securities from the pledge, free and clear of all liabilities of the partnership, under the circumstances related, necessarily involved an undertaking upon Hammill's part to seek and procure new funds from outside sources. In seeking such funds from respondent for that purpose, Hammill was transacting the business of the agency. Ahrnke, as principal, is responsible to respondent for the "wrongful acts committed by such agent in and as a part of the transaction of such business." Civ.Code, § 2338. Such "wrongful acts" include fraud and deceit committed by the agent, Proctor v. Arakelian, 208 Cal. 82, 280 P. 368, even though the principal actually receives none of the fruits of the fraud. Ross v. Prudential Guar. Bldg., etc., Ass'n, 140 Cal.App. 148, 35 P.2d 176.

[9] Ahrnke claims the finding that he ratified the transaction is without support in the evidence, because the evidence shows that Hammill acted for himself and as agent of respondent, not as agent of Ahrnke; and that when Ahrnke received the securities from Hammill, Ahrnke was unaware of the Hammill-Gift transaction or of the fraud committed by Hammill. Neither contention is correct. Ahrnke testified that he had sent word to Hammill to get him out of the firm and to return his securities, and Hammill testified that he agreed to do so. Later, Ahrnke and Hammill signed a dissolution agreement which, among other things, declared that Hammill "agrees to immediately enter into and upon all of the proceedings necessary to effect a complete liquidation of said copartnership business and agrees to assume and pay any and all outstanding obligations of said copartnership and First Party [Ahrnke] shall be held harmless from the payment of any of said obligations." At the trial, Ahrnke's counsel stated that the only winding up was the return of Ahrnke's securities. (The securities could not be returned without payment of the debt or substitution of other collateral.) Hammill testified that he had to have respondent's securities in the bank and under a bank pledge before Ahrnke's securities could be released. This evidence amply supports the finding that Hammill did act for Ahrnke. The fact that Ahrnke was unaware of the fraud during the time of its commission and the return of Ahrnke's securities to him, did not operate to prevent ratification by Ahrnke when, a few months later, he learned the details of the fraud and did not then disaffirm the acts of Hammill, but continued to retain the benefit of those acts, with full knowledge of the means

by which he acquired those benefits. Harris v. Seidell, 1 Cal.App.2d 410, 413, 36 P.2d 1104; Gardner v. City of Glendale, 45 Cal.App. 641, 188 P. 307. In this connection, Ahrnke mistakenly claims that there is no finding of his knowledge of the details of the fraud. He overlooks the fact that the court found that "Subsequent to August 11, 1947, defendant Ahrnke received actual knowledge of the aforesaid fraud and deceit practiced upon plaintiff by defendant Hammill * * *."

[10, 11] Ahrnke further contends that the Hammill-Gift partnership came into existence and engaged in business for several months (until respondent's securities had been dissipated and she learned of the fraud which had been practiced), and that Ahrnke, not a member of that partnership, should not be held liable for losses sustained during the conduct of its business. Here, again, Ahrnke ignores the legal basis of his liability, which was the fraud committed by his agent, Hammill, in obtaining respondent's securities for the substitution and release of Ahrnke's securities from the pledge and the return thereof to Ahrnke, free and clear of any and all liabilities of the Hammill-Ahrnke partnership. He cannot split the agency transaction into separate parts, and take the benefits without the burden. Gardner v. City of Glendale, supra, 45 Cal.App. 641, 644, 188 P. 307; see, also, Vanciel v. Kumle, 26 Cal.2d 732, 734–735, 160 P.2d 802.

[12] Finally, Ahrnke argues that as a retiring partner he was liable, at most, for the amount by which the liabilities of the Hammill-Ahrnke partnership exceeded its assets upon dissolution of that partnership and the withdrawal of Ahrnke's securities; i. e., $3,609.91, exclusive of respondent's credit balance of $4,000. This is but another attempt, in another form, by Ahrnke to break the agency transaction into separate parts and, by ignoring his responsibility to respondent for the acts of his agent, Hammill, to retain the benefits and avoid the burdens inherent in the transaction whereby Ahrnke, through his agent, Hammill, effected the return of his securities (the principal tangible asset of the partnership), free and clear of the debts and liabilities of the partnership.

The several portions of the judgment appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

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107 Cal.App.2d 631

PEOPLE v. GRISCHOTT.

Cr. 908.

District Court of Appeal, Fourth District,
California.
Nov. 20, 1951.

Alice Cordelia Grischott was convicted in the Superior Court of San Bernardino County, A. D. Mitchell, J., for two burglaries, and she appealed. The District Court of Appeal, Griffin, J., held that the evidence was sufficient to justify the jury's finding that defendant had full knowledge of her associates' intention to commit the burglaries and aided and abetted them in commission thereof and escaping thereafter.

Judgment affirmed.

1. Criminal Law ⇨59(3, 5)

An accused's mere presence at scene of crimes does not establish his guilt as abettor, but he must be shown to have been present and to have actively aided and encouraged felonies, with knowledge of felonious intention of persons actually committing crimes, to warrant his conviction as abettor. Pen.Code, §§ 31, 971.

2. Burglary ⇨41(1)

In prosecution for burglaries evidence justified jury's finding that defendant had full knowledge of her associates' intention to commit burglaries and aided and abetted them in commission thereof and escaping thereafter, so as to warrant conviction of defendant as abettor. Pen.Code, §§ 31, 971.

3. Burglary ⇨16

To warrant convictions of burglaries as aider and abettor, defendant's associates need not have communicated to defendant their purpose to commit burglaries, where circumstances clearly showed such purpose and defendant's assistance in accomplishment thereof. Pen.Code, §§ 31, 971.

4. Burglary ⚿16

To justify convictions of burglaries as aider and abettor, proof of actual conspiracy by defendant and persons actually committing crimes was unnecessary. Pen. Code, §§ 31, 971.

5. Criminal Law ⚿554

The jury had right to disbelieve defendant's testimony as to her claimed innocence of crimes charged, where her statements were inconsistent and her testimony was impeached by showing her previous conviction of felony. Code Civ.Proc. § 2051.

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Theo. G. Krumm, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant Alice Cordelia Grischott was charged jointly in two counts of an information with defendants Francis W. Richards, Billy Jones and James D. Hunt, with the crime of burglarizing two furniture stores on the same evening. Appellant plead not guilty. The other defendants entered pleas of guilty. A jury verdict resulted in appellant's conviction on both counts. She appealed and questions the sufficiency of the evidence to show that she aided and abetted the other defendants in the commission of the offenses.

The evidence shows that on the night of December 10, 1950, about 3:30 a. m., a police officer caught the named defendants in the store of the Vanderwall Furniture Company, in Redlands, hiding behind a counter. They had been endeavoring to open a safe by means of a sledge hammer. They had, a few minutes previous to this time, entered another near-by furniture store and were unsuccessful in breaking open the safe located therein. The officer handcuffed them and put them in a police car which was parked behind the store about 50 feet east of an alley. Immediately thereafter appellant drove up behind them through the alley and stopped. The officers went to her and asked her what she was doing in that alley at that time of the morning. She remarked that she was after some fellows she was supposed to pick up there, and mentioned the names of the defendants Richards and Jones; that she had brought them to Redlands "to do some work". She was also taken into custody. She later mentioned she had left the three defendants out close to another near-by furniture store and that she thereafter picked them up and drove them to this alley back of the furniture store where they were later apprehended; that she drove down the street and waited for them at their suggestion; that she got tired of waiting and decided to come back to see why it had taken them so long. In another conversation the officers asked her what part she had played in the burglary on that night and she stated that defendant Jones asked her to drive her car for him to a place on D Street in San Bernardino; that she did so and stayed there until about 1:30 a. m.; that the other two defendants came out, got in the car, and asked her to drive them to Redlands because they "had a job to do". One of them told appellant that they were going to buy her some gasoline for her car. She stated she drove the defendants over to Redlands. She told the officers that there was a sack of tools in the car.

Defendant Richards testified that by prearrangement to "pull these jobs" he met defendants Hunt and Jones at Jones' home in San Bernardino; that when he arrived the appellant was seated at the wheel of the car; that Hunt asked him if he was ready and he said he was, and they drove away without further instructions; that there was a gunny sack with tools in it on the floor of the back seat compartment; that when they arrived to a place near the first furniture store Hunt gave instructions to appellant to stop and told her that they were going over to see a fellow "for something"; that he took the sack of tools and the three defendants then departed and entered the store through a window, but that they were unsuccessful in breaking open the safe; that they returned to the car with the sack of tools, and remarked that "we missed the fellow" and stated that they were going down the street and see if they could find him at another place. Hunt was wearing a jacket which he had appropriated in that furniture store. Richards then testified that Hunt gave orders to appellant where to drive; that she pulled up to the curb about a block from the second furniture store; that the defendants all got out, took the sack of tools, walked to the alley, jimmied the lock, entered that store, and knocked the combination off of the safe; that the officer came in and got them, and held a gun on them until the patrol car came.

Appellant testified she was at a cafe that evening; that defendant Jones came in and asked if she would drive her car for him that evening to his home; that she did so; that the defendants came out and asked her to take them to Redlands because they wanted "to see a man about a job". She then related the story as told by defendant Richards. She denied that she had planned any burglary with the defendants; claimed she did not know where she was going; denied that she knowingly aided and abetted them in the commission of the offenses; and denied any knowledge of the presence of the tools in the car. While on the witness stand she admitted she had been previously convicted of a felony, i. e., attempted grand theft, served a term of imprisonment, and was then on parole.

[1] Appellant apparently aided her associates in the commission of the burglaries, but it is her contention on this appeal that she did not abet them in so doing, and accordingly the facts did not bring her within the provisions of Penal Code, secs. 31 and 971, as a principal in that she did not participate in the commission of the crime with knowledge of the unlawful intent and purpose of her associates, citing such cases as People v. Compton, 123 Cal. 403, 56 P. 44; People v. Davis, 124 Cal. 42, 56 P. 1131; and particularly People v. Hill, 77 Cal.App. 2d 287, 175 P.2d 45, where it is said that the mere presence of the accused at the scene of the crime does not essentially establish his guilt as an abettor, but it must be established that the accused was present, that he actively aided and encouraged the felonies, and that he did so with the knowledge of the felonious intention.

[2–5] Respondent fully points out where the Hill case is factually distinguishable. In the instant case there is evidence that appellant and defendant Jones first met at a cafe and discussed the matter of driving appellant's car on a mission. Appellant had borrowed the use of the car from a friend of hers. Apparently some arrangements were made whereby appellant was to have gasoline furnished to her by the perpetrators of the crime. She had the opportunity of seeing the sack containing the sledge hammer and other implements and tools that were to be used in the burglary. She waited for the defendants to perpetrate the first burglary or "job" and apparently saw them return with the sack and its contents. There is considerable discrepancy in appellant's statements as to the reason she was bringing the defendants to Redlands and as to her actions after she stopped and had let the defendants out to accomplish the second burglary. She claims they stopped a block or two away from the furniture store, and yet when it came time to look for the defendants and help in their escape, she drove up the alley and right to the rear of the furniture building where defendants entered. It was a peculiar hour of the morning for her to be assisting the defendants in hunting for a "job". The jury might well have believed that she had full knowledge of the intention of her associates and that she was aiding and abetting them, not only in the commission of the act, but aiding them in escaping from the scene of the crime after its commission. People v. Palmer, 76 Cal.App.2d 679, 685, 173 P.2d 680. There was no need for the associates to communicate their purpose to appellant if it was clear from the circumstances what their purpose was, and she still assisted them to accomplish it. People v. Bond, 13 Cal.App. 175, 185, 109 P. 150; People v. Le Grant, 76 Cal.App.2d 148, 153, 172 P.2d 554. There was no need to prove an actual conspiracy. People v. Turner, 86 Cal.App.

2d 791, 802, 195 P.2d 809. The jury had the right to disbelieve the testimony of the appellant as to her claimed innocence where her statements were inconsistent and where her testimony was impeached by showing that she had been previously convicted of a felony. Sec. 2051, C.C.P.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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108 Cal.App.2d 1

MACHADO v. KATCHER MEAT CO., Inc. et al.

Civ. 7950.

District Court of Appeal, Third District, California.

Dec. 4, 1951.

Action by Charles B. Machado, operating under the firm name and style of Los Banos Livestock Commission Co., against Katcher Meat Co., Inc., Jack Katcher, and Max Lewis, sued as Meyer Lewis, also known as Myron Lewis, for damages alleged to have resulted from conspiracy to cheat and defraud through giving of worthless check in conditional payment of purchase price of cattle delivered to defendants. The Superior Court, Merced County, R. R. Sischo, J., entered judgment for the plaintiff, and Max Lewis appealed. The District Court of Appeal, Adams, P. J., held that the evidence sustained the inference of joint fraud and the existence of a conspiracy in which all defendants participated.

Judgment affirmed.

1. Conspiracy 🔑19

In action by livestock dealer against buyers to recover damages alleged to have resulted from conspiracy to cheat and defraud through passing worthless check in conditional payment of purchase price of cattle, evidence sustained finding that all defendants were parties to conspiracy to defraud plaintiff.

2. Torts 🔑22

Each participant in wrongful act is responsible as a joint tort-feasor for all damages ensuing from wrong, regardless of whether or not he was direct actor and of degree of his activity.

3. Conspiracy 🔑19

In regard to conspiracy to defraud, conspiracy may be inferred from all circumstances, including nature of acts done, relations of parties, and interest of alleged conspirators.

4. Appeal and Error 🔑1010(1)

If finding of conspiracy to defraud is a reasonable one, it will not be disturbed on appeal.

Theodore Golden and J. Bruce Fratis, Oakland, for appellants.

Linneman, Burgess & Telles, Dos Palos, for respondent.

ADAMS, Presiding Justice.

The plaintiff, Chas. E. Machado, doing business as Los Banos Livestock Commission Co., hereinafter referred to as Machado, brought this action against Katcher Meat Co., Inc., a corporation, hereinafter referred to as corporation, Jack Katcher, hereinafter referred to as Katcher, Jr., Abe Katcher, hereinafter referred to as Katcher, Sr., and Max Lewis, to recover $4,163.82. He alleged in his complaint that in Merced County, on or about December 2, 1948, the corporation gave him a worthless check postdated December 7, 1948, for said sum in conditional payment of the purchase price of 21 head of cattle then and there delivered to defendants. In a second count plaintiff alleged that defendants had conspired to cheat and defraud him, and that by reason of their acts and conduct he had been damaged in the sum of $4,163.82.

Abe Katcher was not served with process and did not appear in the action.

The case was tried by the court without a jury. It found the above allegations to be true, that the defendants caused the livestock to be delivered to the place of business of the corporation at Dixon, California, and that there defendants slaughtered and sold the same and Lewis appropriated and converted all sums of money received from the sale to his own use and benefit and still retains the same. The court further found in favor of plaintiff's allegations of a conspiracy by defendants by finding that at and prior to December 2, 1948, Lewis, in conjunction and cooperation with the corporation, Katcher, Jr. and Katcher, Sr., corruptly and unlawfully contrived, conspired, combined and agreed with each other to perform said acts for the purpose of cheating and defrauding Machado, that the acts were the result of the conspiracy, and that thereby Machado was damaged in the sum of $4,163.82.

Judgment was entered in favor of Machado, against Katcher, Jr. and Max Lewis, and each of them, for $4,163.82, with interest and costs. Only Lewis has appealed from that judgment.

The undisputed facts are that Machado owned and operated a livestock auction yard at Los Banos where he conducted auction sales of livestock every Thursday. Katcher, Jr. and Katcher, Sr. are father and son. Katcher, Sr. and appellant Lewis had been friends for thirty-five years. On May 26, 1947, Lewis lent Katcher, Sr. $1,000. A few weeks thereafter the corporation was formed; and while Lewis denied any connection with the corporation, Katcher, Jr., who was the secretary-treasurer thereof, testified that Lewis and George Lichenstein, his brother-in-law, were officers and shareholders. He also testified that Lewis was financing the corporation.

Lewis testified that in addition to the original $1,000 which he lent to Katcher, Sr., he lent to the corporation, on July 27, 1948, $3,000, on August 26, 1948, another $3,000, on September 2, 1948, another $3,000, and that the latter three loans were repaid with corporation checks; that on September 27, 1948, he lent the corporation an additional $6,000, and on October 19, 1948, $3,000.

Katcher, Jr. testified that he was buyer for the corporation; that it went out of business a week or two before Christmas of 1948, being without funds; that on December 2, 1948, he bought 21 head of cattle from Machado for $4,163.82; that he was acting for the corporation; that he gave Machado a corporation check for said sum, which was drawn on the Eighth and Broadway Branch of Bank of America in Oakland; that he postdated the check to December 7, 1948, which was five days after the purchase of the cattle, but that he did not mention such postdating to anyone.

Beverly Machado, plaintiff's daughter and his bookkeeper, testified that the postdating of the check was not called to her attention when the check was delivered, which was on Thursday, December 2nd; that the next day she tried to deposit the check in the bank and then discovered that she could not do so because it had been postdated; that she then notified her father and he told her to keep the check until December 7, 1948. On December 6, 1948, Machado deposited the check for collection in the Los Banos Branch of the same bank, but when the check reached the Oakland Branch it was dishonored on the ground that the corporation had no funds or credit. The $4,163.82 has never been paid to Machado.

Katcher, Jr. testified that the cattle secured from Machado were taken to the corporation's slaughtering plant at Dixon, California, were slaughtered there on Monday and the meat sold on Tuesday or Wednesday; that he received payment therefor, amounting to a little over $8,000; that it was customary to deposit the proceeds of meat sales in the corporation's bank account to meet outstanding checks, but that, contrary to that custom, Katcher, Sr. instructed him to deposit this money in Katcher, Sr.'s personal bank account in the Lake Merritt Branch of America in Oakland; that he did so and received a deposit slip; that thereupon Katcher, Sr. issued his check on that personal account in favor of Lewis for $8,200; that he, his father and Lewis met at his father's house in Oakland and he (Katcher, Jr.) inquired what would happen to the Machado check and other outstanding checks of the corporation which had not been paid, and Lewis told him to "forget about it"; that Lewis knew that Machado and other creditors could not be paid; that he took Lewis to the latter's bank at Eighth and Broadway, Oakland, and there Lewis had his bank telephone Katcher, Sr.'s bank to hold the money for the $8,200 check which his father had given to Lewis. He further testified that Lewis knew that it was the corporation's custom to deposit sale moneys in the corporation's bank account to meet corporation checks issued for purchases of cattle, and that he also knew that payment of the Machado check depended upon the proceeds of the sale of the slaughtered Machado cattle. He also testified that his father and Lewis "used to drive back and forth from Oakland" together; that they were old friends and both lived in Oakland.

Lewis testified that Katcher, Sr. took him to an auction sale in Los Banos in 1948, and that the boy came later. He also testified he may have been there other times. Katcher, Sr. was not called as a witness.

[1] In view of the foregoing evidence, the conduct of the respective parties, the intimacy between Lewis, Katcher, Sr. and the corporation, the manner in which the cattle were bought from Machado and the proceeds paid to Lewis, and the unsatisfactory manner in which Lewis testified, we cannot say that the trial court was not justified in concluding that Lewis was a party to a conspiracy to defraud Machado.

[2] In California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 149, 219 P.2d 511, 514, the court said: "Each participant in the wrongful act is responsible as a joint tort-feasor for all damages ensuing from the wrong, regardless of whether or not he was a direct actor and of the degree of his activity. Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302. Furthermore, because of the inherent difficulty in proving a conspiracy, it has been held that a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances. Anderson v. Thacher, 76 Cal. App.2d 50, 72, 172 P.2d 533."

[3, 4] In Johnstone v. Morris, 210 Cal. 580, 590, 292 P. 970, 975, the court said:

"In cases of conspiracy to defraud it is not to be expected that direct evidence of the conspiracy can be secured, because such evidence could usually only be secured in the event one of the conspirators confessed. The jury may infer the conspiracy from all the circumstances, and, if the inference is a reasonable one it will not be disturbed on appeal. These principles have repeatedly been recognized by this court. In Revert v. Hesse, 184 Cal. 295, at page 301, 193 P. 943, 946, this court, quoting from a Georgia case [Woodruff v. Hughes, 2 Ga.App. 361, 58 S.E. 551], said: '"The law recognizes the intrinsic difficulty of proving a conspiracy. The allegations with reference to conspiracy are treated as matters of inducement leading up to a more particular description of the acts from which conspiracy may be inferred. * * * The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances." * * *'

"On the same page (301 of 184 Cal., 193 P. 943, 946) the court continued as follows: 'In the present action, while plaintiff was unable to prove any formal agreement between defendants Arthur Hesse and Sidney Beach, nevertheless, there was before the court the entire transaction resulting in the consummation of a flagrant fraud upon the plaintiff, in which transaction defendant Sidney Beach participated as an intermediary. * * * These circumstances, coupled with the further fact that defendants Sidney Beach and Arthur Hesse were not strangers, but were on more or less intimate terms, occupying the same office, were sufficient to warrant the inference drawn by the trial court that defendant Sidney Beach was a party to a conspiracy which had for its object the fraudulent conversion complained of by plaintiff.'"

In Beeman v. Richardson, 185 Cal. 280, at page 282, 196 P. 774, at page 775, the rule is stated as follows: "The point in connection with the finding as to a conspiracy is that the representations were made by the defendant Richardson alone, and that there is no direct evidence that the other defendants agreed that they should be made, or knew at the time that they were being made. But direct evidence of that character could hardly be had in the very nature of things, unless one of the defendants should confess, and the fact must be determined by the inference naturally and properly to be drawn from those matters which can be and are directly proven."

Under the evidence set forth above the inference of joint fraud, and the existence of a conspiracy in which appellant Lewis participated, is not unreasonable, and will not be disturbed on appeal. In view of this conclusion other contentions of appellant need not be considered.

The judgment is affirmed.

VAN DYKE, and PEEK, JJ., concur.

107 Cal.App.2d 674

In re BAXTER'S ESTATE.

THOMPSON v. WHITE et al.

Civ. 4414.

District Court of Appeal, Fourth District, California.

Nov. 26, 1951.

Proceeding in the matter of the estate of Bluford C. Baxter wherein Ben F. White, administrator, etc., filed his account and petition for distribution and Claudia Mae Baxter Thompson filed objections alleging, among other things, that no part of the residue of the estate was community property. The Superior Court of Riverside County, John G. Gabbert, J., entered an order and decree that the residue of the estate was community property, and Claudia Mae Baxter Thompson appealed. The District Court of Appeals, Barnard, P. J., held that the evidence sustained the finding that the property in question was community property.

Order and decree affirmed.

1. Husband and Wife 🔑262(1)

Where property was acquired during coverture, there was a presumption that it was community property, and in proceedings involving status of property, it was incumbent upon party contending that it was separate property of husband to produce satisfactory evidence to the contrary.

2. Husband and Wife 🔑264

In proceeding to settle administrator's final account and for distribution of decedent's estate, evidence sustained finding that residue of estate was community property.

3. Husband and Wife 🔑14(3), 249

Conveyance of property owned by husband and wife as joint tenants would dissolve joint tenancy, but would not, in absence of any agreement, deprive wife of her interest in proceeds of sale or make proceeds the separate property of the husband.

George D. Collins, Jr., San Francisco, for appellant.

Ruel Liggett, Roy M. Cleator and E. C. Davis, San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order settling the final account of an administrator and from a decree of distribution.

In 1925 letters testamentary were issued to Margaret D. Baxter, the widow of the deceased, and the estate was appraised at $41,629.43. In December, 1947, these letters were revoked and in March, 1948, letters of administration were issued to the public administrator. In an order settling Mrs. Baxter's account, made after her death, the court found that she was indebted to this estate in the sum of $11,581.06.

On July 18, 1950, the administrator filed his account and petition for distribution, in which he alleged that the residue of this estate is community property and sought distribution accordingly. The appellant filed objections alleging, among other things, that no part thereof is community property. After "hearing the evidence" the court found, so far as material here, that the residue of the estate amounted to $23,353.55; that this is community property and the estate of Margaret D. Baxter is entitled to one-half thereof; that the remaining half is to be divided equally, in accordance with the will, between two daughters of the deceased and the estate of Margaret D. Baxter; and that the $11,581.06 owed by Mrs. Baxter should be deducted from the amount turned over to her estate. An order and decree in accordance with these findings was entered, and this appeal followed.

The appellant contends that there is no evidence that any of this property is, or was, the community property of the decedent and Mrs. Baxter. We are referred to no evidence in support of this contention, except for the claim that Mrs. Baxter had in effect stated in her petition for family allowance, filed on December 2, 1932, that there was no community property. The statement thus referred to, which did not mention community property, was: "that the only property owned by your petitioner consists of a residence located in Santa Ana". This statement was clearly intended to refer to other property and not to her interest in this estate, and it cannot be construed as establishing the fact that no community property existed.

The only part of the evidence which appears in the record here is one exhibit. This is a transcript of certain testimony at hearings in 1935 and 1937 upon objections to a prior account in this estate. It appears from this exhibit that Mr. and Mrs. Baxter were married in 1914, and that in 1917 a ranch was deeded to them as joint tenants. They sold this ranch in 1920, receiving $10,000 in cash and a note and trust deed for $26,187, which was payable to Mr. Baxter. The main part of this estate, as appraised in 1925, consisted of this note and a parcel of real property, appraised for $13,000, which was acquired by using the cash from the sale of the ranch. Mrs. Baxter testified at those hearings that the proceeds from the sale of the ranch belonged half to her and half to her husband, and that she considered them community property.

[1,2] Such evidence as appears in the record indicates that this property was treated by the parties as community property. There is also a presumption that it was community property, In re Estate of Hill, 167 Cal. 59, 138 P. 690. It was incumbent upon the appellant to produce satisfactory evidence to the contrary, Lynam v. Vorwerk, 13 Cal.App. 507, 110 P. 355, which was not done so far as the record shows. It cannot be held that the court's findings are entirely without support.

[3] It may also be observed that there was no evidence which would even tend to indicate that the property in question was the separate property of the deceased at the time of his death. It clearly appears that at least $39,000 of the property, as appraised in 1925, was the proceeds from the sale of a ranch which Mr. and Mrs. Baxter owned as joint tenants. While the conveyance of this ranch would break the joint tenancy it would not, in the absence of any agreement, deprive Mrs. Baxter of her interest in the proceeds or make them the separate property of Mr. Baxter. In re Estate of Harris, 9 Cal.2d 649, 72 P.2d 873; 48 C.J.S., Joint Tenancy, § 4, p. 928. If this was not community property, one-half of it still belonged to Mrs. Baxter; her half far exceeded the amount she owed the estate; the debts and expenses of the estate would be payable out of the other half; and the appellant would be in a much worse position than she is under the decree appealed from.

The appellant incidentally contends that under the terms of the will the debts of the deceased should have been paid "from the Beaumont property." The will did not so provide, and any attempt to have done so would be abortive since it conclusively appears that that property, which had been held in joint tenancy, was owned by Mrs. Baxter who traded it for the residence in Santa Ana.

The order and decree are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

107 Cal.App.2d 670

Ex parte ANDERSON.

Cr. 2318.

District Court of Appeal, Third District, California.

Nov. 26, 1951.

Hearing Denied Dec. 28, 1951.

Proceedings in the matter of the application of William F. Anderson for writ of habeas corpus in which Attorney General filed brief in opposition to issuance of writ. The District Court of Appeal, Van Dyke, J., 236 P.2d 659, entered judgment adverse to petitioner. On rehearing, the District Court of Appeal, Van Dyke, J., held that adult authority was not precluded by prior judgment acquitting defendant of violation of Deadly Weapons Control Act from maintaining proceeding for revocation of parole based upon same facts giving rise to criminal charge, for judgments in criminal prosecutions are neither bars to subsequent civil proceedings founded upon same facts nor proof of anything in civil proceedings.

Writ denied.

1. Judgment 🔑559

As general rule, judgments in criminal prosecutions are neither bars to subsequent civil proceedings founded upon same facts nor proof of anything in such civil proceedings, and when same acts or transactions constitute crime and also give right of action in civil proceeding, acquittal of defendant when tried for criminal offense is no bar to prosecution of civil action against him nor evidence of his innocence in such action.

2. Judgment 🔑751

Judgment of acquittal in prosecution for violation of Deadly Weapons Control Act was not binding upon Adult Authority on issue of guilt in subsequent proceeding for revocation of parole based on same alleged violation and did not preclude revocation of parole. Gen.Laws, art. 1970; Pen.Code, § 3063.

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William F. Anderson, in pro per., for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy, for respondent.

VAN DYKE, Justice.

This is a proceeding in habeas corpus. Heretofore we issued an order to the respondent Warden to show cause why the writ prayed for should not be issued. The matter was ordered submitted after the filing of the brief of the Attorney General in opposition to the issuance of the writ, and on October 29th this court filed an opinion adverse to petitioner and ordered that the writ be denied. Petitioner then brought to our attention the fact that he had been given additional time within which to file a closing brief and asked that this court revoke the order theretofore made. We treated his petition as one for rehearing and granted the same. Petitioner has since filed his brief and the matter has again been submitted for decision. We have examined this further brief and find nothing therein which persuades us that our former opinion was not correct. We therefore, except for a single change in citation, adopt that opinion which, as amended, reads as follows:

On May 1, 1948, the petitioner was committed to the State prison upon conviction of the crimes of kidnaping and robbery. On May 1, 1950, he was granted parole by the Adult Authority. On March 6, 1951, his parole was suspended for the reason that he had been arrested and charged with having had in his possession a gun capable of being concealed upon his person in violation of the Deadly Weapons Control Act. 1 Deering's Gen.Laws, p. 864, Act 1970. It appears that he was tried upon this charge in the Superior Court of Los Angeles County and was acquitted, the trial being before the court sitting without a jury. Notwithstanding the acquittal, the Adult Authority proceeded upon charges that he had in fact been in possession of a gun and additionally that his conduct and attitude on parole did not justify that privilege. After a hearing the Authority revoked his parole upon both grounds. Thereafter petitioner filed in this court his petition for a writ of habeas corpus, claiming that his parole had been unlawfully revoked contrary to the provisions of Penal Code, Section 3063, which provides that no parole shall be revoked without cause, which cause must be stated in the order of revocation. This court issued an order to show cause why the writ prayed for should not issue and there has been produced before us the record of the proceedings for revocation of parole. It therefrom appears that the charge of possession of a gun considered by the Adult Authority involved the same facts as were involved in the criminal prosecution in Los Angeles County, and it is fair to say that it further appears as to the second ground that it was based upon the same incident. It is the contention of petitioner that since he was acquitted in the criminal proceeding the acquittal was binding upon the Adult Authority in the proceedings for revocation and that for that reason there was no just cause for revoking his parole.

[1, 2] We think that the contentions of petitioner cannot be sustained. It is a general rule that judgments in criminal prosecutions are neither bars to subsequent civil proceedings founded upon the same facts nor proof of anything in such civil proceedings, 50 C.J.S. Judgments, § 754, P. 269, and that even where the same acts or transactions constitute a crime and also give a right of action in a civil proceeding the acquittal of the defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him nor evidence of his innocence in such action. 50 C.J.S., Judgments, § 754, P. 272. The reasons generally given are that the parties to the proceedings are not the same and that with respect to the rule on acquittal the degree of proof required in the criminal proceeding, due to the doctrine of reasonable doubt, is so different from that required in the civil proceeding that no reason exists for a rule that the acquittal in the criminal proceeding should be a bar in the civil proceeding or should establish the fact of innocence.

In Helvering v. Mitchell, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917, 920, in holding that an acquittal in criminal proceedings was no evidence of non-guilt in civil actions arising out of the same facts the court said: "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' Lewis v. Frick, 233 U.S. 291, 302, 34 S.Ct. 488, 492, 58 L.Ed. 967, [973]. It did not determine that Mitchell had not willfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." In Galyon v. State, 189 Tenn. 505, 226 S.W.2d 270, it was held that revocation of parole under the Georgia statutes was not prevented by acquittal of the parolee on a criminal charge involving the same incidents and that the revocation could be based upon an opposite finding by the authority in charge of paroles. The court quotes the rule as stated in Helvering v. Mitchell, supra, and further declares that proceedings for revocation of parole are civil in nature and that parole boards are not bound by adjudication of criminal proceedings involving the same questions of fact. In People v. Kuduk, 320 Ill.App. 610, 51 N.E.2d 997, 1000, which involved revocation of probation based upon a charge of driving a car while intoxicated, upon which same charge, in a criminal proceeding, the probationer had been held not guilty, the court declared: "The issues tried before Judge Ward were criminal and the People were required to prove the charge beyond a reasonable doubt while the matter before Judge Dunne was whether Kuduk had violated the terms of his probation, which did not require such a degree of proof."

The criminal proceedings in Los Angeles County aptly illustrate the soundness of the rules discussed. When arrested, petitioner was driving a car and had been stopped by a patrol officer because of defective headlights. He was accompanied by a woman companion. During a discussion with the officer and in order to prove some point he was making in his argument as to why he should not be given a citation he opened his glove compartment and the officer noted that there was a gun in the compartment. His arrest for violation of the Deadly Weapons Control Act followed. At his preliminary examination his companion testified that the gun belonged to him, and that when she entered the car it had been lying on the seat beside him. At the trial this witness was unavailable. The prosecution endeavored to have admitted her testimony on preliminary examination, but the trial court rejected the offer. Petitioner's testimony was that the gun belonged to the woman, that he had no knowledge that she had it with her and did not know how it got into the glove compartment of his car. Without the contradictory testimony of his companion it is easy to see that the trial court, applying the doctrine of reasonable doubt, felt well justified in acquitting accused of the charge. On the other hand the Adult Authority in matters of parole accepts a heavy responsibility in permitting convicts to be at large and if it was believed after a hearing that the preponderance of evidence was to the effect that petitioner had in fact had a gun in his possession the Authority's action in revoking his parole ought not to be interfered with notwithstanding in the criminal proceeding in Los Angeles County he had been acquitted of the same charge.

We are referred to the case of In re Payton, 28 Cal.2d 194, 169 P.2d 361, 363, wherein the Supreme Court in discussing a proceeding for revocation of parole where a criminal charge had been made against a parolee and his parole had on that ground been suspended and he had been later acquitted on the criminal charge said: "the order [of suspension] is preliminary in nature, 'pending investigation' and the outcome of the prosecution of the charge. Its finality is determined by the appropriate board or authority when the truth of the charge is shown by conviction and an order of affirmance is made. If the prosecution culminate in acquittal, and no other charges support the suspension, it is to be assumed that the proper authority will vacate the preliminary order suspending parole." We do not think that by the foregoing language the Supreme Court intended to depart from the general rules we have herein discussed nor to hold that by such an acquittal the Adult Authority is bound and barred from proceeding themselves to determine the facts of the charge.

The order to show cause heretofore issued is discharged. The writ is denied.

ADAMS, P. J., and PEEK, J., concur.

FASCINATION, INC. v. HOOVER et al.*

Civ. 18768.

District Court of Appeal, Second District,
Division 2, California.

Nov. 20, 1951.

Hearing Granted Jan. 17, 1952.

Fascination, Incorporated, brought a mandamus proceeding to compel Edward G. Hoover, City Tax Collector of Long Beach, and others to issue a license to petitioner for operation of a group game mechanical device in the Amusement Zone of such city. From a judgment of the Superior Court, Los Angeles County, Albert F. Ross, J., directing issuance of a peremptory writ of mandate, defendants appealed, and petitioner applied for an order that the appeal should not stay execution. The District Court of Appeal, Moore, P. J., held that the trial court's admission of a mathematics professor's testimony, not before defendants before their denial of the license, that the game was one of skill, not chance, was error prejudicial to defendants.

Judgment reversed, and petitioner's application denied.

1. Mandamus 🔑168(3)

In mandamus proceeding to compel city tax collector, prosecutor and police chief to issue license to petitioner for operation of mechanical game device, superior court's admission of mathematics professor's testimony, not before defendants before their denial of license, that game was one of skill, not chance, as shown by tests and demonstrations conducted and supervised by witness, was error, as such evidence was outside proper scope of court's review.

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* Subsequent opinion 246 P.2d 656.

2. Mandamus ⚷172

The scope of superior court's inquiry, in mandamus proceeding to compel city tax collector, prosecutor and police chief to issue license for operation of amusement game device after their denial of license on ground that game was one of chance, was limited to determination, solely from review of record before such officials, as to whether there was sufficient evidence to sustain their conclusion or whether they abused their discretion, as by acting arbitrarily, capriciously or fraudulently.

3. Mandamus ⚷172

A city tax collector, prosecutor and police chief have discretion to decide wrongly, as well as correctly, whether game, for operation of which license is sought, is one of chance, and court can interfere with their discretion, in mandamus proceeding to compel issuance of license, only if there was no substantial evidence to support decision.

4. Appeal and Error ⚷931(6)

On appeal from judgment of court, sitting without jury, presumption is that court did not base its finding on improperly admitted evidence, where there is competent evidence to support finding.

5. Mandamus ⚷187(9)

In mandamus proceeding to compel city tax collector, prosecutor and police chief to issue license for operation of amusement game device after defendants' denial of license on ground that game was one of chance, erroneous admission of mathematics professor's testimony, not before defendants, that game was one of skill, as disclosed by tests and demonstrations conducted and supervised by witness, was prejudicial to defendants, where trial judge relied strongly on such testimony and expressly declared that he admitted it for purpose of determining whether defendants conducted sufficient hearing and investigation.

6. Appeal and Error ⚷533(1), 664(1)

Though trial judge's opinion can never operate to impeach court's findings and is generally of little effect on appeal from judgment thereon, it is properly part of record before appellate court, and declarations therein may be fairly invoked for purpose of interpreting findings. Rules on Appeal, rule 5(a).

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Irving M. Smith, City Atty., of Long Beach, Philip J. Brady, John R. Nimocks, Deputy City Attys., Long Beach, for appellants.

Fred N. Howser, Los Angeles, for petitioner and respondent.

MOORE, Presiding Justice.

Petitioner is the owner of a certain type group game, a mechanical device known as and named "Fascination." In April, 1951, it applied to appellant Hoover, City Tax Collector of Long Beach for permission to operate the device in the Amusement Zone of Long Beach and deposited the requisite license fees. Also, it submitted such information as the Tax Collector required as provided by ordinance No. C–2232 of that city. Pursuant to such ordinance, Hoover referred the application to the offices of appellant Sutherland, City Prosecutor, and appellant Dovey, Chief of Police, for a determination as to the legality of the game. As a result of their investigation, Sutherland and Dovey acting in their official capacities concluded that the game violated existing gambling laws in that the element of chance predominated over the element of skill. Accordingly, they recommended against issuance of the license and respondent's application was subsequently denied by Hoover.

Thereafter, petitioner initiated this mandamus proceeding for the purpose of compelling the issuance of the license on the ground that appellants' action in denying the license was "arbitrary, unreasonable and capricious." After a trial of the issues raised by the answer of respondents the court concluded that "the recommendations and findings of * * * Dovey and Sutherland * * * were not based on substantial evidence as they made only a cursory inspection to corroborate a preexisting opinion. All of which conduct was arbitrary." Judgment was accordingly entered directing the issuance of the peremptory writ of mandate. Petitioner thereupon applied to this court for an order under section 1110b of the Code of Civil Procedure.

Appellants now seek reversal of the judgment contending (1) that the finding of appellants' having acted in an arbitrary manner is unsupported by the evidence; (2) that the trial court erred in admitting and considering evidence which was not considered by appellants in making their determination; (3) that, in any event, the court should have remanded the matter to the administrative officers for further investigation rather than to have ordered the issuance of the license.

Although a close question is presented as to whether there is evidentiary support for the finding that appellants acted arbitrarily in denying Fascination a license, since the record discloses other errors requiring a reversal it will not be necessary to examine in detail the evidence as to the extent of appellants' investigation of the game.

[1–3] At the trial of the application for the writ, the court, over the objection of appellants, permitted respondent to call as a witness one Robert P. Dillworth, a professor of mathematics at California Institute of Technology. Dr. Dillworth was qualified as an expert in the field of statistics and probabilities and was then permitted to testify as to tests and demonstrations he had conducted and supervised with respondent's Fascination equipment. Based upon these demonstrations wherein two experienced Fascination players were pitted against two inexperienced players the witness testified that in his opinion the game was one of skill.

The admission of such testimony was error. This evidence was not before the appellants and their investigating officers at any time prior to their final determination on respondent's application for a license and accordingly was outside the proper scope of the court's review on the hearing. The root of the error lies in the court's misconception of its powers of review in a proceeding of this nature. In effect, what the court did was to reweigh and to judge the intrinsic value of the evidence that had guided appellants in their determination. Such procedure was outside the scope of the inquiry which was limited to a determination, solely from a review of the record before the administrative officials, whether there was sufficient evidence to sustain their conclusion that the fascination device is a game of chance. Southern California Jockey Club v. California Horse Racing Board, 36 Cal.2d 167, 175, 223 P.2d 1. In other words, the scope of judicial review is limited to a determination of whether the officials abused the discretion vested in them by law. Such abuse would be indicated if it appeared from the evidence before the administrative officials that they had acted arbitrarily or capriciously or fraudulently. The court's finding is that the recommendations and findings of the officials were "arbitrary" in that they made only a "cursory inspection to corroborate a pre-existing opinion." Inasmuch as their action could have been adjudged arbitrary only in the event there was not a sufficient factual basis before them for their conclusions, 36 Cal.2d at pages 174–175, 223 P.2d 1; McDonough v. Goodcell, 13 Cal.2d 741, 749, 91 P.2d 1035, 123 A.L.R. 1205, necessarily new and independent evidence not previously before the administrative officers had no place in such determination. Such evidence might tend to indicate that appellants erred in their conclusion that the game was not one of skill or science whereas that question was not before the court for decision. The officials have the discretion to decide the matter wrongly as well as correctly, but only in the event that there was no substantial evidence to support their decision can the court interfere. Maxwell v. Civil Service Commission, 169 Cal. 336, 339, 146 P. 869; Pratt v. Rosenthal, 181 Cal. 158, 164, 183 P. 542; Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 179, 110 P.2d 453; Shannon v. McKinley, 62 Cal.App.2d 169, 178, 144 P.2d 433.

[4–6] Respondent argues that the admission of such evidence could in no case be prejudicial. It is true that on appeal it is presumed that the court, sitting without a jury, did not base its finding on improperly admitted evidence where there is competent evidence to support it, Cordi v. Garcia, 56 Cal.App.2d 584, 589, 132 P.2d 887, but the record affirmatively shows that the trial court relied strongly upon the testimony of Professor Dillworth. This is shown first by the fact that after having heard Professor Dillworth's testimony the court received in evidence the testimony of Professor De Garmo, offered by respondents in opposition to the testimony of Professor Dillworth. Also, in his written opinion the trial judge expressly declared that he admitted the Dillworth testimony for the purpose of determining whether appellants had conducted a sufficient hearing and investigation. Although the opinion of the trial judge can never operate to impeach the court's findings and is generally of little effect on appeal, it is properly a part of the record before this court, Rule 5(a), Rules on Appeal; Taylor v. George, 34 Cal.2d 552, 556, 212 P.2d 505, and its declarations may be fairly invoked for the purpose of interpreting the findings. See Southern California Jockey Club v. California Horse Racing Board, supra, 36 Cal.2d 176, 223 P.2d 1.

Judgment reversed. Respondent's application under section 1110b of the Code of Civil Procedure is denied.

McCOMB, J., concurs in the judgment.

107 Cal.App.2d 501

MARCHICA v. STATE BOARD OF EQUALIZATION.

Civ. 18334.

District Court of Appeal, Second District, Division 3, California.

Nov. 14, 1951.

Rehearing Denied Dec. 5, 1951.

Hearing Denied Jan. 10, 1952.

Frank Marchica sued the State Board of Equalization of the State of California for refund of sales taxes, interest, and penalties. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., rendered a judgment of dismissal entered pursuant to an order granting a motion for nonsuit and the plaintiff appealed. The District Court of Appeal, Vallée, J., held that the plaintiff made a prima facie case for recovery and therefore granting of nonsuit was reversible error, since the burden of proving fraud was upon the board and not the taxpayer.

Reversed.

1. Licenses 🔑**32(2)**

In an action by Board of Equalization to collect a delinquent sales tax, certificate of delinquency is prima facie evidence of determination of tax or amount of tax, of delinquency of amounts set forth, and of compliance by board with all provisions of sales tax law in relation to computation and determination of amounts, but when action is brought by taxpayer for recovery of sales tax paid under protest, use of certificate of delinquency as a defense to action is not authorized. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

2. Licenses 🔑**30**

The existence of fraud or an intent to evade the Sales Tax Act is essential to confer upon Board of Equalization the power to make a deficiency assessment and to exact penalties. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

3. Licenses 🔑**32(2)**

Under statute providing that if any part of deficiency in tax is due to fraud or an intent to evade, a penalty shall be added thereto, the fraud meant is actual, intentional wrongdoing, and intent required is specific purpose to evade a tax believed to be owed. Revenue and Taxation Code, § 6485.

4. Licenses 🔑**32(2)**

The burden of proving fraud in the making of a tax return is not sustained by merely establishing a deficiency. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

5. Licenses 🔑**30**

The failure to file a correct tax return does not necessarily constitute fraud, and mere omission of items which should have been included does not show a fraudulent intent. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

6. Fraud 🔑50

Fraud is never presumed and must be established by proof and the presumption always is in favor of good faith, innocence, honesty and fair dealing, except where confidential relations are involved.

7. Fraud 🔑50

One asserting fraud except where confidential relations are involved, has the burden of proving it. Revenue and Taxation Code, § 7151.

8. Licenses 🔑34

In suit for refund of sales taxes, the action of Board of Equalization in assessing a deficiency was presumed to be correct as to amount of tax and interest, and taxpayer had burden of overcoming presumption, but the presumption was against fraud and the burden of proving fraud was on the board as to that portion of the deficiency which was assessed after the statute of limitations had run. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

9. Licenses 🔑34

Where deficiency for alleged failure to pay sales tax could only be sustained if the understatement was due to fraud or an intent to evade, the fact that taxpayer in suit to recover taxes admitted in his complaint upon information and belief that any understatement of taxes did not exceed one-third of asserted deficiency did not prevent taxpayer from recovering. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

10. Licenses 🔑32(2)

The statute providing that notice of tax deficiency shall be mailed within three years is a statute of limitation. Revenue and Taxation Code, § 6487.

11. Limitation of Actions 🔑5(1)

Statutes of limitation are to be viewed favorably as affording to parties who may, by lapse of time, have lost the ability to procure evidence, repose and security from stale demands.

12. Licenses 🔑32(2)

The fact that the amount of tax deficiency is correct does not bar a taxpayer from raising statute of limitations if timely notice was not given. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

13. Licenses 🔑34
Limitation of Actions 🔑166

A taxpayer could urge statute of limitations as ground for refund of sales taxes, where timely notice was not given of deficiency, even though the amount of deficiency was correct. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

14. Licenses 🔑34

A suit for refund of taxes paid is the only legal remedy that a taxpayer has. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

15. Licenses 🔑34

The Board of Equalization does not exercise judicial power in administering the Sales Tax Act, and the act in effect, authorizes a hearing de novo in a suit for refund of sales taxes. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

16. Licenses 🔑34

In action for refund of sales taxes, where taxpayer proved timely filing of all returns, timely payment of taxes shown on return, that amount sought to be refunded consisted of a determination of claimed deficiency of taxes and interest for periods prior to October 1, 1944, and a fraud penalty made on December 30, 1947, more than three years after time for making such determination had expired and a fraud penalty determined December 30, 1947 for period from October 1, 1944, to June 30, 1947, timely payment of determined deficiency, interest, and penalties under protection, and timely filing of a claim for refund, a prima facie case was made for taxpayer to recover and the granting of a motion of nonsuit was reversible error. Revenue and Taxation Code, §§ 6481–6487, 6485, 6487, 6561, 6562, 6565, 6591, 6711, 6714, 6902, 6906, 6931, 6932–6937, 7151.

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James L. Wood, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. James E. Sabine and Edward Sumner, Deputy Attys. Gen. for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered pursuant to an order granting a motion for nonsuit in an action for refund of sales taxes, interest, and penalties.

Plaintiff, a retailer, filed sales tax returns when due with defendant for each taxable period from February 1, 1937, to June 30, 1947, and paid the amounts shown by the returns when due.

December 20, 1947, defendant, pursuant to sections 6481–6487 of the Revenue and Taxation Code, determined a deficiency and mailed to plaintiff a notice of the deficiency determination that additional taxes were due for each taxable period from February 1, 1937, to June 30, 1947, in the total sum of $3223.96, plus interest and a penalty of 25% due to fraud. (Rev. & Tax. Code, § 6485.)

Plaintiff filed a petition for redetermination. (Rev. & Tax. Code, §§ 6561, 6562.) A hearing was held on June 16, 1948. Defendant ordered that the tax and penalty be redetermined without change, and on June 23, 1948, issued and mailed to plaintiff a notice of deficiency redetermination to that effect, adding interest. Plaintiff, on June 26, 1948, under protest, paid $5183.70, the total amount of taxes, interest, and penalty, as redetermined.

Within the time required by law, plaintiff filed a claim for refund which was denied. (Rev. & Tax. Code, §§ 6902, 6906.) He then instituted this action.

The complaint alleged, and the answer denied, that "No part of the deficiency determined by defendant was due to fraud, or to intentional disregard of, or intent to evade the Sales and Use Tax Law, or its amendments, or rules and regulations thereunder." The complaint also alleged "The exact amount of any understatement in taxes originally due for said period [February 1, 1937, to September 30, 1944] cannot now be precisely determined for the reason that complete records are not available. Upon information and belief plaintiff alleges that any understatement of taxes originally due for said period did not exceed one-third of said asserted deficiency of $2,437.19."

On the trial it was stipulated that returns were filed for the period February 1, 1937, to June 30, 1947, and that the amounts shown thereon, which were less than the amount of the deficiency, were paid; that the claim for refund was filed within the statutory period; that the action was commenced within the statutory period; and that the amounts sought to be recovered were correctly computed. Plaintiff introduced in evidence the notice of determination, the notice of redetermination, and rested. Defendant then moved for a nonsuit, its counsel stating, in response to a question by the court, that if the motion was denied defendant would rest. The motion was granted.

The detail of the total shown in the claim for refund and sought to be recovered is as follows:

	Feb. 1, 1937 to Sept. 30, 1944	Oct. 1, 1944 to June 30, 1947	Total
Sales tax	$2,437.19	–0–	$2,437.19
Interest to June 30, 1948	1,051.63	–0–	1,051.63
25% fraud penalty	609.30	$196.69	805.99
	$4,098.12	$196.69	$4,294.81

Plaintiff distinguishes, as we must, between the taxable periods prior to October 1, 1944, and those subsequent thereto; this because a deficiency determination for the periods subsequent to October 1, 1944, was within the authority of the board to make. The board did not have authority to determine a deficiency for the preceding periods unless there was fraud or intent to evade. (Rev. & Tax. Code, § 6487.) The determination of fraud for the periods subsequent to October 1, 1944, goes only to the imposition of the penalty. The like finding in the previous years goes to imposition of the tax, the interest, and the penalty.

Plaintiff says he is entitled to recover the taxes, interest, and penalties for the taxable period from February 1, 1937, to September 30, 1944, because the determination was made, admittedly, after liability for the taxes had been barred by the statute of limitations (Rev. & Tax. Code, § 6487), and that he is entitled to recover the penalty determined for the period from October 1, 1944, to June 30, 1947, because defendant did not prove fraud. Defendant replies that the statute of limitations does not apply where there has been fraud, that this determination for all periods was made because of fraud and, therefore, it was legally made. Plaintiff replies that he has denied the fraud, that fraud is never presumed and that, therefore, the burden was on the board to prove it, and that it has done nothing to carry this burden. The defendant says that the assessment is presumed valid. Defendant further says that plaintiff may not recover because he admitted in the complaint "upon information and belief" that any understatement of taxes originally due for the period from February 1, 1937, to September 30, 1944, "did not exceed one-third of said asserted deficiency of $2,437.19."

Section 6485 of the Revenue and Taxation Code provides: "If any part of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade this part or authorized rules and regulations, a penalty of 25 per cent of the amount of the determination shall be added thereto." Section 6487, in pertinent part, provides: "Except in the case of fraud, intent to evade this part or authorized rules and regulations, failure to make a return, or claim for additional amount pursuant to Section 6563, exery notice of a deficiency determination shall be mailed within three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within three years after the return is filed, whichever period expires the later."

[1] In an action by the board to collect a delinquent sales tax the certificate of delinquency is prima facie evidence of the determination of the tax or the amount of the tax, of the delinquency of the amounts set forth, and of compliance by the board with all provisions of the sales tax law in relation to the computation and determination of the amounts. Rev. & Tax. Code, § 6714; People v. Mahoney, 13 Cal.2d 729, 736, 91 P.2d 1029; People v. Schwartz, 31 Cal.2d 59, 63, 187 P.2d 12. "However, when the action is brought by the taxpayer for the recovery of sales tax paid under protest, the use of the certificate of delinquency as a defense to the action is not authorized." Maganini v. Quinn, 99 Cal.App.2d 1, 8, 221 P.2d 241, 245; cf. Rathjen Bros. v. Collins, 50 Cal.App.2d 765, 772, 773, 123 P.2d 925.

Plaintiff relies on Vitelli & Son v. United States, 1919, 250 U.S. 355, 39 S.Ct. 544, 63 L.Ed. 1028; Budd v. Commissioner, 3 Cir., 1930, 43 F.2d 509, Duffin v. Lucas, 6 Cir., 1932, 55 F.2d 786, and Hood v. Allen, U.S. Dist.Ct.Ga.1941.[1]

In Vitelli & Son v. United States, 1919, supra, 250 U.S. 355, 39 S.Ct. 544, 545, 63 L.Ed. 1028, the plaintiffs, in 1905–6–7, had paid duties on imports. The statute provided that when duties on imports shall have been paid, "such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud * * * be final and conclusive upon all parties." 18 Stat. 190. It will be observed that the statute was substantially the same as section 6487 of the Revenue and Taxation Code except that the limitations prescribed by section 6487 is three years. About five years after the last of these payments the collector, claiming fraud, redetermined (reliquidated) the duties. Vitelli denied fraud, paid the increased duties under protest, and appealed to the Board of General Appraisers. The collector made no proof of fraud before the board, and Vitelli made no proof of absence of fraud. The board held that as the existence of power in the collector to establish the redetermination after one year depended on the fact of fraud, the burden was on the collector to prove fraud, and having failed to do so the redetermination was erroneous and the protest well-founded. On appeal the Court of Customs Appeals reversed the board, holding that the presumption of the correctness of official action was sufficient without proof of fraud to sustain the redetermination. In reversing the Court of Customs Appeals and affirming the holding of the Board of General Appraisers, the Supreme Court of the United States, said 39 S.Ct. at page 545, 63 L.Ed. 1029–1030, that merely because the importer himself sought to resist the reliquidation in a proper proceeding therefor he did not thereby assume the burden of proof as to the absence of fraud; that the "remedial purpose of the statute was to protect the citizen from the unlimited power to reliquidate and the uncertainties affecting commercial transactions resulting from the existence of such power", and to prevent casting upon "the citizen the perpetual burden of showing that he had not been guilty of wrong as the only means of escaping the exercise against him of the unlimited power to reliquidate which it was the purpose of the statute to prevent."

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[1] No opinion for publication.

Prior to 1928 there was no Federal statute with respect to the burden of proof as to fraud in suits for refund. In 1928 the Revenue Act of 1924 was amended to provide: "In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner." (26 U.S.C.A. § 1112.)

Budd v. Commissioner, supra, 3 Cir., 1930, 43 F.2d 509, was a proceeding to review an order of the Board of Tax Appeals, made prior to the amendment of the statute, redetermining income taxes for 1921. The commissioner did not offer any evidence before the board, contending that the burden of proving the absence of fraud was on the taxpayer. The Circuit Court of Appeals held, 43 F.2d at page 512: "In plain terms the position of the Commissioner is that Mr. Budd and Mr. Read are guilty of an attempt to commit a deliberate fraud. It is a general principle that fraud is never to be presumed, and he who avers it, takes upon himself the burden of proving it. [Citations.] The determination of the Commissioner being presumptively correct, in appealing from the additional assessment, Mr. Budd was required to prove a sale, transfer of title, a valuable consideration, and the other positive elements upon which he relied. This he did, and this must stand unless the sale was a pretense and a fraud. That it was is in substance what the Commissioner charges. It is necessary for him to bear the burden of establishing this by clear proof, [Citations] unless the well-established rule of law generally applicable is different in tax cases, and the Commissioner says it is. The Commissioner made no attempt to prove fraud, but relied upon Mr. Budd to negative the charge of fraud. But fraud cannot be inferred by the court or jury from acts, legal in themselves and consistent with an honest purpose." The court noted that the Revenue Act of 1924 had been amended in 1928 (after the order under review) and continued, 43 F.2d at page 513: "This is simply declaratory of what the law was.

"The burden was, therefore, on the Commissioner to bear the burden of proving his charge of fraud that the sale was not bona fide."

Jemison v. Commissioner, 5 Cir., 1930, 45 F.2d 4, involved a deficiency assessment and a penalty for fraud levied prior to the 1928 amendment to the Revenue Act of 1924. The tax was on gain realized by stockholders from distribution of assets in liquidation of a corporation. The statute of limitations barred the assessment and the penalty unless the return was fraudulent. The court said, 45 F.2d at page 5: "The assets of the corporation were transferred to the partnership at book value. It is not shown what profit the petitioner derived over the cost of his stock, but in that respect the determination of the Commissioner must be presumed to be prima facie correct. However, the presumption does not extend to his determination that the taxpayer was guilty of fraud in filing his returns. Fraud is not to be presumed, but must be determined from clear and convincing evidence, considering all the facts and circumstances of the case. Vitelli & Son v. U. S., 250 U.S. 355, 39 S.Ct. 544, 63 L.Ed 1028."

Griffiths v. Commissioner. 7 Cir., 1931, 50 F.2d 782, 786, also involved a deficiency assessment for income taxes and a penalty for filing a fraudulent return made before the 1928 amendment to the Revenue Act of 1924. The petitioner contended the statute of limitations had run against any assessment. The court held that the burden of proving fraud was on the commissioner and that "the presumption of Commissioner's correctness does not extend to his determination that fraud existed." Marshall v. Commissioner, 6 Cir., 1932, 57 F.2d 633, 634, which apparently also involved a deficiency assessment made prior to the 1928 amendment to the Revenue Act of 1924, is to the same effect.

Duffin v. Lucas, supra, 6 Cir., 1932, 55 F.2d 786, also had to do with the law prior to the 1928 amendment to the Revenue Act of 1924. It was an action by a taxpayer against the Collector of Internal Revenue to recover payments of income taxes and penalties. The penalties were imposed by the commissioner for alleged fraud with intent to evade tax. The statute authorized a 50% penalty in such a case. The court held, 55 F.2d at page 798: "It may well be doubted whether power can rightly be conferred upon an administrative officer to find a citizen guilty of a felony (which a fraudulent return is) [in the present case a misdemeanor. Rev. & Tax. Code, § 7151.] and punish him therefor;[2] but, assuming that this power exists, what is the status of its exercise when under judicial review? In appropriate cases there is a presumption that the commissioner's action was rightful; but it is a fundamental rule of judicial procedure that fraud cannot be lightly inferred but must be established by clear and convincing proof. It may well be that the right to due process would be infringed by a rule of procedure which abolished this fundamental principle and authorized a finding of fraud—at least, if involving a felony—to be based on that minimum called 'any substantial evidence.' Certainly, as we think, in a suit to recover back such a penalty, the general presumption that the commissioner was right has no evidential effect of itself sufficient to support a judgment affirming the penalty, its effect being procedural only; * * *"

Hood v. Allen, supra, U.S.Dist.Ct.Ga. 1941, was an action to recover a deficiency of income tax and a penalty imposed for alleged fraud. The deficiency and penalty had been assessed after the statute of limitations had run. The collector contended that fraud in the return prevented the bar of the statute from attaching. The court said, "The general burden of proof is on the plaintiff. He makes a *prima facie* case by showing the tax was assessed and collected after the statute of limitation had run. Then, the burden is on the defendant to show fraud in the return to avoid the bar of the statute. If the plaintiff contended that the tax, even if not barred, was otherwise illegally assessed, he would face the presumption that the Commissioner's finding was correct and would have the burden of overcoming that presumption and proving the illegality. However, it being admitted in this case that the tax was assessed after it was barred and the only issue being fraud in the return, the burden on that issue was on defendant." Other cases applying the 1928 amendment and holding that the burden of proving fraud is on the commissioner will be found in the margin.[3]

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[2] "The penalty is imposed without notice or hearing, excepting as upon an abatement or refund claim the taxpayer may present his complaint as to this matter about which the commissioner has already made up his mind."

[2–5] The Sales Tax Act prevents the retention of a tax paid after it is barred by the statute of limitations in the absence of fraud or an intent to evade. The existence of fraud or an intent to evade was essential to confer upon the board the power which it exerted. In the present case the deficiency assessment and the penalties were predicated on fraud. The fraud meant by the statute is actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owed. Guaranty Trust Co. v. United States, D.C.Wash. 1942, 44 F.Supp. 417, 422, and cases there cited. The only evidence in this case is the failure to file correct returns. The burden of proving fraud is not sustained by merely establishing a deficiency. Cohen v. Commissioner, 10 Cir., 176 F.2d 394, 401. The failure to file a correct return does not necessarily constitute fraud. Davis v. Commissioner, 10 Cir., 184 F.2d 86, 87. The mere omission from a tax return of items which should have been included does not show a fraudulent intent. Delone v. Commissioner, 3 Cir., 100 F.2d 507, 510. If returns are filed a deficiency necessarily arises from an understatement in the returns. An understatement may have resulted from ignorance, bad advice, honest mistake, negligence, or misinterpretation of law; none of which in itself would constitute fraud.

[6, 7] Fraud is odious. It is never presumed; but must be established by proof. The presumption always is in favor of good faith, innocence, honesty and fair dealing, except, perhaps, where confidential relations are involved. This presumption has been held to approximate in strength that of innocence of crime. Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114. It is to be noted that any person who renders a false or fraudulent return is guilty of a misdemeanor. (Rev. & Tax. Code, § 7151.) One asserting fraud, except, perhaps, where confidential relations are involved, has the burden of proving it. Estate of Ross, 199 Cal. 641, 651, 250 P. 676.

[8] There were two questions before the board: (1) whether the returns duly reflected the sales subject to taxation; and, (2) whether they were due to fraud or intent to evade. In a suit for refund the action of the board in assessing a deficiency is presumed to be correct as to the amount of the tax and interest, and the taxpayer has the burden of overcoming the presumption. On the other hand, in such a suit the presumption is against fraud and the burden of proving fraud is on the board if the deficiency was assessed after the statute of limitations had run.

The board relies on Pacific Fruit Express Co. v. McColgan, 67 Cal.App.2d 93, 153 P.2d 607, and Van Antwerp v. United States, 9 Cir., 92 F.2d 871. Neither case is in point. The Pacific Fruit case was an action to recover franchise taxes claimed to have been wrongfully exacted. In the course of the opinion the court said, 67 Cal.App.2d at page 96, 153 P.2d at page 609: "[S]ince a suit to refund taxes is in the nature of an action in assumpsit, the taxpayer may recover only if it be shown that more taxes have been exacted than in equity and good conscience should have been paid. Stone v. White, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265; Lewis v. Reynolds, 284 U.S. 281, 52 S.Ct. 145, 76 L.Ed. 293." This, of course, is the general rule. But in that case the deficiency assessment was levied before the statute of limitations had run and no question of fraud or intent to evade was involved. The Van Antwerp case was an action to recover an alleged overpayment of income taxes, claimed to have been illegally exacted prior to the bar of the statute of limitations. No question of fraud or intent to evade was involved.

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[3] Mitchell v. Commissioner, 5 Cir., 1941, 118 F.2d 308, 309; Cohen v. Commissioner, 10 Cir., 1949, 176 F.2d 394, 401; Bronson v. Commissioner, 2 Cir., 1950, 183 F.2d 529, 534; Davis v. Commissioner, 10 Cir., 1950, 184 F.2d 86; Guaranty Trust Co. v. United States, D.C.Wash. 1942, 44 F.Supp. 417, 422.

The board also says that Rogers v. Commissioner, 6 Cir., 1940, 111 F.2d 987, and McClure v. United States, 1943, 48 F.Supp. 531, 98 Ct.Cl. 381, are "squarely contrary to appellant's intention [sic] that a presumption against fraud exists under the circumstances involved here." Defendant misreads these cases. The Rogers case was an appeal from a decision of the Board of Tax Appeals. The commissioner had assessed an income tax fraud penalty for the years 1932–3–4. On the hearing before the Board of Tax Appeals both sides introduced evidence on the fraud issue. The board sustained the commissioner. The Circuit Court of Appeals merely held that the question of fraud was one of fact and that there was sufficient evidence to support the finding of the board. The question of the burden of proof on the issue of fraud was not discussed. It would have been an anomaly if the court had held that the burden was on the taxpayer to prove absence of fraud when the statute at the time expressly placed "the burden of proof in respect of such issue * * * upon the Commissioner." (26 U.S.C.A. § 1112.) The McClure case was a trial by the Court of Claims. McClure had imported a large amount of distilled spirits over a period of seven years without reporting the importations or paying a tax thereon. After liability for the taxes had been barred by the statute of limitations the commissioner assessed a tax with a fraud penalty. The court, exercising the function of a trial court, merely held that the only reasonable inference to be drawn from the proven facts was that McClure did not intend to pay the taxes, but intended to defraud the government thereof. In the present case there is no evidence from which an inference of fraud can be drawn.

[9] The argument that plaintiff may not recover because he admits in his complaint —"upon information and belief"—that any understatement of taxes originally due for the period from February 1, 1937, to September 30, 1944, "did not exceed one-third of said asserted deficiency of $2,437.19," is untenable. The argument overlooks the fact that the deficiency for that period can be sustained only if the understatement was due to fraud or an intent to evade. At the trial plaintiff did not attempt to prove that any part of the deficiency for that period or for the period from October 1, 1944, to June 30, 1947, was erroneously assessed. Assuming, as we must, that the deficiency for the entire period from February 1, 1937, to June 30, 1947, was correctly computed as to amount, there still is no proof that any understatement or underpayment was due to fraud or intent to evade. Cases holding that the statute of limitations does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded are not pertinent in view of the provisions of the Sales Tax Act which specifically authorize the recovery of "any amount alleged to have been erroneously or illegally determined or collected." (Rev. & Tax. Code, §§ 6932–6937.)

[10–15] It is argued that recovery may not be had in the absence of proof that the amount of the deficiency taxes should not have been returned and paid when due. The statute providing that the notice of deficiency shall be mailed within three years (Rev. & Tax. Code, § 6487) is a statute of limitation. It bars the remedy for enforcement in the event that notice of deficiency be not mailed within that time. It bars enforcement—by assessment or collection—in the event of failure to give timely notice. See Mudd v. McColgan, 30 Cal.2d 463, 467, 703, 183 P.2d 10. "'[S]tatutes of limitation are to be viewed favorably as affording to parties who may, by the lapse of time, have lost the ability to procure evidence, repose and security from stale demands.'" People v. Universal Film Exchanges, 34 Cal.2d 649, 659, 213 P.2d 697. The fact that the amount of the deficiency is correct does not bar the taxpayer from raising the statute of limitations if timely notice was not given. The deficiency is barred unless there was fraud or an intent to evade. The entire tenor of the Sales Tax Act contemplates that a taxpayer may raise such defenses as he has in a suit for refund. See People v. Skinner, 18 Cal.2d 349, 357, 115 P.2d 488, 149 A.L.R. 299. Such a suit is his only legal remedy. The act contains no provision for appeal from an assessment to the courts. Injunction to prevent collection by the board is prohibited. (§ 6931.) If the taxpayer fails to pay when ordered to do so, he becomes delinquent and suffers an automatic 10% penalty in addition to interest. (§§ 6564, 6565, 6591.) When a taxpayer becomes an alleged delinquent the board has every conceivable remedy to compel him to pay immediately. It may sue to recover the alleged delinquent amount. (§ 6711.) In such suit the certificate of delinquency is prima facie evidence of the delinquency and of compliance by the board with the act in relation to the computation and determination of the amounts. § 6714; People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029. The board may, without suit, sell any security which has been deposited and apply the proceeds to the amount determined to be due. (§ 6701.) Debtors of the alleged delinquent taxpayer may be required to withhold any amounts payable to the alleged delinquent. (§ 6702.) The board, by merely filing a certificate of the amount claimed to be due, may have a judgment entered, which has the effect of a judgment lien, and may execute on that judgment and collect the claimed tax without court action. §§ 6736–6739; People v. Skinner, 18 Cal.2d 349, 115 P.2d 488. The board may, without court action, make an outright seizure and sale (distraint) of any realty or personalty owned by the delinquent and apply the proceeds to the amount claimed to be due. (§ 6796.) On the other hand, in a suit for refund the statute does not give any finality to the determination of the board. The board does not exercise judicial power in administering the Sales Tax Act and the act, in effect, in a suit for refund authorizes a "hearing *de novo*." Standard Oil Co. v. State Board of Equal., 6 Cal.2d 557, 559, 561–562, 59 P.2d 119.

[16] Plaintiff proved (1) timely filing of returns for all taxable periods involved; (2) timely payment of the taxes shown on the returns; (3) that the amounts sought to be refunded consisted of (a) determination of claimed deficiency of taxes and interest for periods prior to October 1, 1944, and a fraud penalty made on December 30, 1947, more than three years after the time for making such determination had expired under section 6487, and (b) a fraud penalty determined December 30, 1947, for the period from October 1, 1944, to June 30, 1947; (4) timely payment of the determined deficiency, interest, and penalties under protest; (5) timely filing of a claim for refund. Proof of these facts aided by the presumption that the returns were made in good faith, without fraud, made a prima facie case which entitled plaintiff to recover and required the denial of the motion for nonsuit.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; TRAYNOR and SPENCE, JJ., dissenting.

38 Cal.2d 107

PETERSON et al. v. BURKHALTER.

L. A. 22005.

Supreme Court of California, in Bank.
Nov. 30, 1951.

Action by Clarence A. Peterson to recover damages for medical expenses and Jon Peterson, a minor, by his guardian ad litem, Clarence A. Peterson, for personal injuries against Everett G. Burkhalter. The Superior Court of Los Angeles County, Samuel R. Blake, J., rendered judgment for plaintiffs after jury verdict and defendant appealed. The Supreme Court, Edmonds, J., held that evidence that defendant, knowing that minor plaintiff, upon approaching an intersection, was unaware of impending collision, failed to take any steps to warn plaintiff or to avoid collision, was sufficient to authorize application of last clear chance doctrine against defendant.

Affirmed.

Schauer, J., dissented.

Prior opinion, 229 P.2d 403.

1. Negligence ⚷138(4)

Instruction stating doctrine of last clear chance is proper when evidence shows that plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by exercise of ordinary care, and that defendant has knowledge of plaintiff's peril and knows, or in exercise of ordinary care should know, that plaintiff cannot escape from such situation and has last clear chance to avoid the accident by exercise of ordinary care, and fails to exercise same and accident results thereby, and plaintiff is injured as proximate cause of such failure.

2. Negligence ⚷83.11

Doctrine of last clear chance is applicable not only where it is physically impossible for plaintiff to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape.

3. Negligence ⚷83.5

Continuing negligence of plaintiff does not bar recovery from person who has last clear chance to avoid the accident.

4. Automobiles ⚷227(1)

Application of doctrine of last clear chance is not dependent upon an admission by defendant that he expected that there might be a collision, but it is enough if circumstances of which defendant had knowledge were such as to convey to mind of a reasonably prudent man a question as to whether plaintiff would be able to avoid the accident.

5. Automobiles ⚷244(13)

Evidence that motorist, approaching intersection from south at speed of 15 to 20 miles an hour, saw plaintiff on motor scooter approaching intersection from west at speed of 30 miles per hour, at time plaintiff was about 75 feet from intersection and looking over his shoulder in opposite direction from which he was traveling, was sufficient to authorize finding that a reasonably prudent man, knowing facts of which motorist was aware should have foreseen that plaintiff might not turn or stop his scooter, and under the circumstances it was negligent for motorist to proceed toward intersection acting on a contrary assumption.

6. Automobiles ⚷245(16)

Where motorist, approaching intersection from south at speed of 15 to 20 miles per hour, saw plaintiff on motor scooter, approaching intersection from west at speed of 30 miles per hour, at time plaintiff was about 75 feet from intersection and looking over his shoulder in opposite direction from which he was traveling, and continued into intersection without attempting to avoid accident by turning automobile or sounding horn, and stopped automobile within 30 feet after impact, whether sounding of horn by motorist to attract plaintiff's attention would have constituted the exercise of reasonable care to avert the accident was for jury, in personal injury action.

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Betts, Ely & Loomis and John A. Loomis, all of Los Angeles, for appellant.

Cushman, Lynch & Wetherbee and E. Spurgeon Rothrock, all of Los Angeles, for respondents.

EDMONDS, Justice.

A motor scooter ridden by Jon Peterson, a minor, and an automobile which Everett

G. Burkhalter was driving collided at an intersection. The young man is suing for damages for personal injuries sustained at that time, and his father claims special damages for medical services. Burkhalter's appeal from the judgment entered against him upon the verdict of a jury presents only the question as to the propriety of an instruction on the doctrine of last clear chance.

Stated most favorably to the giving of the instruction, the evidence shows the following facts:

Burkhalter was proceeding in his automobile in a northerly direction on Craner Avenue at about 15 to 20 miles per hour. According to his testimony, when he was approximately 50 feet south of the intersection of Craner Avenue and Collins Street, he saw Peterson on the motor scooter. At that time, Peterson was traveling east on Collins Street at approximately 30 miles per hour. The boy was about 75 feet from the intersection and looking over his right shoulder in the opposite direction from which he was traveling.

Burkhalter directed his attention to the right and when he next saw Peterson, the motor scooter was four to five feet from the left side of the Burkhalter automobile, which was then in the center of the intersection. The boy was still looking over his right shoulder. The motor scooter hit the automobile at the left rear door.

Burkhalter testified that the impact occurred at a point approximately one and one-half feet north of the center of Collins Street and at the center of Craner Avenue. His automobile was then two thirds of its length past the center of the intersection and traveling at a speed of 15 to 18 miles per hour. The motor scooter struck the automobile at a slight angle.

Burkhalter told the jury that his brakes were in excellent condition; he could have stopped his car within "just a few feet, 10 or 15, possibly". However, he did not sound his horn at any time prior to the accident nor did he apply his brakes or attempt to change his direction of travel. He stated that when he saw the boy immediately before the impact, he tried to accelerate in order to move out of Peterson's way, but was unsuccessful in doing so. The automobile came to rest 28 to 32 feet past the point of collision but Burkhalter stated that he could have stopped it within a lesser distance.

The jurors returned a verdict for only the amount of special damages sustained by the father. Upon inquiry by court and counsel, the foreman stated that they had found against the boy on the ground of contributory negligence. The doctrine of last clear chance was then restated, and after further deliberation, a verdict was returned for the same amount but in favor of both the boy and his father. The appeal is from the judgment entered accordingly.

No complaint is made of the form of the instruction on the doctrine of last clear chance, but Burkhalter contends that the rule is inapplicable. None of the required elements is present, he says, and a judgment must be entered in his favor because the evidence shows, as a matter of law, that Peterson was guilty of contributory negligence.

[1] An instruction stating the doctrine of last clear chance is proper when the evidence shows: "That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917. In substance, the instruction given at the request of Peterson stated these essential elements.

Burkhalter contends that the evidence does not show that Peterson was in "a position of danger" when first observed by him; that is, when Peterson was 75 feet from the intersection, traveling 30 miles per hour, and looking in the opposite direction from that in which he was moving. "A position of danger", he argues, means that the plaintiff must have been so near the path of travel of the defendant's automobile that he could not escape a collision by the exercise of ordinary care.

This reasoning is based upon the fallacious assumption that the doctrine of last clear chance is limited in application to a situation where the plaintiff is physically helpless to prevent the impending accident through the exercise of ordinary care. Although Burkhalter cites decisions in which the plaintiff, at the time of discovery, was in the path of the approaching vehicle, neither the opinions in those cases nor any logical reason justifies such a limitation upon the rule. See Girdner v. Union Oil Co., supra; Bonebrake v. McCormick, 35 Cal.2d 16, 215 P.2d 728. When Peterson was first seen by Burkhalter, the vehicles were 75 to 50 feet, respectively, from the intersection, and traveling at speeds which would place them in the intersection at the same time. To argue that Peterson was not then in "a position of danger" is to disregard reality.

[2, 3] As to the contention that Peterson may not have the benefit of the doctrine of last clear chance because he was physically able to prevent the accident by stopping or turning, Burkhalter ignores the fact that the inattentive plaintiff, as well as the physically helpless one, comes within the scope of the rule. It applies "* * * not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape * * *." Girdner v. Union Oil Co., supra. The continuing negligence of a plaintiff does not bar him from obtaining a judgment against the person who had the last clear chance to avoid the accident.

[4] Also relied upon for reversal of the judgment is the testimony of Burkhalter that when he first saw Peterson he was not aware of a possible collision. But the application of the doctrine of last clear chance is not dependent upon an admission by the defendant that he expected that there might be a collision. As was stated in Cady v. Sanford, 57 Cal.App. 218, 226, 207 P. 45, 48. "It was not necessary that appellant should actually know that an accident was inevitable if he failed to exercise care. It is enough if the circumstances of which he had knowledge were such as to convey to the mind of a reasonably prudent man a question as to whether respondent would be able to escape a collision."

Burkhalter compares his situation to that of the defendant in Johnson v. Southwestern Engineering Co., 41 Cal.App.2d 623, 107 P.2d 417. There the rule of last clear chance was held to be inapplicable because there was no evidence showing knowledge by the defendant of the plaintiff's danger. Johnson had fallen asleep while driving his automobile, and there was no evidence that the driver of the other car was aware of this fact. For that reason, it was held, the defendant did not know that Johnson was in a position of danger, and did not have the last clear chance to avoid the collision.

[5] Burkhalter knew that Peterson was oblivious to the impending collision, and he excuses his failure to do anything to avert the accident upon the ground that he had no reason to expect continuing negligence on the part of Peterson. However, there is ample evidence from which the jury could determine that a reasonably prudent man, knowing the facts of which Burkhalter was aware, should have foreseen that Peterson might not turn or stop his motor scooter. Under such circumstances, it was negligent for Burkhalter to proceed toward the intersection acting upon a contrary assumption. It is this evidence which distinguishes such cases as Jones v. Heinrich, 49 Cal.App.2d 702, 122 P.2d 304; McHugh v. Market Street Railway Co., 29 Cal.App.2d 737, 85 P.2d 467 and Choquette v. Key System Transit Co., 118 Cal.App. 643, 5 P.2d 921, relied upon by Burkhalter.

Finally, Burkhalter contends that he neither had, nor failed to avail himself of, a clear opportunity to avoid the accident by the exercise of ordinary care. However, as has been stated, the jury could properly find from the evidence that Peterson was in a position of danger when first seen by Burkhalter, who then had reason to believe the boy was totally unaware of the impending collision.

In taking the position that, as a matter of law, he did not have a "last *clear* chance" to avoid the accident but only a possible one, Burkhalter relies upon Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932, 935. It was there held that "Under the evidence presented we are of the opinion that the trial court correctly refused appellant's proposed instruction on the last clear chance doctrine." This holding was based upon evidence that, at the time the defendant saw the plaintiff commence a sudden turn to the left, he was 50 feet away and had two seconds within which to stop. The defendant was driving 20 or 35 miles per hour, and the street was "a little wet". There was expert testimony that the defendant's car could be stopped in 16 feet when traveling 20 miles per hour, and in 45 to 50 feet when traveling 35 miles per hour, if the street were dry.

But in stating these distances, the witness did not include the required reaction time which, he testified, might be "a second or more". Also the record showed that the plaintiff was not unaware of the impending danger. If the defendant could have stopped or turned to avoid the collision, said the court, the plaintiff could likewise have stopped or turned for that purpose. It was on this ground that Girdner v. Union Oil Co., supra, which is factually similar to the present case, was distinguished.

Considering the evidence in the Poncino case, it does not stand for the proposition that, as a matter of law, a defendant with two seconds within which to avoid an accident had no chance to do so. In a proper case, an appellate court might say that the defendant did not have a chance which amounted to a "clear" one. But the rule should not be applied when the only evidence is to the effect that the defendant could have avoided the accident within the existing time and distance limitations.

[6] Burkhalter saw Peterson when 50 feet from the intersection. He estimated that he could stop his automobile within 10 or 15 feet. He did stop within 28 to 30 feet after the impact, and testified that he could have done so sooner. All of the evidence indicates that Burkhalter might have halted his automobile at a much less distance than 50 feet.

Moreover, Burkhalter's testimony reveals that he made no attempt to avoid the accident by turning his automobile or sounding his horn. It cannot be said, as a matter of law, that he did not have sufficient time in which to do something, and the jury properly might have found that sounding his horn to attract the attention of Peterson would have constituted the exercise of reasonable care on his part to avert the accident. (See Rest.Torts, § 480, comment b.)

The judgment is affirmed.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, J., concurs in the judgment.

SPENCE, Justice.

I concur in the judgment.

The situation presented here is quite similar to that which was before this court in Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915. While that case and the present one appear to be "border-line cases", see Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 231, 28 P.2d 932, the peculiar facts here, shown by the testimony most favorable to the application of the doctrine of last clear chance, justified the submission of that issue to the jury. The trial court therefore did not err in giving an instruction on that subject.

I adhere, however, to the views expressed in Poncino v. Reid-Murdock & Co., supra, 136 Cal.App. 223, 28 P.2d 932, and in Johnson v. Sacramento Northern Ry., 54 Cal.App.2d 528, 129 P.2d 503, which views need not be repeated here. The review of the authorities made in those decisions shows that the last clear chance doctrine is ordinarily inapplicable to a situation involving the collision of two moving vehicles, for in such cases the negligent act of plaintiff which creates the peril usually occurs practically simultaneously with the happening of the accident, and neither party may be said to have had a last clear chance to avoid the consequences.

There is language in some of the decisions, and some implication in the majority opinion here, indicating that a last clear chance instruction should be given whenever there is any evidence tending to show that defendant, after discovering plaintiff's peril, had a chance "to do something" to avoid the accident. Such is not the rule, for it is only where there is evidence tending to show that defendant had a last clear chance, as distinguished from a bare possible chance, to avoid the accident that the doctrine may be applied.

SCHAUER, Justice.

I dissent. The standard of conduct required of the defendant in this case exceeds that imposed in any reported case which has come to my attention. The majority require that the defendant in entering and crossing a street intersection at a lawful rate of speed, and having the right of way over plaintiff, should have looked right, looked left, looked ahead (all of which he did do) *and have anticipated that plaintiff riding a motor scooter approaching and entering the same intersection from the defendant's left at a speed not over 30 miles per hour would for more than 75 feet of his travel look neither right or left nor ahead but only behind him, would violate the law by failing to yield the right of way to defendant, and crash into defendant's car.* For failing to anticipate all these things and avoid the accident defendant is liable to plaintiff in damages on the theory of last *clear* chance. The plaintiff, hold the majority, was in a position of danger from which he could not, and could not be expected by a reasonable man to, extricate himself.

The tendency of courts in recent years to extend application of the last clear chance doctrine has been manifest. I think there should be a limit to its extension and that this case passes reasonable bounds.

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38 Cal.2d 114

ROSE v. KNAPP et al.

No. L. A. 21556.

Supreme Court of California, in Bank.

Dec. 4, 1951.

As Modified Dec. 27, 1951.

Maurice Rose, doing business as Golden State Finance Company, brought a quiet title action against E. W. Knapp, June Knapp, and others. The Superior Court, Los Angeles County, William J. Palmer and Charles E. Haas, JJ., entered an order dismissing the action on ground that it was not brought to trial within five years after filing of complaint, and the plaintiff appealed and was opposed by June Knapp, and others. The Supreme Court, Gibson, C. J., held that where the quiet title action had been pending for over six and a half years when it was dismissed but for over two years and four months of that time there was outstanding against plaintiff a judgment cancelling the deed upon which he relied as establishing his title, though judgment was subsequently reversed, time between entry of judgment and reversal thereof should have been excluded in computing five year period in which a filed action must be brought to trial, and dismissal was improper, and held that order denying plaintiff's motion to vacate order correcting record was not appealable.

Order of dismissal reversed; appeal from order denying motion to vacate dismissed.

Prior opinion 227 P.2d 276.

1. Dismissal and Nonsuit 🔑60(3)

Statute requiring dismissal if an action is not brought to trial within five years after filing of complaint unless parties have stipulated for extension is mandatory, but is subject to implied exceptions where going to trial would be impossible, impracticable or futile, the existence of which exceptions are to be determined in light of facts of each particular case. Code Civ. Proc. § 583.

2. Dismissal and Nonsuit ⚷60(3)

Where quiet title action had been pending for over six and a half years when it was dismissed, but for over two years and four months of that time there was outstanding against plaintiff a judgment cancelling deed on which plaintiff relied to establish his title, though judgment was subsequently reversed, it was a bar to prosecution of quiet title action because so long as effective it operated to destroy or impair basis for the action and rendered it impracticable and futile to bring the action to trial, and hence period between entry of the judgment and final decision on appeal should have been excluded in computing five-year period within which a filed action must be brought to trial, and dismissal was improper. Code Civ.Proc. § 583.

3. Appeal and Error ⚷113(1)

Order denying motion to vacate order correcting the record, being an intermediate order made prior to dismissal, was not "appealable." Code Civ.Proc. § 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

◆

A. J. Weiss and Samuel H. Sherman, Hollywood, for appellant.

Bodkin, Breslin & Luddy, S. V. O. Prichard, Benjamin Chipkin and Oliver O. Clark, Los Angeles, for respondent.

GIBSON, Chief Justice.

This appeal involves the propriety of the trial court's dismissal of a quiet title action pursuant to a motion made by defendants June Knapp and Mattie Hye on the ground that plaintiff had failed to bring the action to trial within five years after the filing of the complaint and that dismissal was mandatory under section 583 of the Code of Civil Procedure.[1]

More than twenty years ago, in 1929, Lorn Betty, plaintiff's predecessor, recovered a money judgment against Ellen Crowder and her son, E. W. Knapp. Betty then brought an action to set aside an alleged fraudulent conveyance of real property to June Knapp, wife of E. W. Knapp, and in September, 1932, obtained a judgment which provided that he should have a lien upon the property and directed that execution should issue accordingly. See Betty v. Knapp, 5 Cal.App.2d 512, 43 P.2d 325. The real property was sold to Betty on execution, and the judgment was satisfied of record, but in August, 1937, the court granted a motion to revive the judgment on the ground that the sheriff's sale was void. See Betty v. Superior Court, 18 Cal.2d 619, 116 P.2d 947. The judgment was thereafter assigned to plaintiff Rose who obtained an alias writ of enforcement and purchased the property at public auction. The present quiet title action was commenced by Rose on July 16, 1943, and the trial was set for June 21, 1944, but after a continuance counsel stipulated on October 20, 1944, that the cause should go off calendar.

On January 18, 1945, the Knapps instituted an action to annul the writ of enforcement under which the real property had been sold and upon which plaintiff's title is predicated. Judgment was entered in favor of the Knapps on May 15, 1946, annulling the writ of enforcement and cancelling the certificate of sale and the deed issued thereunder. This judgment was subsequently reversed on appeal, and the writ was held to be valid, by an opinion which became final on October 2, 1948. Knapp v. Rose, 32 Cal.2d 530, 197 P.2d 7. It was pointed out in that case that "for many years, by a series of obstructive delays and procedural mishaps, the judgment debtors have succeeded in avoiding the payment of the amount which they owe and they do not suggest, much less assert, that Rose is not entitled to enforce his claim against them." 32 Cal.2d at page 535, 197 P.2d at page 10.

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[1] Code Civ.Proc., § 583, provides in part that an action "shall be dismissed by the court * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended * * *."

During the pendency of Knapp v. Rose, supra, plaintiff Rose filed a memorandum to set the present case for trial. The case was set for December 8, 1947, but it was continued until June 16, 1948, when it was ordered off calendar by a minute order which recited that, by stipulation, counsel for the parties had waived the five year provision of section 583 of the Code of Civil Procedure. On March 7, 1949, after the decision on appeal in Knapp v. Rose, plaintiff again moved to set the case for trial, and a date was set, but defendants made motions to dismiss under section 583, and the trial was continued to September 12, 1949, pursuant to a stipulation that defendants' rights under section 583 would not be prejudiced. On August 30, 1949, more than fourteen months after the making of the minute order reciting the waiver of section 583, defendants moved to correct the order by deleting the recital, and the motion was granted on November 16, 1949. Pending that decision, three additional continuances were ordered on the court's own motion.

Between December 1, 1949, and February 7, 1950, defendants made a series of unsuccessful applications to three different trial judges for dismissal of the action under section 583. On February 6, 1950, June Knapp petitioned the District Court of Appeal for a writ of prohibition to restrain trial of the action on the theory that dismissal was mandatory, but the writ was denied on the following day. The cause was then transferred for trial before a judge who had not passed on the prior motions to dismiss, and on February 10, 1950, he made the dismissal order from which the present appeal was taken.

[1] The provision of section 583, requiring dismissal if an action is not brought to trial within five years after the filing of the complaint unless the parties have stipulated for an extension of the period, is mandatory, but it is subject to implied exceptions. As stated in Christin v. Superior Court, 9 Cal.2d 526, 532–533, 71 P.2d 205, 208, 112 A.L.R. 1153, "The purpose of the statute is plain: to prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years * *" and one exception has been recognized "where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile." See also Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 67–68, 168 P.2d 665; City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 916–917, 207 P.2d 17; Judson v. Superior Court, 21 Cal.2d 11, 14, 129 P.2d 361; Westphal v. Westphal, 61 Cal.App.2d 544, 550, 143 P.2d 405. What is impossible, impracticable or futile must, of course, be determined in the light of the facts of the particular case.

[2] As we have seen, the present quiet title action had been pending for over six and a half years when it was dismissed, but for over two years and four months of that time there was outstanding against plaintiff a judgment in Knapp v. Rose annulling the writ of enforcement and cancelling the certificate of sale and the deed to plaintiff issued thereunder. Although the writ was eventually held to be valid in Knapp v. Rose, 32 Cal.2d 530, 197 P.2d 7, prior to that decision plaintiff was faced with the judgment of the trial court cancelling the deed on which he relied as establishing his title. Obviously, while that judgment was outstanding, and until it was reversed or set aside, it was a bar to the prosecution of plaintiff's quiet title action because, so long as it was effective, it operated to destroy or impair the basis for plaintiff's action, and it would have been impracticable and futile for plaintiff to have attempted to bring his action to trial. Accordingly, the time which elapsed between the entry of judgment in Knapp v. Rose and the final decision thereof on appeal is to be excluded in computing the five-year period under section 583, and it was error to hold that dismissal was mandatory.

[3] Plaintiff has advanced two other contentions as grounds for reversal. He

claims that the decision of the District Court of Appeal denying a writ of prohibition was res judicata and that the trial court erred in granting a motion "to correct the record" by striking from a minute order the recital that the parties by stipulation had waived the five-year provision of section 583. However, in view of the conclusion we have reached, it is unnecessary to consider these contentions. Plaintiff has also filed a notice of appeal from an order denying his motion to vacate the order correcting the record, but the order denying relief, being an intermediate order made prior to the dismissal, was not appealable under section 963 of the Code of Civil Procedure.

The order of dismissal is reversed, and the appeal from the order denying the motion to vacate is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

107 Cal.App.2d 827

SHELLEY v. KOFKA.

Civ. 18526.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1951.

A. C. Shelley, doing business as Shelley's Floor Coverings, brought action against Ben Kofka and Goldie Kofka, husband and wife, also known as Ben Kafka and Goldie Kafka, to recover the reasonable value of a carpet laid in defendants' dwelling house, and for the foreclosure of its asserted mechanic's lien. The Superior Court of Los Angeles County, Thurmond Clarke, J., entered a judgment for plaintiffs on the first count and for the defendants as to the second count, and plaintiff and defendants appealed. The District Court of Appeal, Drapeau, J., held that as it was impossible to resolve conflict in findings without passing on the weight, value, and effect of the evidence, it was necessary to reverse the judgment and send the issues back to the Superior Court for a new trial.

Reversed.

1. Trial 🔑404(1)

Findings are to receive such construction as will uphold rather than defeat a judgment.

2. Appeal and Error 🔑931(1)

Findings are to be read together and to be liberally construed on appeal.

3. Appeal and Error 🔑931(1)

An appellate court has the duty to reconcile findings if that can be reasonably done.

4. Appeal and Error 🔑1177(8)

Where it seemed impossible to resolve the conflict in findings without passing on weight, value, and effect of the evidence, the District Court of Appeal would reverse the judgment and send the issues back to the trial court for a new trial.

5. Mechanics' Liens 🔑288(4)

Where evidence in action to recover reasonable value of carpet and for foreclosure of asserted mechanic's lien was sufficient to require a determination by the trial court, as trier of the facts, whether carpet was so affixed to house as to make it part of the realty and render it subject to a mechanic's lien, trial court erred in granting a nonsuit in favor of defendant as to the count dealing with mechanic's lien. Code Civil Proc. § 1183; Const. art. 20, § 15.

◆

N. E. Youngblood, Beverly Hills, for plaintiff and appellant.

Irwin R. Buchalter, Los Angeles (Murray M. Fields, Los Angeles, of counsel), for respondents and cross-appellants.

DRAPEAU, Justice.

Plaintiff furnished and laid carpet upon certain floors in defendants' dwelling house. $1,000 was paid to plaintiff on account by defendants' interior decorator. When, upon completion of the work, plaintiff's bill for the balance due of $2,223.74

was presented to them defendants refused to pay it.

Plaintiff's complaint was in two counts: First, for the reasonable value of the carpet; and, secondly, for the foreclosure of his asserted mechanic's lien upon defendants' real property.

As to the first count, the trial court found that defendants purchased the carpet from the interior decorator as an independent contractor and not from plaintiff; that defendants were billed for the carpet by the interior decorator and they paid him in full; and that plaintiff did not sell and deliver the carpet to defendants.

Then, notwithstanding the foregoing findings, the court found that $2,000 was the reasonable value of the carpet and that defendants were indebted to plaintiff in the sum of $1,000, "inasmuch as $1,000 had been paid to plaintiff" by the interior decorator. Judgment for plaintiff for $1,000 was directed in accordance with this finding.

No findings were made as to the second count, defendants' motion for a nonsuit as to that count having been granted.

Plaintiff testified that the reasonable value of the carpet as laid upon the floors of defendants' house was $3,223.74. There was no other testimony as to value. Therefore, if plaintiff was entitled to a judgment at all, it should have been for $2,223.74. As to the fact of indebtedness, however, the record would support a finding, either that the carpet was laid at the instance and request of defendants, or that plaintiff dealt directly with an independent contractor.

The house was furnished and decorated by an interior decorator employed by defendants. Plaintiff and the interior decorator testified that the defendant wife talked with plaintiff before the carpet was laid, and that she was advised by them that she was to pay plaintiff for it. Defendant wife testified that she never knew or met plaintiff, nor had she had any conversation with him until she got his bill, whereupon she telephoned him that she had already paid the interior decorator. And the exhibits show that defendants paid the interior decorator $5,175, for which they received only the carpet and some material.

Plaintiff and defendants both appeal from the judgment. Plaintiff appeals also from the order of nonsuit.

[1–4] While findings are to receive such construction as will uphold rather than defeat a judgment, and are to be read together and liberally construed, Johndrow v. Thomas, 31 Cal.2d 202, 187 P.2d 681, and it is the duty of an appellate court to reconcile the findings if that can be reasonably done, Ungemach v. Ungemach, 61 Cal.App.2d 29, 142 P.2d 99, in this particular case it seems impossible to resolve the conflict in the findings without passing upon the weight, value and effect of the evidence. Therefore, the judgment will have to be reversed and these issues sent back to the Superior Court for a new trial.

This leaves for consideration the question whether the order of nonsuit should have been made. In granting the motion, the trial judge indicated that he did not think a mechanic's lien would lie for carpet in any circumstances.

The question is not that easy of solution. The applicable part of Section 1183 of the Code of Civil Procedure provides for mechanics' liens to persons furnishing labor and material used in the "construction, alteration, addition to or repair" of any building. Our Constitution of 1879 declares that "Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material * * *." Const. Art. XX, Sec. 15.

It was said in Stevenson v. Woodward, 3 Cal.App. 754, 86 P. 990: "* * * where an improvement is constructed in such manner as to affix it to the real property, and the laborer has no information that it will be regarded otherwise than as suggested by the manner of construction, he may well assume that he is making an improvement upon real property, * *." See, also 17 Cal.Jur. 35, for a recital of articles placed in buildings held to be lienable, such as screen doors, counters, shelving, wainscoting, etc.

So here we have a question of fact presented to the trial court for determination: Was the carpet affixed to, was it part of real property? Or was it removable personal property?

The testimony on this issue was that the carpet was secured to the floor with tack stripping, wall to wall, and nailed around floor casings; "it was nailed to the floor." Tack stripping is a means of securing the carpet to the floor by a piece of wood nailed about one-half inch from the base line. If the carpet is taken up, the tack stripping leaves holes in the floor. And the floors upon which this particular carpet was laid were so irregular in form that if the carpet were taken up it would have had little salvage value. On the other hand, it was testified that the carpet was laid by tackless stripping and could have been taken up without injury to the house or floor.

[5] Under familiar and oft-stated rules relative to nonsuits, the evidence in this case was sufficient to require the determination by the trial court of the controlling facts heretofore stated. Therefore, it was error to grant a nonsuit.

The judgment and the order granting a nonsuit are, and each of them is, reversed. Each party to bear his own costs on appeal.

WHITE, P. J., and DORAN, J., concur.

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107 Cal.App.2d 677

LEE v. CRANFORD et al.

Civ. 18068.

District Court of Appeal, Second District,
Division 1, California.
Nov. 28, 1951.

Rehearing Denied Dec. 18, 1951.

Hearing Denied Jan. 24, 1952.

Robert W. Lee brought action against R. A. Cranford, employer, and others, for injuries sustained in crash while employed by named defendant as an airplane student flight instructor, allegedly caused by negligence of employer in supplying defective airplane. The named defendant filed a cross-complaint. A judgment was entered on a verdict returned in favor of the plaintiff, and the named defendant moved for a new trial. The Superior Court of Ventura County, William A. Freeman, J., entered an order granting a new trial, and the plaintiff appealed from that order and the named defendant appealed from the judgment. The District Court of Appeal, Hanson, J., pro tem., held that where there was a square conflict in the evidence, granting new trial on ground of insufficiency of evidence to sustain verdict of the jury was not abuse of discretion, and that affirmance of the order vacated the judgment.

Order granting new trial affirmed; defendant's appeal dismissed.

1. Workmen's Compensation ⚷2100

Where employer's workmen's compensation insurance failed to cover person employed as an airplane student flight instructor, the employee was entitled to bring negligence action against the employer.

2. Workmen's Compensation ⚷2110

Under Labor Code, any injuries sustained by employee not covered by compensation insurance while in the course of business of employer, must be classed as proximately due to negligence of employer, and negligence of employee, if any, is not a defense. Labor Code, § 3708.

3. Evidence ⚷42

District Court of Appeal would take judicial notice that court clerks generally write up the minutes as the case progresses.

4. New Trial ⚷163(1)

Where clerk's minutes read that motion for new trial was argued and submitted to court for consideration and decision and that after due deliberation court ordered that motion for new trial be granted, and the transcript showed judge's signed order granting new trial only on ground of insufficiency of evidence and not on all grounds stated in motion, but there was no indication of which of the inconsistent orders was prior in time, minutes showed that judge deliberated in his chambers and signed written order, whereupon clerk then completed his minutes, and therefore judge's written order was the only valid one and showed that new trial was granted solely on ground of insufficiency of evidence to sustain verdict.

5. New Trial ⚷163(1)

Where clerk's minutes showed that new trial was granted on all statutory grounds set forth in motion, but judge's signed order showed that new trial was granted solely on ground of insufficiency of evidence to sustain verdict, and record was devoid of showing of any direction, express or implied, given by court to clerk, court's written order would be regarded as the only direction given to clerk, and the written order would be the court's judicial act rather than the minutes of the clerk, who is at most an administrative assistant. Code Civ.Proc. § 1003.

6. New Trial ⚷71

Where evidence was in square conflict in negligence action by airplane student flight instructor against employer, granting new trial on ground that evidence was insufficient to sustain verdict of jury was not abuse of discretion.

7. New Trial ⚷76(1)

Granting of new trial, after verdict was returned for plaintiff, would not be an abuse of discretion where special damages assessed by jury were in excess of damages proved, or were more than trial judge was entitled to regard as proved by testimony he regarded as being true.

8. Appeal and Error ⚷790(3)

Where plaintiff who had favorable verdict from jury appealed from order granting new trial to defendant for insufficiency of evidence, and defendant appealed from judgment entered upon verdict of jury, affirmance of order granting new trial would automatically vacate the judgment against defendant and his appeal would be dismissed.

◆

Harold A. McCabe, Fullerton, Hammons & Willard, Ventura, for Robert W. Lee.

Edward C. Maxwell, Robert B. Maxwell, Oxnard, for R. A. Cranford.

HANSON, Justice pro tem.

The plaintiff below appeals from an order granting a new trial to the defendant who, in turn, appeals from the judgment entered upon the verdict of the jury which found against him.

[1, 2] The plaintiff, an airplane student flight instructor employed by the defendant, was severely injured as a result of the crash of an airplane owned by the defendant while it was coming in for a night landing at the Oxnard airport. At the time of the accident the plane was being piloted by a student named Jacques who was being supervised and assisted by the plaintiff. The defendant Cranford's workmen's compensation insurance failed to cover the plaintiff as an employee, and accordingly, the plaintiff was entitled to and did sue his employer, the defendant, on the theory that the defendant was negligent in supplying him with a plane that was defective and that as a proximate cause thereof the plaintiff was injured. Under the facts of this case, as they are alleged by the plaintiff, the Labor Code, sec. 3708, which is here controlling, presumes that the injury sustained by the plaintiff "was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence." Moreover, under the specific language of the section it "is not a defense to the employer that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of * * *." In short, it is plain under the language of the statute that if the evidence shows plaintiff was an employee of the defendant at the time, then any injury he sustained while in the course of business of his employer must be classed as being proximately due to the negligence of the employer and that the negligence, if any, of the employee is not a defense thereto. Accordingly, it is clear that the statute is not only operative, but likewise controlling if but two facts are proved: (1) that the plaintiff is an employee and (2) that he was injured in the course of the business of the employer as a result of the negligence of the employer. Hence, it follows that the trial court could not grant a new trial in

such a case, on the ground of insufficiency of the evidence, unless the evidence was insufficient to sustain both of these grounds. In the case before us the evidence was conflicting on both grounds.

The cross-complaint by the defendant against the plaintiff as cross-defendant, alleged in the first count that the cross-defendant caused a total loss of the airplane through his negligence, and as a second count that the cross-defendant converted the plane to his own use and totally demolished it.

The motion for a new trial sets forth, in part, all of the statutory grounds for a new trial and specifically the ground that the evidence was insufficient to sustain the verdict. The argument on the motion, it appears, took the better part of a day. As the hearing was not reported, and as we declined to augment the record by permitting affidavits made subsequent to the hearing as to what occurred thereat to be made part of the record, we are confined to such facts as are set forth in the clerk's transcript.

Turning to the clerk's transcript we find what purports to be two distinct "orders" in the case pertaining to the granting of the new trial and both made on the same day. One is a recital by the clerk in his minutes of an order purportedly made by the court and another is a separate written order signed by the judge. The clerk's minutes of the order purportedly made, so far as material, read as follows: *"The said motion is duly argued by respective counsel and is submitted to the Court for consideration and decision.* After due deliberation the Court orders that said motion for new trial be, and hereby is granted." (Italics supplied.)

The judge's signed order reads as follows: "The motion of defendant, R. A. Cranford, to grant to said defendant a new trial is hereby granted on the ground of insufficiency of the evidence to justify the verdict, and the said verdict herein is hereby vacated. Dated this 10th day of November, 1949. Wm. A. Freeman, Judge of the Superior Court."

It is at once apparent from a reading of the clerk's minutes and the written order signed by the court that there is an irreconcilable conflict in the two orders. The minute "order," if thus it may be classed, states that the motion for a new trial is granted. This means a new trial on all the grounds stated in the motion, which grounds included as one of the grounds the insufficiency of the evidence to sustain the verdict. On the other hand, the order signed by the judge of the court grants a new trial on the latter ground alone.

In view of the conflict plaintiff contends that the order as set forth in the clerk's minutes is controlling and that the order signed by the judge is void, because the minute order was entered prior to the preparation, signing and filing of the judge's order. The difficulty with the contention is that there is no showing by the record before us whether the clerk's recital in the minutes, or whether the court's written order was first in point of time.

[3, 4] It is a well-known fact of which we take judicial notice that court clerks generally write up the minutes as the case progresses, a fact which is here likewise indicated by the clerk's minutes in this case. Turning to the minutes as quoted above it will be observed that we have italicized a portion thereof reading as follows: "The said motion is duly argued by respective counsel and is submitted to the Court for consideration and decision." If the court had ruled finally from the bench it is self-evident that the court would not have *submitted* the case *for consideration and decision*. Accordingly it is our belief that the court submitted the motion for consideration and decision; that "after due deliberation," in chambers, he prepared and signed the written order and handed it to the clerk; that the clerk thereupon completed his minutes with a recital that did not correctly reflect the written order; and that the court was not advised of the conflict between his order and the clerk's minutes until after the appeal was taken.

[5] Even if our surmise is incorrect we must regard the written order of the court as the only direction given to the clerk. In that connection, it is to be observed, that "Every direction of a court, judge, or justice, made or entered in writing, and not included in a judgment, is

denominated an order." Code Civ.Proc., sec. 1003. The record here is devoid of any showing of any direction, express or implied, being given by the court to the clerk. Accordingly, we must accept the act of the court, as set forth in its written signed order, as being in truth its judicial act rather than the minutes of the clerk, who is at most but an administrative assistant of the court. Quite regardless of what we have so far said it is entirely possible, although we do not so hold, that by reason of the language of Section 657, Code of Civil Procedure (new trials), and the interpretation of the language thereof by the Supreme Court that an oral direction to the clerk if such was made in this case may be modified so as to specify that a new trial is granted upon the ground of insufficiency of the evidence to sustain the verdict, if only it is filed within ten days after a new trial is granted. See Dempsey v. Market St. Ry. Co., 23 Cal.2d 110, at pages 114 and 115, 142 P.2d 929.

There remains for consideration the question whether the trial court abused its discretion in granting a new trial upon the ground that the evidence did not sustain the verdict. We pass to an appraisal of that point.

[6] Without detailing the pertinent facts which we are not required to do it is sufficient for us to state that the record clearly discloses a square conflict in the evidence on the question whether the defendant was or was not negligent. Accordingly, under well-established rules the trial judge did not abuse his discretion in ruling that the evidence was insufficient to sustain the verdict of the jury.

[7] We think it quite proper to add that even if we were restricted to considering the minute order, shorn of the ruling of the court that the evidence was insufficient to sustain the verdict of the jury, we would still be compelled to hold that the trial judge did not abuse his discretion in granting a new trial. This, for the reason, that the special damages assessed by the jury, as a matter of law were erroneous and in excess of the damages proved, or at all events, were more than the trial judge was entitled to regard as proved by testimony he regarded as being true.

[8] It follows that the order granting a new trial must be and is affirmed. So far as the appeal by defendant is concerned it appears that it is based upon the composite verdict of the jury which was set aside by the trial court and that being true, the affirmance of the order automatically vacates the judgment and thus demands that we dismiss the appeal. It is so ordered. Costs of appeal are ordered taxed to the plaintiff-appellant.

WHITE, P. J., and DRAPEAU, J., concur.

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107 Cal.App.2d 758

In re Guardianship of MORRIS' ESTATE.

SIMOTAS v. MORRIS.

Civ. 14844.

District Court of Appeal, First District,
Division 1, California.
Nov. 30, 1951.

Contest over the guardianship of the person and estate of Lylanne Morris between Mary E. Simotas and George James Morris. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., granted the petition of the father, and the maternal grandmother, Mary E. Simotas, appealed. The District Court of Appeal, Peters, P. J., held that the trial court did not abuse its discretion in awarding custody of child to her father.

Order affirmed.

1. Guardian and Ward 🔑10

In contest over guardianship of child between maternal grandmother and father, trial court did not abuse its discretion in awarding custody of child to her father. Probate Code, §§ 1406, 1407.

2. Guardian and Ward 🔑13(1, 8)

Appointment of a guardian for a minor is a matter lying within sound discretion of court and conclusion reached will not be set aside on appeal unless it is shown to have been reached as a result of an abuse of discretion.

3. Guardian and Ward ⚷13(8)

Burden of showing abuse of discretion by court in appointment of guardian for minor is upon party seeking to avoid or prevent appointment of guardian.

4. Guardian and Ward ⚷10

Though as between parent and others, all being equally entitled in other respects, parent has prior right to be guardian of minor child, this right is not absolute and will yield to primary consideration of what is for best interest of child. Probate Code, §§ 1406, 1407.

5. Guardian and Ward ⚷13(8)

In contest over guardianship of child between maternal grandmother and father, his mental competency to have custody of his child was question for trial court in view of conflicting evidence.

6. Guardian and Ward ⚷10

In appointing guardian for minor child, trial court should consider the best interests of the child and not be guided by the best interests of the parent. Probate Code, § 1406.

7. Guardian and Ward ⚷13(4)

In contest between maternal grandmother and father, evidence did not establish that trial court awarded custody of child to father in order to benefit his mental condition, in derogation of best interest of the child. Probate Code, §§ 1406, 1407.

8. Guardian and Ward ⚷13(8)

In contest over guardianship of child between maternal grandmother and father, weight to be given to father's alleged premarital relations with present wife as affecting his moral qualification to have custody of his child was for trial court.

9. Evidence ⚷558(4)

In contest over guardianship of child between maternal grandmother and father, question by counsel as to whether witness, who was psychiatrist, would want his child to be in care of the father, was irrelevant.

Lawrence A. Cowen, San Rafael, for appellant.

Berwyn A. Rice, San Rafael, for respondent.

PETERS, Presiding Justice.

This is a contest over the guardianship of the person and estate of seven-year old Lylanne Morris. The contest is between Mary E. Simotas, maternal grandmother of the child, and George James Morris, Lylanne's father. The child's mother is dead. Each of the contestants filed a petition. The father answered that of the grandmother, but she failed to answer that of the father. The two petitions were heard at the same time. The trial court, after a hearing, by minute order, denied the petition of the grandmother and granted that of the father. The grandmother appeals. Her basic contention is that the trial court abused its discretion in denying her petition and in granting that of the father.

The record shows the following: Lylanne is the daughter of George and Jeanette Morris. Jeanette was the daughter of appellant Mary Simotas. In March of 1949 George and Jeanette separated, and in September of that year Jeanette secured a Nevada divorce. Jeanette kept custody of Lylanne, and, after the divorce, Jeanette and the child lived with Mary Simotas in San Rafael. On December 13, 1949, George married again, and is presently married to his second wife.

On February 13, 1950, Jeanette committed suicide. About eight days later Mary Simotas, without informing George of the whereabouts of the child, placed her in a San Francisco convent. On May 25, 1950, George secured a writ of habeas corpus directing that the child be brought into court. Before that writ could be served, Mrs. Simotas removed the child from the convent and placed her in the home of a sister-in-law. Upon a hearing of the writ, the court ordered the child returned to the convent. Since that time the child has either been at the convent or at a camp at Monte Rio run by the convent. Both Mrs. Simotas and George stated to the court that it was their intention to leave the child in the convent regardless of who secured custody.

After placing the child in the convent Mrs. Simotas, who is divorced from her husband, the grandfather of the child, gave up her home in San Rafael, and moved to a hotel in San Francisco, where she is presently living.

Mrs. Simotas contends that the evidence demonstrates that George is neither morally nor mentally qualified to have custody of his daughter. George admitted that he has known Margaret, his second and present wife, since 1948. It was the theory of Mrs. Simotas that the marriage of Jeanette and George broke up because of the attentions paid by George to Margaret while he was still living with Jeanette. She so testified. George contradicted this evidence. He admitted that he met Margaret in 1948, because her father worked at the same restaurant as did George, but he testified that he did not "go out" with Margaret until about a month after he had separated from Jeanette. He admitted that he started to have sexual relations with Margaret in October of 1949, at which time Margaret was but sixteen years of age. He married Margaret in December of 1949, and a child was born to them in June of 1950. He testified that at the time of the hearing (August of 1950) he was "living" with Margaret, but that she is actually residing with her father and he is sleeping elsewhere. He explained this by stating that his doctor had advised him that he needed a complete rest, and that, because the new baby cries quite a bit, it would be best for him to live alone for a few weeks. He testified, however, that he and Margaret are happy and contented together, and intend to reside together again. He sees Margaret every day and has dinner with her every night.

Two residents of San Rafael were called by Mrs. Simotas, and they testified that George's reputation for morality in San Rafael was bad. Neither knew George very well, and both were friendly to Mrs. Simotas. Both evidently based their conclusion as to George's morality on his relationship with his present wife before their marriage.

As to George's mental qualifications, he has attempted suicide on two occasions. The first attempt occurred on February 14, 1950, when he took an overdose of aspirin and elixir of codeine, a mild drug used as a cough medicine. This attempt occurred the day after Jeanette committed suicide. George was informed by his partner of the suicide on February 14th, and the partner also told George that Jeanette's father had ordered that George not go near the funeral parlor or try to see the child. George got in touch with his attorney who advised him to telephone to Mrs. Simotas and request permission to attend the funeral. George telephoned to her to ask permission to attend the funeral. Mrs. Simotas was very disagreeable to him, and hung up the telephone. Later that day the coroner called upon George and requested him not to attend the funeral, but he did arrange for George to visit the funeral parlors when neither Mr. nor Mrs. Simotas was present. George visited the funeral parlors at 6 p. m. that evening. He testified that the sight of his former wife's body was a great shock to him. A couple of hours later, in a fit of despondency, he attempted suicide.

The second suicide attempt occurred August 12, 1950, at which time George took "sodium nembutal," a drug described as being of the phenobarbital family, and inhaled carbon monoxide fumes. This attempt was about eleven days before the hearing relating to the guardianship of the child. George stated that he had learned that Mrs. Simotas was going to produce the evidence about his pre-marital relationships with his present wife, that this upset him very much, and that he "dreaded coming into court."

George is a high school graduate. He attended a junior college for one year, and graduated from a night school after four years of study, with the degree of Bachelor of Commercial Science. He is a duly licensed accountant, at which business he worked until November of 1947. At that time he went to work for Mr. Simotas, who operated a restaurant in San Rafael. Early in 1949 George and another man purchased the restaurant, and thereafter operated it together until March of 1950, when George sold out to his partner. Between March and the date of the hearing (August of 1950) George had been unemployed, but he testified that he had been offered and accepted an accountant's job in Stockton. This job will pay $275 a month, plus a bonus, as a starting salary.

At the time of the hearing George had a little over $1,000 in cash, and was trustee for Lylanne of a cash fund of $175, and of some bonds totalling $1050. He testified that his mother, a widow, would help him financially if he needed it. George owes Mrs. Simotas $1,150 on some transaction, the nature of which was not disclosed. Since the return of the child to the convent George has been paying the convent $50 per month for her room, board and education, and taking care of her clothing and other needs.

A psychiatrist was called on behalf of George. He testified that he had examined George the day before the hearing; that George was "anxious," "tense," "intense," and "frustrated"; that George did not need hospital care, but could be helped by, and needed, out-patient psychiatric treatment; that he could not ascertain the basic cause of George's difficulties by one consultation; that it was his opinion that George could take care of himself and of his business affairs; that he did not need to be watched; that George was not a danger to other people; that if George were granted custody, his immediate anxiety would be markedly diminished; that superficially, at least, the anxiety of George grew out of worrying over what was going to happen to his daughter. On cross-examination the doctor testified that, in his opinion, George was competent to take care of his daughter.

Mrs. Simotas undoubtedly feels that her daughter's marriage was broken up because of the actions of George, while George undoubtedly feels that his mother-in-law interfered in that marriage. It is quite clear that there exists considerable bitterness between the two parties, and that Mrs. Simotas, while she has had custody of Lylanne, has tried to turn the child against her father. George testified that he had always been kind and dutiful father to his daughter, and that he had never beaten her, although he had used "pats" to correct her when necessary.

Mrs. Simotas is divorced from her husband, the grandfather of Lylanne. Mr. Simotas testified that his former wife was a kind and thoughtful person, and that the divorce was his fault because he was "too much of a playboy." They had been married over twenty-six years at the time of the divorce. He admitted that he had had some "quarrels" with his wife, but denied that they had ever "fought." He denied that Mrs. Simotas ever drank to excess, but admitted that she occasionally took a drink or two. He testified that although his former wife occasionally played bingo or bet on a horse, it was not what he would call "gambling." It is quite obvious that Mr. Simotas heartily dislikes George.

[1–3] On these facts the appellant urges that the trial court abused its discretion in denying her application and in granting that of the father. Although the evidence is conflicting and might support a finding either way on the issue of guardianship, we cannot hold, as a matter of law, that the evidence compels a holding that this child should be taken from her father and given to her grandmother. "The appointment of a guardian for a minor is a matter lying within the sound discretion of the court and the conclusion reached will not be set aside on appeal unless it is shown to have been reached as a result of an abuse of discretion." Guardianship of McCoy, 46 Cal.App.2d 494, 496, 116 P.2d 103, 104. The burden of showing such an abuse of discretion, of course, is upon the appellant.

In determining the issue of guardianship, the primary fact to be determined by the trial court is what is for the best interests and welfare of the child. Guardianship of Reynolds, 60 Cal.App.2d 669, 141 P.2d 498; Guardianship of Casad, 106 Cal.App.2d 134, 234 P.2d 647. This rule is codified in this state. Section 1406 of the Probate Code provides in part: "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare * * *."

[4] Of course, as between a parent and others, all being equally entitled in other respects, a parent has and should have a prior right to be the guardian of his minor child. Probate Code, § 1407; see, generally, Shea v. Shea, 100 Cal.App.2d 60, 223 P.2d 32; Guardianship of Jones, 86 Cal.App.2d 35, 194 P.2d 141; Guardianship of Sloot, 92 Cal.App.2d 296, 206 P.2d 862. This right is not absolute, but will yield to the primary consideration of what is for the best interests of the child. Guardianship of Casad, 106 Cal.App.2d 134, 234 P.2d 647.

Appellant, while recognizing these principles, nevertheless claims that the evidence demonstrates an abuse of discretion in failing to award the child's custody to her. In this connection appellant argues that the evidence shows that George is some kind of narcotic addict. The evidence shows no such thing. While it shows that George uses codeine and phenobarbital, the psychiatrist testified that George needed some sedative. While drugs were used in both suicide attempts, the drug used in the first attempt was aspirin and elixir of codeine, which is a cough medicine, while "sodium nembutal" is a mild sedative of the phenobarbital family. There is no evidence at all that George was a drug addict.

[5] Appellant also emphasizes that George twice attempted suicide, and urges that these attempts demonstrate that he is not mentally competent to have custody of his child. This, of course, was a very serious matter. George explained the circumstances surrounding each attempt, and, while those explanations are not entirely satisfactory, they do render the occurrences understandable. Undoubtedly George is unstable. But the psychiatrist testified that George is competent to handle his own affairs and, in his opinion, was a proper person to take care of the child. Under the circumstances, it was for the trial court to weigh this conflict in the evidence and in the inferences therefrom.

[6, 7] Appellant emphasizes the testimony of the psychiatrist to the effect that granting custody to George would tend to relieve George's immediate anxiety, and contends that this demonstrates that the trial court awarded the child to George in order to benefit his mental condition, in derogation of the best interests of the child. Of course the trial court should consider the best interests of the child and not be guided by the best interests of the parent. Matter of Lee, 165 Cal. 279, 131 P. 749, 45 L.R.A.,N.S., 91. But here the evidence relied upon by appellant does not sustain her conclusion. The statement under discussion, when read in its context, demonstrates that the doctor was simply testifying that George's tendency towards self-destruction would be alleviated by awarding the child's custody to him. He also testified that George was a fit and proper person to have custody. There is no evidence that the doctor intended to imply that the trial court should disregard the best interests of the child, and there is no evidence that the trial court did so.

Some point is made of the fact that at the time of the hearing George was unemployed, and had been unemployed for five months. The evidence also showed that George was well trained and educated, and had accepted a job as an accountant at $275 per month, plus a bonus, as a starting salary.

[8] Much is made by appellant of George's pre-marital relations with his present wife. That too, was a factor, and an important factor, in determining whether the father was morally qualified to have custody of his child, and whether it would be to the best interests of the child to have her custody awarded to the father. But George testified that he had had no such relations prior to his separation from Jeanette, and there is no evidence that he was promiscuous. He did marry Margaret and the two are now happy in that relationship. Under the circumstances, the weight to be given to George's past derelictions was for the trial court.

[9] Appellant makes some mention of three rulings of the trial court on the admission of evidence. We have examined these rulings and find nothing prejudicial in them. All of the questions involved were directed to the psychiatrist on cross-examination by counsel for appellant. Although objections were first sustained as to all three questions, as to two of them the doc-

tor was later permitted to answer. By the third question counsel tried to ask the doctor if he had a seven-year old daughter, would he want her to be in the custody of respondent. The court properly pointed out that such a question involved different people and different personalities "and it won't help us in this case." The ruling was correct.

When all of the evidence is considered, we cannot hold, as a matter of law, that the best interests of this child require that her custody be awarded to her grandmother, and that the holding that such custody be awarded to the father is totally unsupported.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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107 Cal.App.2d 692

RANDALL et al. v. BEBER et al.

Civ. 14537.

District Court of Appeal, First District, Division 1, California.

Nov. 29, 1951.

Rehearing Denied Dec. 29, 1951.

Hearing Denied Jan. 24, 1952.

Action by Harry Randall and Edward Randall against Edward Beber and others for damages allegedly caused by sale by defendants to plaintiffs of shares of capital stock of corporation. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was sufficient to establish that individual defendants had knowingly authorized, directed, or aided in sale of corporate stock prior to issuance by commissioner of permit for sale.

Judgment reversed.

See, also, 101 Cal.App.2d 179, 225 P.2d 291.

1. Licenses ⟹18½(22)

Under provision of Corporate Securities Act that sale includes every disposition, or attempt to dispose, of a security for value, an attempt to sell, an option of sale, a solicitation of sale, subscription or offer to sell, directly or by an agent, or a circular, advertisement or otherwise, sale of corporate stock was complete when stock subscription agreement was signed and purchase price was paid even though stock certificate was not delivered to buyer until later date. Gen.Laws, Act 3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St.1945, p. 853, § 2.

2. Licenses ⟹39.24

In action for damages by purchasers of corporate stock, predicated upon alleged statutory liability provided by Corporate Securities Act for sale of corporate stock prior to procuring of permit from commission authorizing sale, evidence was sufficient to warrant finding that corporation, acting through its officers, had made such sale. Gen.Laws, Act 3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St.1945, p. 853, § 2.

3. Licenses ⟹39.24

In action by purchasers of corporate stock against individual defendants for damages, in which theory of recovery was statutory liability provided by Corporate Securities Act for sale of corporate stock prior to procuring from commission of permit for sale, wherein fact of sale prior to procuring of permit was established by evidence, evidence established that individual defendants had knowingly authorized, directed, or aided in making of sale to plaintiffs. Gen.Laws, Act 3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St.1945, p. 853, § 2.

4. Licenses ⟹39.12

Statute imposing penalty upon company which offers corporate security for sale without having procured permit from commissioner and statute imposing penalty upon corporate officers or employees, or any other person, aiding in such sale contrary to Corporate Securities Act, indicated legislative intent to void sales of corporate stock made when no permit has been procured from commissioner for sale thereof as required by statute, and illegality of sale is not cured by subsequent issuance of stock for consideration received. Gen.Laws, Act

3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St.1945, p. 853, § 2.

5. Licenses ⚷39.12

Under statute requiring procurement of permit from commissioner prior to sale of any corporate securities, and statutes imposing penalties upon company and persons participating in sale without permit, sale of corporate stock prior to obtaining of permit required was void even though stock was subsequently issued for consideration received. Gen.Laws, Act 3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St.1945, p. 853, § 2.

6. Licenses ⚷39.18

Where sales of stock by corporation without obtaining permit from commissioner as required by statute were void, purchaser who is not in pari delicto is entitled to relief against corporation and against any person who aided corporation in making sale or participated in general scheme to sell stock. Gen.Laws, Act 3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St. 1945, p. 853, § 2.

7. Licenses ⚷39.17

A purchaser of corporate stock who is in pari delicto with one selling such stock without having procured permit from commissioner authorizing sale, has no right to recover consideration illegally collected. Gen.Laws, Act 3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St.1945, p. 853, § 2.

8. Licenses ⚷39.26

Where sales by defendants of stock of corporation certain had been made without obtaining of permit from commissioner as required by statute, purchasers, if not in pari delicto, might bring action for damages suffered, measured by money which purchasers had paid or value of property conveyed for stock, and that stock was worth what purchasers paid for it when issued does not bear upon purchaser's right to recover such amount. Gen.Laws, Act 3814, §§ 1 et seq., 17, 18, 33; St.1941, p. 2064, § 3; St.1945, p. 853, § 2.

9. Fraud ⚷58(4)

In action against individual defendant for damages for alleged fraud in sale of corporate stock to plaintiff, wherein it appeared that corporation had subsequently become bankrupt, evidence sustained finding that purchase of stock by plaintiffs had not been induced by reliance on any statement of defendant, but had been made as result of independent investigations by plaintiffs.

10. Parties ⚷60

Where motion to amend complaint by substituting certain persons for defendants fictitiously named was made on last day of trial and renewed upon written notice month later, and it appeared that plaintiffs were aware of identity of such defendants prior to trial, and that joinder at such stage of proceedings would result in hardship and unfairness to original defendants, trial court did not abuse its discretion in denying motion.

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Jaffa & Sumski, San Francisco, for appellants.

Marcel E. Cerf, Robinson & Leland, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiffs Harry Randall and Edward Randall appeal from the judgment rendered against them and in favor of all of the defendants in an action brought by them for damages allegedly caused by the sale to them of 200 shares, at $100 per share, of the capital stock of Churchill's Frozen Foods, Inc., a corporation.

The complaint states two causes of action for damages, one predicated upon the asserted statutory liability of each of the defendants, and the other against defendant Beber, alone, for his alleged fraud and deceit in the sale of these shares to plaintiffs. The trial court found against the plaintiffs upon each cause of action.

The asserted statutory liability of the several defendants to the plaintiffs turns, principally, upon the question whether or not there was a "sale" prior to the granting by the state Commissioner of Corporations of a permit for the issuance of the shares, and, if so, whether or not the defendants knowingly authorized, directed or aided in the sale of those shares, or caused or assisted in causing them to be sold. The defendants are Harold F. Churchill, A. Schapiro, and Edward Beber, individually, and Harold F. Churchill Company, a partnership consisting of Harold F. Churchill and Edmund E. Nies, general partners, and A. Schapiro, limited partner.

The following significant facts appear without conflict in the evidence: The members of defendant Harold F. Churchill Company decided to incorporate for the purpose of expanding and improving the business of the partnership, that of processing and freezing fruits and vegetables at Stockton. In February, 1946, a preincorporation stock subscription agreement was prepared at the instance of Churchill and forwarded by him to Schapiro, for use in San Francisco. The agreement recited a proposal to incorporate and apply for a permit to issue stock and declared that the undersigned agreed with each other and with the proposed corporation that they severally subscribed for the number of shares set opposite their names and would pay par value therefor, upon the conditions that the corporation be incorporated "within ——— days" and would with reasonable diligence secure from the state Commissioner of Corporations a permit "authorizing the issuance of the shares of stock conditionally subscribed for herein." The corporation was formed March 7, 1946, with the name Churchill Frozen Foods, Inc. In the latter part of March, 1946, Harry Randall signed the stock subscription agreement, undertaking to purchase 200 shares of stock at $100 per share, and delivered to one Richard G. Kobritz his check dated March 30, 1946, for $20,000, payable to Churchill's Frozen Foods, Inc. (Randall testified he did not read the text of the agreement. We find in the record no evidence that either of the plaintiffs read or was informed of any of the provisions of the agreement, other than that it was a subscription agreement.) This check was transmitted to Churchill. On or about April 3, 1946, it was endorsed in the name of the corporation by Churchill as president and deposited by him in a special bank account in the name of the corporation. A receipt signed by Schapiro, reading, "Received from Harry Randall $20.000.—dollars for 200 (two hundred) shares of stock in Churchill's Frozen Food, Inc. Harold F. Churchill Company. [Signed] A. Schapiro," was mailed to and received by Randall a few days after March 30, 1946. Churchill was president and a director of the corporation from March 18 to December 13, 1946; Schapiro was vice-president from March 18 to November 12, 1946, and a director from March 18 until after December 16, 1946. The board consisted of three members until July 15, 1946, when it was increased to seven. The partnership assets were turned over to the corporation on March 31 and the corporation began to operate as a corporation on April 1, 1946.

Not until April 19, 1946, was an application made to the Commissioner of Corporations for a permit for the issuance and sale of shares of its capital stock by the corporation. The applicant requested permission to issue a certain number of shares of its stock in exchange for the business and properties of the Churchill partnership, and to sell 1500 shares at par for cash to the public. It made no mention of the preincorporation subscription agreement or of the fact that any subscriptions had been made. It stated that no time had been fixed to commence to sell its securities, that it proposed to sell them upon the issuance of a permit therefor.

The permit, issued May 8, 1946, authorized the corporation to sell and issue not exceeding 1500 shares at par for cash, after it had issued the shares to the Churchill partners and received the consideration therefor. The permit was issued upon the express condition "That a true copy of this permit be given to each subscriber prior to the taking of his subscription and to each purchaser prior to the sale to him of the securities permitted to be issued."

The minutes of a meeting of the board of directors of the corporation held May 15, 1946, contain the following statement: "President Churchill reported that heretofore under the provisions of a certain Subscription Agreement, certain individuals had subscribed to 810 shares of the capital stock of this corporation to be issued to them upon the incorporation of this corporation. That the Subscription Agreement was presented to the meeting and filed with the Secretary; said Subscription Agreement indicating the names of the subscribers, the date of the subscription and the number of shares subscribed to respectively by the persons signing said agreement. President further stated to the meeting that it was appropriate at this time to comply with the terms of said agreement and cause to be issued to said subscribers, the number shares of the capital stock of this corporation so subscribed by each of the said parties to said agreement. That said Subscription Agreement is hereby made a part of the minutes of this meeting and reference is hereby made thereto for the names of the subscribers and the number of shares subscribed by each." Then follows a resolution that day adopted by the board. It recites that on January 24, 1946, and subsequent thereto, certain individuals subscribed to the number of shares of the capital stock of the corporation set forth in said subscription agreement and at the time of the subscription deposited in trust $100 for each share of stock so subscribed, and that the corporation has secured the permit referred to in said agreement, authorizing the issuance of the shares conditionally subscribed for in the agreement. The resolution then directs the president and secretary to issue and deliver certificates evidencing the number of shares of stock subscribed to by each of said subscribers, in consideration of the delivery to the corporation of $100 per share, "being stock authorized by said Permit," and directs that a copy of the permit be delivered at once to said subscribers.

Stock Certificate No. 9, dated May 15, 1946, evidencing the ownership of 200 shares of the corporation by Harry and Edward Randall, was mailed to them May 17, 1946, with a letter of transmittal bearing the signature of Churchill as president of the corporation. This letter recited, also, the enclosure therewith of a copy of the permit and a copy of the resolution of the board of directors. (An employee of the corporation testified that he enclosed copies of the permit and the resolution with each letter transmitting a stock certificate. Harry Randall testified he did not receive a copy of the permit with his certificate. We do not find in the record any evidence that the matter of a permit, and its issuance or not, was orally mentioned to either of the plaintiffs.)

The evidence most favorable to the defendants concerning the circumstances under which the plaintiffs subscribed for these shares, and paid the consideration therefor, was furnished by the testimony of defendants' witness Richard G. Kobritz. He testified that he and the Randalls were neighbors and that he knew Ed Randall very well; that Ed visited at Kobritz' home frequently and they would often discuss finances and investments, and that Ed told him one time that if Kobritz heard of any good investments to let him know. In February, 1946, Kobritz heard about the pending Churchill expansion, and one evening when Ed Randall was at his home Kobritz told Ed he had heard of the expansion and that it looked like a good thing. There were four or five more discussions about the matter and then Ed told Kobritz that he and his brother would be interested in investing $10,000 in the Churchill corporation, whereupon Kobritz made an appointment at his office for the Randalls to meet defendant Beber. The meeting was held at the office of the Allied Produce Company, a partnership engaged in the food brokerage business, its members consisting of Kobritz, Beber, Earl B. Johnson and Charles Arata. Beber told the Randalls that the Churchill Packing Company intended to expand its operations; that he, Beber, intended to take some stock in the company, as also did his partners Arata and Johnson, and others. He explained to them the future of the frozen food industry and said it looked to him like a good thing but they did not have to take his word for it, advising them to go and see the Kelley-Clarke Company, broker for the Churchill company, giving them that firm's address. Beber told them that the Churchill company had been making money in previous years and intended to expand in order to increase its production. No paper was signed by either of the Randalls during that interview. One of the Randalls said, "When shall we pay for this stock?" and Beber said "Whenever you are ready." About a week later, Harry Randall brought the $20,000 check and delivered it to Kobritz, who gave it to his partner, Johnson. Johnson then gave Kobritz some kind of a paper for Randall to sign, which Kobritz brought in to Harry Randall who signed it, and then Kobritz gave it back to Johnson. Kobritz saw several other people bring in checks, Arata handed several checks over to Johnson, and Johnson handled the mailing of these checks to the Churchill company. The witness thought Johnson had a portfolio of everything pertaining to the Churchill company.

This was not an isolated transaction. Churchill testified that some ten, twelve or fifteen persons signed the subscription agreement, including Churchill, Nies, Schapiro, Beber, Johnson, Arata, one of the Randalls, Krieg, Helms, and Bevanda. Among the subscribers who testified, Phillip Krieg said he first heard of the deal through Kobritz and met Beber through Kobritz at the office of Allied Produce Company; that Beber told him about the profits made by the Churchill partnership and that the money was going to be used to put up a freezing plant; that Beber showed Krieg a subscription list, with Beber's name at the top, and Krieg signed for 50 shares, which he thereafter paid for by check of March 7, cashed March 21, 1946. George S. Helms testified that he asked Kobritz if there was a chance to invest and was referred by Kobritz to Beber, who described the project and said he was going to invest $10,000 himself, and that Helms signed up, delivering a check therefor to Beber, a check dated March 12, 1946. Beverly O. Brace, another subscriber, discussed the matter with Beber, Johnson and Arata. Jack Patrick talked the matter over with Arata. Eugene J. Marty heard about it in March, 1946, talked to Johnson and sent a check, dated April 1 and paid April 17, 1946, to Johnson. Charles H. Kispert talked to Johnson, Beber and Arata, and in March, 1946, delivered his check to Johnson. Milton Levy, an employee of Allied Produce Company, invested in March or April, 1946, and delivered his check to Beber. Most of these subscribers had known either Johnson, Beber, Arata, or Kobritz for some years.

Schapiro testified that he was the representative officer of the corporation in San Francisco (the principal office of the corporation was in Stockton); that at his request receipts similar to that which Harry Randall received were prepared in Stockton and sent to him; that he signed them in blank and left them in his desk in the offices of Allied Produce Company for use when stock was sold; that he was acting as vice-president of the corporation at the time of signing; at the time of signing he did not know in what name the funds were going to be deposited prior to issuance of the stock (although the name used in the receipts was that of the partnership, it was also the name by which the proposed corporation was designated in the subscription agreement); that all the partners of Allied Produce Company had access to his desk; that he expected most of the stock to be sold in San Francisco; that there was no direct authorization to anybody to sell the stock but he did make them understand that if they did sell any stock, or if anyone sold any stock, they could use one of the receipts he had signed in blank; that he signed the receipts in blank for the reason that the corporation commissioner had not yet given permission to issue the stock; that it was a sort of temporary receipt until the stock was to be issued. Asked if the partners in Allied Produce Company were supposed to sell the stock, he said, "I don't know who was supposed to sell it. We were all going to go out and see if we could find subscribers to the stock." He knew that Mr. Johnson and Mr. Arata found subscribers to the stock. Churchill testified that prior to April 17, 1946, he received in the neighborhood of $70,000 or $75,000 for stock in the corporation, which he originally deposited in a special bank account in the name of the corporation, and that, eventually, this was all drawn out of that account when the permit was issued, and was placed in a general account of the corporation.

Schapiro testified that the corporation paid no dividends and went into bankruptcy January 2, 1947, and that the stockholders would receive nothing of value. The Randalls testified they had received no dividends on the stock, and nothing of value.

[1] These facts demonstrate that a sale of 200 shares of the capital stock of the corporation was made to the plaintiffs when

they subscribed for them and paid the purchase price to the corporation in late March and early April, 1946, prior to the issuance of a state permit therefor. "Sale," as used in the Corporate Securities Act Gen.Laws, Act 3814, § 1 et seq., at the time of this transaction, included "every disposition, or attempt to dispose, of a security * * * for value", also "an attempt to sell, an option of sale, a solicitation of a sale, subscription or an offer to sell, directly or by an agent, or a circular letter, advertisement or otherwise." Corp. Sec. Act, § 2, as amended by Stats. 1945, pp. 853–854.

[2] The acts of the president and vice-president, each a director, of the corporation, in planning the sales and in furthering this sale, and the receipt of the purchase price for and its deposit in bank in the name of the corporation, would support a finding that the corporation made this sale. Such a sale is proscribed by the Corporate Securities Act. "No company shall sell any security, except upon a sale for a delinquent assessment against such security * * *, or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do." Corp. Sec. Act, § 3, as amended by Stats. 1941, p. 2064. This subscription, although in terms a preincorporation subscription agreement, was not within the sanctions accorded by section 33 of the act. That section permitted only subscriptions "made prior to the incorporation" of the corporation, and did not permit "the collection of any portion of the consideration to be paid on account of such subscriptions, unless and until a permit shall have been issued by the commissioner authorizing such collection". Corp. Sec. Act, § 33, as added by Stats. 1931, p. 958.

[3] The evidence of the activities of the defendants in furthering this sale, and other sales, would support a finding that they knowingly authorized, directed, or aided in this sale or assisted in causing it to be made.

The statute imposes penalties upon a corporation making such a sale, and upon each person who knowingly authorizes, directs, or aids in the sale. "Every company which shall directly or indirectly offer for sale, or negotiate for the sale of or sell, or issue, or cause to be issued any security contrary to the provisions of this act, * * * shall be guilty of a public offense and shall be punishable by a fine not exceeding ten thousand dollars". Corp. Sec. Act, § 17, as amended by Stats. 1931, p. 950. "Every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this act, * * * is guilty of a public offense and shall be punished by imprisonment * * * or by a fine * * * or by both * * *." Corp.Sec. Act, § 18, as amended by Stats. 1931, p. 950.

[4, 5] From the imposition of these penalties in such a statute, a legislative intent to void the proscribed "sale" is inferred. This illegality infects the final act in the transaction, the issuance of the shares of stock, even though that act occurs after the issuance of a state permit, if that act stems directly from the illegal sale without any intervening circumstance such as the making of a new agreement between the parties after issuance of the permit and in accordance with its terms. It is the validity of the sale, not the validity of the shares or their issuance, which is the crucial question. The collection of the money, a significant part of a sale for value, People v. Beber, 104 Cal.App.2d 359, 369, 231 P.2d 516, and cases cited, occurred at a time when there could be no legal sale. The corporation actively participated in this transaction, made a "sale," at least as early as the date when it received, accepted, and deposited the purchase price check. The illegality which attached to and inhered in this sale prior to obtaining a permit, could not be removed, cured, or rendered innocuous by issuance of the shares after obtaining a permit, if such issuance was based upon and stemmed directly from the illegal sale without any

intervening circumstance to break the chain. That is this case. Nothing occurred between the plaintiffs and the defendants or the corporation concerning these or any shares of stock of the corporation after payment and receipt of the money and the issuance and delivery of the stock certificate. The very minutes of the May 15 meeting of the board of directors demonstrate that the issuance of the shares was based upon the subscription agreement and the receipt of the money. For all practical purposes, the action taken by the board of directors on May 15 was a formal confirmation of the corporation's prior collection of the consideration, and approval and acceptance of the subscription agreement made for its benefit. The illegality which tainted this transaction prior to the issuance of the permit tainted the entire transaction. As said by this court in Bourke v. Frisk, 92 Cal.App.2d 23, at page 31, 206 P.2d 407, 412, "Such essential part being tainted with illegality infected the entire transaction and completion of the sale by issuance of the shares at a later time could not make it valid." See, also, Miller v. California Roofing Co., 55 Cal.App.2d 136, 141–142, 130 P.2d 740.

[6] In such a case the law does not necessarily leave the parties to the illegal contract where it finds them. The applicable statute was designed for the protection of the public. Its penalties run against the corporation and those persons who participated with it in making a "sale" contrary to its provisions, not against a member of the purchasing public. If such a purchaser is not *in pari delicto,* the law accords him relief against the corporation and against any person who aided the corporation in making the sale or participated in the general scheme to sell securities. Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 514–516, 86 P.2d 102. Mere knowledge that no permit has been issued does not necessarily bring a purchaser *in pari delicto.* Id., 12 Cal.2d at page 516, 86 P.2d 102. When the purchaser's action is for damages (as in this case), such a participant need not have received any of the consideration paid for the stock. Randall v. California Land Buyers Syndicate, 217 Cal. 594, 598–599, 20 P.2d 331, distinguishing Pollak v. Staunton, 210 Cal. 656, 293 P. 26, which was an action for money had and received.)

We will now consider the findings which the trial court made, based upon the evidence which we have summarized.

The trial court found: (1) Churchill was president of the corporation from March 18 to December 13, 1946; Schapiro, vice-president from March 18 to November 12, 1946; (2) the corporation did not between March 18 and April 3, 1946, sell 200 of its shares to plaintiffs; on March 30, 1946, plaintiffs at their own request signed a preincorporation subscription agreement, subscribing for 200 shares conditioned upon the corporation securing a permit authorizing issuance of the shares conditionally subscribed for, knowing that no such permit had issued; no statement by any defendant was made to plaintiffs that any such permit had issued; the corporation was not a party to said agreement, the only parties being the persons signing it; (3) plaintiffs did not at the request of the corporation deliver a check in the sum of $20,000 to the corporation; about April 2, 1946, plaintiffs received an instrument in the form of Exhibit B attached to the complaint [the receipt to Harry Randall, signed by Schapiro, for the $20,000]; at the time of signing the agreement, plaintiffs, with full and equal knowledge with the other parties thereto that no permit had been issued, delivered a check for $20,000 in the form of Exhibit A attached to the complaint [payable to the corporation]; *the check was deposited by the corporation* in a trust account specially maintained for the deposit and holding of funds paid by said subscribers pending the issuance of the stock conditionally subscribed for; plaintiffs' money remained on deposit until after the issuance, receipt and acceptance of their stock; (4) April 19, 1946, the corporation filed an application for a permit for the sale and issuance of its capital stock; on May 8, 1946, a permit was issued by the Commissioner of Corporations, requiring that a copy thereof be given each subscriber or purchaser prior to sale; (5) May 15, 1946, the board of directors of the corporation adopted a resolution directing that stock certificates be issued to "said subscribers in consideration for the delivery to the corporation of $100 each for each share so subscribed for," and directing that a copy of the permit be delivered at once to "each of said subscribers"; (6) May 17, 1946, an employee of the corporation enclosed and mailed, by registered mail, to plaintiffs, the certificate for 200 shares and a copy of the permit, which plaintiffs received and examined May 18, 1946; a copy of the permit was shown and given the plaintiffs prior to the sale of said stock to them; (7) continuously from April 2, 1946, and at the time of the "tender of the stock to plaintiffs by said corporation" and the acceptance thereof by plaintiffs and until more than a reasonably sufficient time within which plaintiffs could have refused to accept the stock and have returned it and demanded return of their money and taken other steps to rescind, cancel or withdraw said conditional subscription, the $20,000 remained on deposit in the trust account; the conduct of plaintiffs comprised an agreement to purchase unconditionally said 200 shares so tendered by the corporation pursuant to said conditional subscription; (8) said sale occurred at the time of the receipt and retention of the stock by the plaintiffs; prior thereto there was no agreement on the part of the corporation with plaintiffs to sell or issue stock to them; the sale was not made prior to the issuance of a permit, nor in violation of the Corporate Securities Act, nor was it void; (9) April 11, 1947, the corporation was adjudicated a bankrupt; plaintiffs still have the shares and have received no dividends or other return on said shares, which are worthless, but at the time of plaintiffs' receipt and acceptance thereof the shares were reasonably worth the price paid therefor; (10) after accepting and retaining the stock, plaintiffs participated in the affairs of the corporation and received statements concerning its condition and earnings, without objection on their part.

Concerning the part played by the defendants in this transaction, the trial court found: (11) None of the defendants participated in making a sale of 200 shares of the stock of the corporation to plaintiffs between March 18 and April 3, 1946; none of the defendants conducted any negotiations for, or directed or aided in, said sale or any sale to plaintiffs; Beber was not an agent of the corporation; Beber did not conduct any negotiations resulting in, nor did he participate in making, said sale or any sale; none of the defendants participated in the sale of said stock to plaintiffs prior to the issuance of a permit, nor without giving a copy of the permit to the plaintiffs prior to the sale thereof; (12) none of the defendants received any part of the money or any benefit therefrom except such incidental benefit as plaintiffs and other stockholders received mutually from each other by reason of their community of interest and investment in the corporation.

The finding that plaintiffs' purchase price check for $20,000, made payable to the corporation and endorsed in the name of the corporation by its president (which the evidence shows was receipted for by Schapiro, acting as vice-president of the corporation), was deposited by the corporation in an account specially maintained for the deposit and holding of funds paid by plaintiffs and other subscribers pending the issuance of the stock that had been conditionally subscribed for, identifies the corporation with the illegal sale of March-April, 1946.

The finding that the board of directors of the corporation adopted a resolution directing that stock certificates be issued to "said subscribers in consideration for the delivery to the corporation of $100 each for each share so subscribed for," further identifies the corporation with the sale which was made prior to the issuance of a permit.

These findings, coupled with the recitals in the minutes concerning the subscription agreement, demonstrate that in issuing the stock certificates the corporation acted in response to and in acceptance of the offer tendered by the signers of the subscription agreement. As to the plaintiffs herein, nothing happened after the delivery of the purchase price money by them and before the action taken by the board of directors of the corporation at its meeting of May 15, 1946. We find in the record no evidence even of any conversations during that period between either of the plaintiffs and any representative of the corporation, or any of the other subscribers, or any of the defendants herein, concerning the purchase of shares of stock of the corporation. The issuance of the certificates to the plaintiffs stemmed directly from the illegal sale of March-April, 1946, without any intervening circumstance. There is no basis in fact for an inference or a legal conclusion that the issuance and the mailing of the certificate to the plaintiffs was a new, separate and independent offer by the corporation which resulted or could result in a new, separate and independent agreement between the corporation and the plaintiffs upon the reception and retention of the certificate by the plaintiffs. Even the letter of transmittal was not suggestive of a new and independent transaction. It merely recited the enclosure of the stock certificate and copies of the permit and the resolution, directed attention to the fact that the resolution waived all rights for promotional stock to the incorporators, and concluded: "I appreciate, very much, your investing with us and hope you will realize considerable pleasure and profit from the investment." Nor is this a case in which the rights of innocent third parties, such as creditors, have attached. The principles applied in Moore v. Moffatt, 188 Cal. 1, 204 P. 220; Waring v. Pitcher, 135 Cal.App. 493, 27 P.2d 397, and Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42, are inapplicable here, for the reasons stated by this court in Bourke v. Frisk, supra, 92 Cal.App.2d at pages 29–31, 206 P.2d 407.

The finding that the deposit was a "trust account" does not alter the fact that the corporation received the money and had it at its disposal. The very collection of the money was under the ban of the statute.

The findings that the sale occurred at the time of the receipt and retention of the stock by the plaintiffs, that prior thereto there was no agreement on the part of the corporation with plaintiffs to sell, and that the sale was not made prior to the issuance of a permit, are, in reality, erroneous legal conclusions stemming, perhaps, from erroneous application of the concept of "sale" ordinarily used in relation to the sale of personal property, a vastly narrower concept than that used in defining "sale" for the purposes of the Corporate Securities Act.

The finding that the defendants did not participate in making, or directing or aiding in, any "sale" to plaintiffs, obviously is based upon the erroneous legal conclusion that no "sale" occurred prior to the issuance and delivery of the stock certificate. We do not know what the trial court would have found concerning participation by the defendants in this transaction, had the court used and applied the legally applicable definition of the word "sale."

[7] The finding that plaintiffs signed the subscription agreement knowing that no permit had been issued, and did so with full and equal knowledge with the other parties thereto that no permit had been issued, could have been based, at most, upon an inference that Harry Randall read the agreement before signing, despite his testimony that he was told merely that it was a subscription agreement, and that he signed without reading it. There was no testimony that the subject of a permit, or the lack of one, was ever mentioned to either plaintiff, and Kobritz testified that Edward Randall was not present when Harry signed. In view of these circumstances, we do not construe this as a finding that the plaintiffs were *in pari delicto* and for that reason not entitled to recover, especially in the light of the finding that no sale occurred prior to the issuance of a permit and the finding that plaintiffs could have withdrawn their subscription and demanded return of the money prior to their receipt and acceptance of the stock certificate. A right to recover the consideration paid is not a right which the law accords a purchaser who is *in pari delicto,* if the consideration was illegally collected. Campbell v. Julian Merger Mines, 111 Cal.App. 649, 295 P. 1040; see, also, Bank of Orland v. Harlan, 188

Cal. 413, 419–422, 206 P. 75, and Matthews v. Lopus, 24 Cal.App. 63, 68–70, 140 P. 306. The finding under consideration is not the same as the finding which this court construed in Miller v. California Roofing Co., supra, 55 Cal.App.2d 136, 130 P.2d 740, as a finding that the plaintiff was *in pari delicto.* There, the trial court found that the plaintiff was estopped from asserting against defendants any claim. That, while a wrong designation, was interpreted as a holding that the plaintiff was *in pari delicto.* This court observed that "although the learned court below did not affix the appropriate legal tag, it is plain that he had in mind the doctrine of *in pari delicto.*" 55 Cal.App. at page 143, 130 P.2d at page 745. Also, that finding was supported by evidence that the plaintiff was a branch plant manager of the corporation and a relative of one of its directors, and that one of the directors had numerous discussions with plaintiff on the necessity of taking care of legal formalities before a permit to sell stock could be obtained and that no stock could issue until the necessary legal steps were taken.

[8] The finding that the stock, although now worthless, was worth what the plaintiffs paid for it when issued, does not bear upon plaintiffs' statutory right of recovery if other facts established such a right, however appropriate it might be in an action for rescission for fraud or deceit. In such a case as this, the purchaser, if not *in pari delicto,* may bring an action for the damages suffered, measured by the money which he paid or the value of the property which he conveyed for the stock. Randall v. California Land Buyers Syndicate, supra, 217 Cal. 594, 598–599, 20 P.2d 331.

The finding that a copy of the permit was shown and given to plaintiffs prior to the sale of the stock to them, is predicated upon, and falls with, the erroneous finding that no sale took place until plaintiffs received and retained the stock certificate.

The judgment must be reversed and the cause remanded for trial of the issues presented by the first cause of action, based upon the alleged statutory liability of the defendants.

As to the cause of action for damages for the alleged fraud of Beber in the sale of the stock to plaintiffs, the findings of fact are supported by the evidence. There is a sharp conflict in the evidence concerning the representations made by Beber and the reliance thereon by the plaintiffs. That conflict was resolved by the trial judge, who observed the witnesses and heard their testimony.

The alleged representations were that Beber said (1) that he was going to purchase stock, and that by displaying the subscription agreement which he had signed he represented he was going to buy the stock for cash; (2) that the corporation wanted money to buy refrigeration equipment and that the money paid by plaintiffs would be used therefor. The complaint then alleged that Beber did not buy stock for cash and never intended to, and that the corporation did not intend to use the money for the purchase of refrigeration equipment, did not so use it, and intended to and did use it to pay the existing indebtedness of the corporation or of the Churchill partnership; that Beber knew that these representations were untrue and that the plaintiffs bought their stock in reliance upon said representations.

Kobritz testified that Beber said to plaintiffs, "I understand you intend to come into the Churchill Frozen Foods"; told them how long the company had been in existence, and said he thought they did very well in the business and expected to do even better in the future by expanding their operations, by putting in new equipment; explained the future of the frozen fruit industry and said it looked good to him, like a good thing; that the Churchill company was making money in the previous years and intended to expand in order to develop a larger production. He said he intended to take some stock in the company; did not say how many shares he was going to take. Beber had no papers in his hand during the time he was talking with the plaintiffs and no papers were signed by anybody at that time. Beber had no papers with him that contained signatures of people who were going to buy stock in the company. He had no such document.

Beber said he was glad the plaintiffs were coming in as friends of Kobritz but "Don't take my word for it; go see Kelley-Clarke Company," brokers for the Churchill company, who could give plaintiffs any information they desired. Plaintiffs asked for and Beber gave them the address of Kelley-Clarke.

John Chaddock, of Kelley-Clarke, testified that both the plaintiffs came to see him and Robert Dodd in March, 1946; that they discussed the merits and hopes of the Churchill company; that plaintiffs said Beber sent them there or that it was Beber's office they were coming from; that plaintiffs said they were contemplating investing in the Churchill company and wanted to know its merits and its prospects.

Robert F. Dodd, of Kelley-Clarke, testified that plaintiff Edward Randall came to see him and Chaddock. He thought Harry Randall was also present. Edward said he had been sent by Beber to inquire about the operation of the Churchill company with regard to sales and other items; that he was a prospective investor in the company. Dodd and Chaddock explained the manner of sales procedure in the company and the sales experience they had with the Churchill company, saying that their relations had been excellent, that they always found Mr. Churchill entirely trustworthy and reliable, and their experience had shown that the company had made a profit, which was a fact.

Dodd also testified that the frozen food industry had prospered prior to 1946, but during that year, due to low ceiling prices and credit restrictions, sales dropped and packers were unable to move their products, with the result that many firms went through bankruptcy or were on the verge of it.

[9] These and other facts support the trial court's findings that Beber did not represent that he intended to purchase stock for cash; that the corporation intended to use a portion of the proceeds of the sale of its stock for the purchase of additional machinery and equipment, and entered into contracts for the purchase of the same; that the corporation's business flourished until August, 1946, when the business generally suffered a severe slump from overproduction and shrinkage of bank credit, causing substantial losses to the corporation, bringing about its adjudication as a bankrupt; that the statements which Beber did make to plaintiffs were in good faith, based on information he reasonably believed true, and was true; that those statements were opinions, not representations; that plaintiffs knew and should have known that they were opinions and not representations; and that plaintiffs did not rely upon any of said statements but made and relied upon an independent investigation as to the advisability of investing in stock of the corporation.

That portion of the judgment which decrees that plaintiffs take nothing by the second cause of action of the complaint should be affirmed.

[10] *The denial of plaintiffs' motion to amend the complaint by substituting the names* of Kobritz, Johnson, and Allied Produce Company for certain defendants fictitiously named, is assigned as error.

The motion was made on the last day of the trial and renewed upon written notice about a month later. The notice states that the participation of these proposed parties in the sale to plaintiffs, and their liability to plaintiffs was not discovered until the second day of the trial.

In denying this motion, the trial court found that the identity of Kobritz, Johnson and Allied Produce Company, and their participation in the transaction, was known to plaintiffs prior to the trial, and that plaintiffs did not exercise due or any diligence in taking proceedings to join or bring them in as parties. The evidence supports that finding. The plaintiffs certainly knew Kobritz and the essentials of his participation. It was with him that they principally dealt. The only element of surprise in that regard was his testimony that he delivered the $20,000 check to Johnson, not to Beber. Prior to the trial, plaintiffs were informed by Churchill, upon deposition, that most of the stock was sold by Schapiro or Beber or Johnson, and that Churchill could have received the $20,000 check from Schapiro or Beber or Johnson. Schapiro testified upon deposition that he first saw a document that answered to the description of the subscription agreement in March or April, 1946; it was at Allied Produce Company, he thought it was on Johnson's desk; that Johnson was a member of Allied Produce Company and sold some stock in the corporation; that someone in Allied Produce handed Schapiro the document and he signed it; so far as Schapiro knew, the only persons who sold the stock were the people in Allied Produce; he did not know of anybody who sold besides Johnson; he did not hear of Beber selling any; that Johnson told Schapiro the corporation received around $100,000 for stock sold prior to authorization by the corporation commissioner; that Beber received his stock by transfer from Schapiro, in payment of a debt owing from Schapiro ever since the Allied Produce partnership was formed. Plaintiffs' counsel then asked Schapiro if he knew what interest anybody in Allied Produce had in obtaining stock subscriptions, which he refused to answer upon advice of counsel. The asking of that question indicated awareness of active participation upon the part of members of Allied Produce Company.

The trial court further found that the joinder of these persons "at this stage of the proceedings [the conclusion of the trial] would result in hardships and unfairness to the original defendants." That, too, was peculiarly within the province of the trial court to determine. We find no abuse of discretion in the denial of plaintiffs' motion. The fact that the trial court, in its order of denial, expressed the opinion (whether correctly or not) that the evidence in the case did not furnish a basis for liability against Kobritz, Johnson or Allied Produce Company, does not alter our conclusion. The three reasons assigned by the court for its denial were separate and independent, not interdependent.

From what has been said it is clear that the trial court properly exonerated defendants on the second cause of action, but erroneously exonerated them on the first cause of action. The issues presented by the first cause of action must be retried.

The judgment appealed from is reversed. Each party shall pay his own costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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JORDAN et al. v. REYNOLDS et al.

Civ. 7988.

District Court of Appeal, Third District, California.

Dec. 7, 1951.

D. J. Jordan and others brought action against H. A. Reynolds and others to recover damages for alleged conversion by plaintiffs of sawmill and logs, and to repossess the sawmill and logs. The Superior Court of Mendocino County, Lilburn Gibson, J., rendered a judgment adverse to the plaintiffs, and the plaintiffs appealed. The District Court of Appeal, Peek, J., held that because of substantial default by defendants in performance of conditional sales contract, they were entitled neither to repossession of sawmill nor to damages for alleged conversion thereof.

Judgment affirmed.

1. Fixtures 🔑27(1)

Where sellers and buyers of sawmill agreed to treat the sawmill as personalty, the character of the sawmill was established as personalty.

2. Sales 🔑479(2)

On buyer's default under a conditional sales contract, seller has right to retake the property even in absence of an express provision for repossession.

3. Sales 🔑479(10)

Though, after a retaking of conditionally sold property by seller, where default was a failure to make money payment, buyer is entitled to possession on making a tender of a price within a reasonable time, where contract has not expressly made time of the essence, still, where buyer has repudiated the contract or has failed to tender adequate compensation for the default, the buyer's rights in the property are thereby terminated.

4. Sales 🔑**481**

Where sellers and buyers of sawmill agreed that the sawmill should be treated as personalty, and the sale was a conditional sale, and buyers were in substantial default at time of repossession of sawmill by sellers, and buyers did not tender adequate compensation for their default or admit that sellers were entitled to such compensation, buyers were entitled neither to repossession of the sawmill nor to damages for conversion thereof by the sellers, and it was immaterial whether or not the conditional sales contract expressly made time of the essence or provided for a forfeiture.

5. Trover and Conversion 🔑**48**

Claim for alleged conversion of logs was effectively refuted by fact that logs had been abandoned by plaintiffs and were worthless at time of alleged conversion by defendants.

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Preston & Falk, Ukiah, for appellants.

Spurr & Brunner, by John Lawrence, Ukiah, for respondents.

PEEK, Justice.

This is the second appeal in a controversy concerning a sawmill located in Mendocino County. In the first appeal, 97 Cal.App.2d 194, 217 P.2d 66, this court reversed a judgment in favor of defendants, the action being for damages for eviction from the sawmill and for conversion of logs, and remanded the cause for further proceedings. We upheld the finding of the trial court that the agreement between the parties was one for the conditional sale of the sawmill by respondent Reynolds to appellants, but we held that the findings as a whole were inconclusive on the question of whether Reynolds was entitled to repossess the sawmill.

Upon the cause being remanded the parties stipulated that the matter could be resubmitted to the trial court upon the evidence theretofore taken. No additional evidence was offered by either party. The trial court again rendered judgment for defendants upon findings that the parties entered into certain agreements, see Jordan v. Reynolds, supra, 97 Cal.App.2d at page 196, 217 P.2d 66, under which it was agreed that appellants could remove the sawmill from the land where it stood any time after payment to Reynolds of $5,000; that appellants agreed to treat the sawmill as personal property, and that said agreements constituted a conditional sale of said personal property; that appellants agreed to pay Reynolds at the rate of $1.50 per thousand board feet of lumber cut by the mill in a period not to exceed five years; that appellants agreed to commence operating the mill and to operate it continuously in a workmanlike manner at its full rate of productivity except when prevented by bad weather, and if so prevented by bad weather for a period of thirty days to make a minimum payment of $25 per month during such period of idleness; that the following obligations of appellants were conditions precedent to respondents' obligation to permit them to occupy the said premises; that time was of the essence of the said contract; that appellants entered into possession of the mill in October, 1944, and thereafter operated it for approximately three weeks; that after December, 1944, the mill was not operated by plaintiffs or for their account in a continuous, profitable or workmanlike manner, and was idle for substantially the entire period between December, 1944, and September, 1945; that on September 2, 1945, Reynolds served notice on appellants that their rights in the sawmill would terminate in thirty days; that on October 25, Reynolds peaceably took possession of the sawmill, it previously having been abandoned by appellants, and thereafter sold it for $4,000; that appellants' activities in connection with the operation of the sawmill were not substantial compliance with the contract, and appellants were in substantial, unexcused and wilful breach thereof; that from the date of said contract appellants have paid Reynolds only $312.23, and tendered an additional $175, which tender was refused by Reynolds; that appellants have never tendered adequate compensation for their breaches of the contract or offered to perform; that respondents fully performed all their duties and obligations under the contract; that the $7,000 expended by plaintiffs in making changes in the sawmill were detrimental thereto and the market value of the sawmill was reduced by reason of said changes; that appellants suffered no loss by reason of Reynolds' repossession of the mill; that 256,685 feet of logs owned by appellants, and situated on the sawmill premises were abandoned by them, and were not converted by respondents, and that at the time of the alleged conversion were deteriorated in quality, unmarketable, and of no value.

Appellants' principal contention is that Reynolds' repossession of the sawmill was wrongful because the contract did not expressly provide that time was of the essence, nor did it provide for forfeiture. Appellants assert that even if the contract were breached by them, Reynolds was not entitled to repossess. In view of the findings now before us such contention is without merit.

To clarify the question of what constituted the appellants' breach it should be noted that the within agreements were to a certain extent ambiguous, and we so held in the prior appeal. One paragraph of the agreement required appellants to commence operating the mill as soon as labor and weather conditions permitted and to continue operating in a workmanlike manner. A later paragraph provided that if appellants failed or were unable to operate said mill for a period of thirty days, they were to pay Reynolds $25 per month. Testimony was admitted relating to the surrounding circumstances, that is, the fact that the appellants were to take possession of the mill with the winter near at hand and the likelihood of adverse weather preventing operation of the mill, and the negotiations between the parties as to the $25 a month payment.

Considering the record as a whole, the court's finding that under the agreement appellants were obligated to operate the mill continuously except when prevented by bad weather is supported by substantial evidence and will not be disturbed on appeal. Neither can there now be any question but that appellants were in substantial default of this obligation, and their tenders of payments of $25 a month were not tenders of adequate compensation for this breach.

[1–3] It is in the light of these findings, then, that we must determine whether appellants were entitled to damages on account of Reynolds' repossession of the mill. Since the trial court found that appellants and respondents had agreed to treat the sawmill as personal property as between the parties the character of the sawmill was established as personalty. R. Barcroft & Sons Co. v. Cullen, 217 Cal. 708, 712, 20 P.2d 665. It is well established that upon the buyer's default under a conditional sales contract the seller has the right to re-take the property even in the absence of an express provision for repossession. Goldberg v. List, 11 Cal.2d 389, 393, 79 P.2d 1087, 116 A.L.R. 900; Liver v. Mills, 155 Cal. 459, 101 P. 299; Rogers Lamb Co. v. Coast Securities Co., 58 Cal.App. 744, 209 P. 246. While it is true that after a retaking by the seller, where the default was a failure to make a money payment, the buyer is entitled to possession upon making a tender of the price within a reasonable time, where the contract has not expressly made time of the essence, Miller v. Steen, 30 Cal. 402, 403; still where the buyer has repudiated the contract or has failed to tender adequate compensation for the default, the buyer's rights in the property are thereby terminated. Liver v. Mills, supra, 155 Cal. at page 463, 101 P. 299; see also McConnell v. Redd, 86 Cal.App. 785, 790, 261 P. 506.

[4] In the present case not only were appellant buyers in substantial default at the time of Reynolds' repossession but since that time they have not tendered adequate compensation for their default, or admitted that respondents are entitled to such compensation. Hence, under the principles

above stated, appellants are entitled neither to repossession of the mill nor to damages for the conversion thereof, and it is immaterial whether or not the contract expressly made time of the essence or provided for a forfeiture. The case of Forgay v. Plum, 99 Cal.App. 524, 279 P. 177, relied upon by appellants, is clearly distinguishable because there the buyers, following the sellers' filing suit for repossession, made a tender of the payments due under the contract.

[5] Appellants' claim for damages for conversion of the logs is effectively refuted by the trial court's findings that the logs had been abandoned by appellants and were worthless at the time of the alleged conversion, which findings are supported by substantial evidence.

The judgment is affirmed.

VAN DYKE, J., and SCHOTTKY, Justice pro tem., concur.

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SECOND SERIES

108 Cal.App.2d 37

BURNETT et al. v. BOUCHER et al.

SNELL et al. v. BOUCHER et al.

Civ. 4402, 4403.

District Court of Appeal, Fourth District, California.

Dec. 5, 1951.

Hearing Denied Jan. 31, 1952.

Action by Percy Burnett and Beatrix Burnett against Edward Darwin Boucher, Earl Boucher, and others, and action by Walter E. Snell, Olive Snell, and others against Edward Darwin Boucher, Earl Boucher, and others, for personal injuries sustained when automobile owned by Earl Boucher and driven by Edward Darwin Boucher collided with automobile in which plaintiffs were occupants. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered judgment dismissing plaintiff's complaint, and plaintiffs appealed. The District Court of Appeal, Barnard, J., held that complaint that set forth complete cause of action against defendant Earl Boucher, which, if proved, would have made him liable for negligence of Edward Boucher as agent under rule of respondeat superior, could not be amended to state theory of permissive use by Edward Boucher, since such amendment would have set forth new and different cause of action, calling for proof of facts based upon different ground of liability, in that imputed negligence was created by statutory provision.

Judgment affirmed.

1. Pleading ⇨248(11)

Where plaintiffs sustained personal injuries as result of collision of automobile in which plaintiffs were riding with automobile owned by father and operated by son, and complaint against father set forth complete cause of action basing liability of father, if any, on theory of agency and doctrine of respondeat superior without allegation of permissive use by son, amendment for purpose of alleging permissive use under statutory theory of imputed negligence would have set forth new and different cause of action and was not permissible. Vehicle Code, § 402.

2. Trial ⇨109

In action for personal injuries sustained in automobile collision brought against father who owned automobile which had been driven by son when same collided with automobile in which plaintiffs were riding, wherein complaint alleged liability of father on theory of agency and basis of doctrine of respondeat superior, opening statement by which plaintiffs expressly disclaimed any intention of proving that son was acting as agent or employee of father, but which stated that plaintiff expected to prove that son was driving automobile with father's permission, was an abandonment of theory of agency. Vehicle Code, § 402.

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Taylor F. Peterson, Thomas C. Parry, San Bernardino, for appellants.

Swing & Gillespie, San Bernardino, for respondent.

BARNARD, Presiding Justice.

These actions for damages were consolidated for trial and on this appeal. The complaint in each action alleged that on June 19, 1949, "the defendants" owned and operated a certain automobile; and that "at said time and place the defendants then and there so negligently and carelessly had, owned, operated, managed, possessed, propelled and controlled their said automobile that the same collided violently with the automobile in which the plaintiffs were riding," causing the injuries complained of.

The defendant Earl Boucher admitted in his answers that he owned the vehicle in question and that it was then being driven by the defendant Edward Darwin Boucher, but denied the allegations charging him with negligence. Edward Darwin Boucher, who is the son of Earl Boucher, was not served and the actions came to trial on November 20, 1950, as against Earl Boucher alone. In their opening statement the plaintiffs conceded that the automobile was owned by the father and was being driven by the son; expressly disclaimed any intention of proving that the son was acting as an agent or employee of his father; and stated that they expected to prove that the son was driving the car with the father's permission.

The defendant Earl Boucher moved for a nonsuit based on the contention that the only cause of action alleged in the complaints had been abandoned, and that evidence on a different theory, statutory liability for imputed negligence, was inadmissible. The plaintiffs argued that their complaints were broad enough to cover the matter "statutory or otherwise", but asked permission to amend the complaints on their face by alleging that the son was driving with the permission, express or implied, of the father. They relied mainly on the case of Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965, while the defendant Earl Boucher relied on the case of McKnight v. Gilzean, 29 Cal.App.2d 218, 84 P.2d 213. The court denied permission to amend on the ground that the cause of action stated in the complaints could not be changed into one of statutory liability under Section 402 of the Vehicle Code, since more than a year had elapsed after the accident occurred. The motion for nonsuit was granted as to each action, and judgments of dismissal were entered in favor of the defendant Earl Boucher. From these judgments the respective plaintiffs have appealed.

The appellants first contend that "the complaints were sufficient to tender issues of agency and permissive use." The only argument under this point is that the complaints alleged that the defendants owned and operated the automobile at the time in question, and that as a result of their negligence the plaintiffs were injured; that the complaints tendered the issue of whether the son was the agent of his father; and that an inference of agency arises from the operation of the vehicle with the consent of the owner. It was, and is, conceded that the complaints were sufficient to raise the issue of agency. However, it was not alleged that the driver of this vehicle was operating it with the consent of the owner. No argument is presented in support of the contention that the complaints were sufficient to show permissive use under the statutory theory of imputed negligence. Vehicle Code, § 402.

While not directly presented by appellants, the controlling question is as to whether or not the proposed amendment, setting up the matter of permissive use, would have constituted a change in the cause of action as originally pleaded. In Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965, the complaint alleged that one defendant was employed by the other defendants and was driving a truck owned by them. It was not alleged that he was driving in the course of his employment, which would be necessary under the theory of *respondeat superior,* nor that he was driving with their permission, which would be necessary under the theory of imputed liability. The plaintiffs were allowed to amend by adding an allegation that he was driving with the express or implied permission of the other defendants. It was held that the original complaint was incomplete, under either the common law theory or the statutory theory; that the amendment merely completed a cause of action which hade been incompletely stated; and that the complaint could be amended by alleging in what capacity it was claimed that the operator was driving the truck. In McKnight v. Gilzean, 29 Cal. App.2d 218, 84 P.2d 213, it was alleged that Gilzean was driving an auto for and on behalf of the other defendants, that he was in their employ, and that he was acting in the scope of his employment. It was sought to amend by adding a cause of action based on allegations that he was operating a vehicle owned by the other defendants, with their permission. The sole question there presented was whether this proposed cause of action, for imputed negligence under Vehicle Code Section 402, was "a new and different cause of action from that pleaded in the original complaint." The court pointed out that the cause of action in the original complaint was clearly one based on the common law doctrine of *respondeat superior*. It distinguished the case of Woods v. Cook, supra, on the ground that the amendment there considered merely completed a cause of action which had been imperfectly stated. It was held, in the McKnight case, that a cause of action on the theory of *respondeat superior* had been fully stated, and that the cause of action upon the statutory liability for imputed negligence, proposed by the amendment, was a new and different cause of action. The test there applied was whether proof of additional facts which depended upon a different ground for holding the defendant liable, for the wrong alleged, would be required. The basis for the decision was that the amendment did not merely complete a cause of action which had been imperfectly stated, but added a different ground for holding the defendants liable, requiring proof of an entirely new element.

[1] The same situation here appears. The complaints set forth a complete cause of action as against this respondent which, if proved would have made him liable for the negligence of his agent, under the rule of *respondeat superior*. No element of permissive use was alleged and the amendment, if permitted, would have set forth a new and different cause of action, calling for proof of facts based upon a different ground of liability, the imputed negligence created by the statutory provision.

[2] The only other point raised is that the opening statement, which must be taken as true, was sufficient to require a trial upon the merits. The only argument made is that the complaints were obviously sufficient to permit proof of liability under the doctrine of *respondeat superior;* that the opening statement sufficiently informed the court that the appellants were relying on that doctrine; that an inference of agency could be drawn from proof of permissive use; and that the agency theory was not abandoned during the opening statement and the argument which followed. This contention is without merit. The record shows beyond any possible question that counsel for the appellants expressly and completely abandoned any theory of agency; that they intended this to be, and it was, so understood by the court and counsel; and that this fact, accepted by all parties, was the basis for the rulings and orders made.

The judgments are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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108 Cal.App.2d 114

PRATT v. LOS ANGELES COUNTY CIVIL SERVICE COMMISSION et al.

Civ. 18360.

District Court of Appeal, Second District, Division 3, California.

Dec. 10, 1951.

Shella A. Pratt brought mandamus proceedings against the Los Angeles County Civil Service Commission and others directing the defendants to set aside decision sustaining the discharge of the plaintiff from her position as senior typist clerk in the office of county clerk. The Superior Court of Los Angeles County, Arnold Praeger, J., entered a judgment directing issuance of writ of mandate, and the defendants appealed. The District Court of Appeal, Vickers, J. pro tem, held that evidence sustained findings of commission that plaintiff was guilty of misconduct in removing public records from the files and mutilating and secreting them, and that such misconduct warranted discharge.

Judgment reversed and Superior Court directed to quash writ.

1. Officers ⚷72(1)

In hearing before County Civil Service Commission on question of propriety of the discharge of senior typist clerk in office of county clerk, on ground that she removed public records from the files and mutilated and secreted them, evidence sustained finding of commission that senior typist clerk removed from the files, mutilated and secreted certain public records as charged in letter discharging her from her position.

2. Officers ⚿72(1)

In hearing before County Civil Service Commission on question of propriety of the discharge of senior typist clerk in office of county clerk, on ground that she removed public records from the files and mutilated and secreted them, circumstantial evidence was sufficient to sustain finding of commission that senior typist clerk was guilty of misconduct charged.

3. Officers ⚿72(1)

In hearing before County Civil Service Commission on question of propriety of the discharge of senior typist clerk in office of county clerk, on ground that she removed public records from the files and mutilated and secreted them, it was not necessary to establish the guilt of the senior typist clerk beyond a reasonable doubt.

4. Mandamus ⚿187(10)

Fact that letter discharging senior typist clerk in office of county clerk stated that she was guilty of misconduct in removing public records from the files and mutilating and secreting them on various dates, whereas in hearing before County Civil Service Commission evidence was introduced only as to what took place on one of the dates, did not require the District Court of Appeal on appeal from judgment awarding senior typist clerk writ of mandate, after reversing the judgment of the superior court, to remand the matter to the commission for reconsideration, where there was a similarity of facts surrounding removal of the documents on all of the dates. Code Civ.Proc. § 1094.5(a, b, c).

5. Officers ⚿72(1)

Finding of County Civil Service Commission in hearing on question of propriety of discharge of senior typist clerk in office of county clerk, that the senior typist clerk removed public records from the files and mutilated and secreted them, because of emotionally unstable condition resulting from menopause, justified decision of commission in upholding the discharge of the senior typist clerk.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, John B. Anson, Deputy County Counsel, all of Los Angeles, for appellants.

Robinson, Guerin & Powers, Joseph P. Guerin and John J. Guerin, all of Los Angeles, for respondent.

VICKERS, Justice pro tem.

The petitioner-respondent, a civil service employee of the County of Los Angeles, was a senior typist clerk in the office of the county clerk. On May 16, 1949, she was notified by the county clerk that as of June 2, 1949, she was permanently discharged from that position. In conformity with the rules of the County Civil Service Commission she denied the charges contained in the letter of discharge and requested a hearing before the Commission. On June 2, 1949, in the manner prescribed by the County Charter and the rules of that Commission, a hearing was had before the Commission. On June 7, 1949, the Commission rendered its decision sustaining respondent's discharge. Respondent thereupon petitioned the superior court for a Writ of Mandate. Upon issue joined a trial was had following which that court made its findings and rendered judgment. The judgment directed the issuance of a peremptory Writ of Mandate commanding the Commission, its individual members and the county clerk to set aside the decision sustaining respondent's discharge. Appellants thereupon took this appeal.

The case was tried under the theory that the appellant Civil Service Commission is one of the inferior tribunals or boards referred to in Code of Civil Procedure, section 1094.5, subsections (a) and (b) and that the trial court's inquiry was limited as specified therein to the following questions: "Whether the appellant (Commission) has proceeded without or in excess of jurisdiction; whether there was then a fair trial; and whether there was any prejudicial abuse of discretion?" It is also conceded that as stated in subsection (b) "Abuse of discretion is established if the appellant (Commission) has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Neither in the court below nor in her brief on appeal has the respondent attacked the Commission's decision on the ground that the Commission did not proceed as required by law or that the decision is not supported by the findings. The only evidence received in the trial court was that which had been introduced at the hearing before the Commission. In their opening brief the appellants recite that the trial court found that the Commission acted in excess of its jurisdiction in that there was no substantial evidence in the light of the whole record, of respondent's guilt. They state that the sole issue on this appeal is whether the findings in the language of Code of Civil Procedure, section 1094.5, subsection (c), are "supported by substantial evidence in the light of the whole record." By her reply brief the respondent declares: "Respondent agrees with the appellants to the extent that the sole issue of this appeal is confined to the question of whether there was no substantial evidence of respondent's guilt to sustain the Commission's decision upholding her discharge." There are in reality two questions before us, namely, (1) is there substantial evidence which supports the Commission's findings, (2) do the findings support its decision?

By his letter of May 16, 1949, discharging respondent, County Clerk Ostly declared that she was "* * * guilty of wilfully destroying, mutilating, defacing, removing from and secreting, public papers and documents contained in the probate files of the Long Beach Department of the Superior Court in and for the County of Los Angeles. The specific facts constituting the above described offense are as follows:

"That for a period of several weeks prior to May 2nd, 1949, and particularly on April 29, and May 2, 1949, you have removed numerous papers from probate files, consisting of such documents as Affidavits of Publication of Notice to Creditors, Certificates of Inheritance Tax, Inheritance Tax Releases, and that more particularly on or about the 2nd day of May, 1949, you wilfully removed from said probate files, the following described documents and papers which you mutilated and secreted:

Number	Document	Date Filed
LBP 18882	Certificate of Inheritance Tax Appraiser	11-1-48
LBP 12413	Affidavit of Publication of Notice to Creditors	8-14-43
LBP 18880	Certificate of Inheritance Tax Appraiser	4-7-49"

By its decision of June 7, 1949, upholding the discharge and entered in its minutes the Commission declared: "'In the matter of the discharge of Shelia A. Pratt, heard and submitted on June 2, 1949, the Commission having considered all the evidence, including the appearance and demeanor of Mrs. Pratt while testifying, and being fully advised in the premises, found that the facts stated in the letter of discharge dated May 16, 1949, are true; that on May 2, 1949, Mrs. Pratt removed from the files, mutilated, and secreted, certain public records as charged in the letter of discharge; that such action was not done with criminal intent but because of her emotionally unstable condition; that such removal, mutilation and secretion of public records constitute reasonable grounds for discharge; that none of the facts stated in the Answer to Charges, dated May 19, 1949, are true; that the resignation was withdrawn with the consent of the department head and is therefore not material to this case; that such resignation was entirely voluntary and entered into without duress or menace. The Commission concluded—Commissioners Mack and Crouch voting "aye"—that the reasons justify the discharge. Commissioner O'Keefe took no part in the findings or decision.'"

Respondent for a period of 18 months prior to May, 1949, had been assisting Probate Commissioner Charvat of the Long Beach Superior Court. One of her principal duties was to check the probate files prior to each Monday, which was the regular calendar day, to determine if the necessary supporting documents were present. It was also Commissioner Charvat's duty to separately check such files. They were the only persons who did so. On each Monday for two or three weeks prior to May 2nd, Judge Maltby, who regularly heard the probate calendar, had found from three to six necessary documents missing which Charvat had noted as present at the time of his checking. An examination of the files disclosed that they had been torn from the files leaving small portions thereof remaining at the points where the files were bound. An investigation was then instituted by the judge and the county clerk about April 28th. It was discovered that the documents that had been torn from the files prior to the investigation were of the same general character, being Certificates of Inheritance Tax Appraiser, Affidavits of Publication of Notice to Creditors, Inheritance Tax Releases or Orders Fixing Inheritance Tax. On the evening of April 28th two investigators from the county clerk's office, Kerfoot and Peck by name, checked the files of cases on the calendar for the following Monday, May 2nd. On the morning of April 29th the respondent checked the files and thereafter reported that an Affidavit of Notice to Creditors in one of the files, referred to as item 22, was missing. This document had been found and noted as present by Kerfoot and Peck the previous evening. On Saturday morning, April 29th, Kerfoot and Peck checked the remaining files noting the presence or absence of the necessary documents therein. They completed this check at 7:20 a. m. and left the files in the locked office jointly occupied by respondent and Commissioner Charvat. At 8:15 a. m. respondent arrived, followed shortly thereafter by Commissioner Charvat. About 9:30 a. m. the respondent commenced checking the files and continued to do so during much of that day. During this time Commissioner Charvat was on the bench or doing other work and did not touch the files until 7:30 p. m. At the completion of her checking the respondent reported the following items missing: Item 26, Certificate of Inheritance Tax Appraiser; item 27, Affidavit of Publication of Notice to Creditors; and item 30, Certificate of Inheritance Tax Appraiser. The presence of each of these items in the respective files had been specifically noted by Kerfoot and Peck at the time of their examination early that morning. About 5 p. m. of that day Judge Maltby and Investigator Kerfoot went to the office jointly occupied by the respondent and Commissioner Charvat. The judge looked in the waste basket and pulled out item 26 which had been shredded into three pieces whereupon Kerfoot went to the lavatory used by the respondent and found items 27 and 30 in a crumpled condition among the soiled paper towels. Respondent should have completed the checking of the files containing items 26, 27 and 30 by 10:30 a. m. of the day in question. Commissioner Charvat testified that either he or the respondent was usually present in their joint office or in the adjoining courtroom. Deputy Sheriff Graham testified that from the hall he kept the door of the office in question in surveillance from 11 a. m. until 1:45 p. m. of May 2nd and that from 2 p. m. to much later in the afternoon of that day he kept the office under surveillance by the use of binoculars from the window of another building, during which time he saw the repondent working at her desk and saw no unauthorized persons enter. Judge Maltby and Commissioner Charvat testified that they did not remove any of the documents in question including those which had been removed prior to April 29th. An examination of the files from which items 22, 26, 27 and 30 had been torn disclosed small portions of each of the documents still held by the binder and appearing to be similar in character to the pieces that had been found in the files from which the other documents had been torn during the previous two or three weeks.

[1] The trial court by its memorandum of opinion declared that there was no substantial evidence to support the findings of the Commission and that its decision was based on mere suspicion. With this we cannot agree. It seems clear to us that in the light of the whole evidence and the inferences reasonably to be drawn therefrom the findings of the Commission were not only supported by substantial evidence but were also well justified. The specific finding was "that on May 2, 1949, Mrs. Pratt removed from the files, mutilated and secreted, certain public records as charged in the letter of discharge." This is sup-

ported by the evidence that at 7:20 a. m. of that day the documents in question, items 26, 27 and 30, were in their respective files in respondent's locked office; that respondent entered the office at 8:15 a. m.; that Commissioner Charvat arrived thereafter and did not touch those files that day; that respondent or Mr. Charvat or both were present at all times between 8:15 a. m. and 9:30; that respondent checked those files between 9:30 a. m. and 10:30 a. m.; and that the documents were torn out, mutilated and secreted in the office waste basket and lavatory. The specific finding is also supported by the following inferences which could reasonably be drawn from the above evidence and the record as a whole: That no one entered the office between 7:20 a. m. and 8:15 a. m.; that no one except respondent touched the files between 8:15 a. m. and 10:30 a. m.; that the documents were removed by respondent while checking those files that morning and thereafter mutilated and secreted.

[2, 3] Respondent urges that no one saw respondent take the documents or found them on her person and that Mr. Charvat had an equal opportunity, and since there were several keys to the office some third person may have been the guilty one. Such an argument while a proper one to be made before the Commission at the hearing can be of no effect after that Commission has rendered its decision. Circumstantial evidence was sufficient. Demonstration of respondent's guilt was not required. Neither, since this is a civil case, was it necessary to establish her guilt beyond a reasonable doubt. The Commission chose to believe Mr. Charvat's denials that he had taken the documents and to disbelieve respondent. The mere fact that there was a bare possibility that some third person might have taken them did not prevent the Commission from finding that respondent had done so. Such a possibility was most remote. It would have had to be done by use of an office key between 7:20 a. m. and 8:15 and such a person would have had to search through 80 voluminous files to find these particular types of documents and then have secreted them where found. In addition it is difficult to conceive of any motive for such an act.

Respondent urges that there was no motive shown on her part. It is hard to understand why she should have done the acts in question. Appellant urges that it may have been an endeavor on her part to impress Mr. Charvat with the need for her services in double checking the files. Be that as it may the Commission found that it was the result of her "emotionally unstable condition." There was evidence that respondent had for some time been passing through a period of menopause. Respondent urges that this fact was discovered during the conversations between respondent and the county clerk and his deputies at the time respondent submitted her resignation, later withdrawn, and that all parties had agreed the resignation was irrelevant. However, it was respondent who developed the subject and relies on it in her brief. In any event the Commission had every opportunity to observe her appearance and demeanor and her manner of testifying during the hearing and was entitled to draw its own conclusions in regard to her condition of mind. Both the trial court and we are bound thereby.

[4] Respondent also argues that if we assume the finding as to the removal of items 26, 27 and 30 on May 2nd is supported by substantial evidence, that that is not true as to the portion of the letter of discharge which charged that for a period of several weeks prior to May 2nd and particularly on April 29th (and on May 2, 1949) respondent took numerous papers from the files. Respondent urges therefore that in that event only a portion of the findings are supported by substantial evidence and we must remand the matter to the Commission for reconsideration. Such is the procedure to be followed in a proper case therefore. See Cooper v. State Bd. of Medical Examiners, 35 Cal.2d 242, 244, 217 P.2d 630, 18 A.L.R.2d 593, and Jones v. Maloney, Cal.App., 234 P.2d 666. But this is not such a case. The evidence of the events of April 29th set out earlier in this opinion, the similarity of the facts surrounding the removal of all of the docu-

ments torn from the files and the evidence as a whole, with the inferences to be reasonably drawn therefrom, would substantially support a finding that respondent had so removed documents during the prior weeks before May 2nd as well as on that day. Furthermore, from a reading of the findings and decision of the Commission, as shown by the minutes of June 7th set out above, it appears that respondent's discharge was approved because "on May 2, 1949, Mrs. Pratt removed from the files, mutilated, and secreted, certain public records as charged in the letter of discharge." The only reference in the minutes to April 29th and the weeks prior thereto was a general statement immediately preceding this declaration to-wit: "The facts stated in the letter of discharge dated May 2, 1949, are true." If the word "facts" includes the reference in the letter of discharge to the events prior to May 2nd, it may well be that the Commission incorporated them as additional support for its basic finding that respondent had committed the acts complained of on May 2nd.

In any event to remand the matter to the Commission could only result in the same decision. By its finding that respondent had removed, mutilated and secreted public documents on May 2nd, the Commission not only found her guilty of a most serious breach of duty, but also of having committed an act of a felonious nature in that she had violated section 6200 of the Government Code. That section reads as follows: "Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the State prison not less than one nor more than 14 years." The Commission would be doing less than its duty if it failed to uphold respondent's discharge in view of that clear declaration of public policy. We must assume that the Commission would perform its duty.

[5] What we have said demonstrates that the findings of the Commission supports its decision. The judgment is reversed and the trial court is directed to quash the peremptory Writ of Mandate.

SHINN, P. J., and WOOD, J., concur.

108 Cal.App.2d 95

CORNWALL v. CORNWALL.

Civ. 14826.

District Court of Appeal, First District,
Division 2, California.

Dec. 10, 1951.

Rehearing Denied Jan. 9, 1952.

Hearing Denied Feb. 7, 1952.

Christine Laird Cornwall sued Thomas W. Cornwall for divorce and obtained a decree giving her custody of their child, and defendant moved to modify the judgment with respect to custody. The Superior Court in and for the City & County of San Francisco, Daniel R. Shoemaker, J., granted the motion and plaintiff appealed. The District Court of Appeal, Goodell, J., held that the evidence sustained the modification of custody.

Affirmed.

1. Divorce 🔑303(3)

Evidence sustained order transferring custody of child from divorced mother to father because of mother's frustrating father's right of visitation, and resulting detriment to child.

2. Pleading 🔑430(2)

Where notice of motion to modify divorce decree as to child's custody recited that motion would be based upon all pleadings and upon all documentary evidence to be adduced, and no objection was made in extended hearing that inquiry was going beyond issues tendered, objection of lack of conformity between pleadings and proof was not available.

3. Divorce 🔑303(2)

The "change of conditions rule" with respect to modification of divorce decree as to child's custody is not iron-clad, but must be subsidiary to the main consideration, of the child's welfare.

4. Divorce 🔑303(2)

"Change of conditions" as ground for modifying divorce decree as to child's custody is not limited to such matters as living conditions, household surroundings, family relations, schooling, or child's recreation.

See publication Words and Phrases, for other judicial constructions and definitions of "Change of Conditions".

5. Divorce 🔑303(3)

In proceeding to modify divorce decree as to child's custody, findings are not required.

James Martin MacInnis, San Francisco, for appellant.

Peart, Baraty & Hassard, San Francisco, for respondent.

GOODELL, Justice.

This is an appeal from an order granting the motion of defendant to modify a judgment of divorce with respect to custody.

The parties married on June 28, 1941 and lived in San Francisco. On May 5, 1942 a son was born and named Thomas George Cornwall. He is the only child, and was 8 at the time of the hearing.

On December 23, 1943 appellant filed suit for divorce on the ground of extreme mental cruelty. On May 5, 1944 an interlocutory judgment was entered, reciting that no evidence had been offered by defendant; that plaintiff was entitled to a divorce, and approving the agreement respecting property rights which had been executed. It awarded joint custody of the son to the parties and provided that plaintiff should have his physical custody with the right of defendant to visit him at all reasonable times, and to take him on an annual summer vacation for a reasonable period of time not exceeding 15 days. It ordered defendant to pay plaintiff $200 a month for the maintenance and support of the son. It also ordered him to pay plaintiff $200 a month for her own support and maintenance for a period of three years. There is no issue with respect to any of the payments.

Appellant and her son went to live with appellant's parents, named Laird, at their home in the Montecito district of Santa Barbara. A wing was added to the Laird dwelling which gave the plaintiff separate and ample living quarters for herself and son.

The final judgment was entered on May 18, 1945 incorporating by reference the provisions of the interlocutory judgment.

On June 4, 1947 defendant moved for a modification of the custody order and an order was made on September 16, 1947 that defendant be permitted to visit with the boy and take him with him at points at or near Santa Barbara on week-ends from Friday afternoons to Monday mornings, at all reasonable times; that defendant be permitted to have the boy with him in his own home in San Francisco for the 1948 Easter vacation week and the 1949 Christmas vacation period, and that the boy should spend the 1947 and 1948 Christmas seasons and the 1949 Easter vacation period with his mother; also that defendant be permitted to take the boy with him to defendant's home in San Francisco, or elsewhere in California, for a period of 30 days during each summer school vacation.

On March 16, 1950 a notice of motion was served and filed by respondent which initiated the proceedings now under review. The motion was for an order changing the physical custody of the boy from the mother to the father. On May 17, 1950 appellant served and filed a counter-motion respecting custody and counsel fees. Both motions were given a full and extended hearing which lasted for seven half-day court sessions and produced 331 pages of testimony. It of course comprehended many of the matters and incidents which had been before the court at earlier hearings. On July 26, 1950 the court ordered that the final judgment of divorce be modified as follows:

"1. The defendant * * * shall have forthwith the physical custody of said minor child until the further order of the Court, with the right of plaintiff to visit said minor child at all reasonable times; and, further, that the plaintiff shall have the custody of said minor child during alternate Christmas and Easter school vacations, commencing with the Easter school vacation for the year 1951, and, further, that the plaintiff shall have the care and custody of said minor child for one month during each summer school vacation, commencing with the 7th day of July, 1950.

"2. That at the conclusion of the present month's vacation period, to-wit, August 8, 1950, plaintiff shall deliver the physical custody of the said minor child to defendant at her home in Santa Barbara.

"3. Said minor child shall not be taken or removed from the State of California by either parent without due notice to the other party and the order of the above-entitled Court, after application therefor;

"4. That defendant pay the sum of $250.00 to Messrs. Hallinan, MacInnis & Zamloch as attorneys for plaintiff for services rendered herein;

"5. That the motion of plaintiff for modification of said final decree, with the exception of the allowance of attorneys' fees as hereinabove set forth, be and the same is hereby denied;

"6. That, until further order of the Court, no further payments shall be made by defendant to plaintiff for the care, support and maintenance of said minor child."

In this record there is a very considerable volume of evidence which is wholly uncontradicted, and it will be reviewed first.

The religious question:

At the time of the boy's birth neither parent seems to have been much of a church-goer. The infant was not baptized at that time or affiliated in any other way with any church or denomination. After the divorce and when the boy was 2½ or 3 years old his parents discussed the choice of a Sunday school and agreed on the Presbyterian Sunday school in Santa Barbara, which he attended for about a year.

Later appellant became a convert to Catholicism and was baptized by a priest in Santa Barbara. On February 23, 1947, when Tommy was almost 5, his mother had him baptized by a Catholic priest in Santa Barbara. The father, who is not a Catholic, was not consulted, and learned about it some time later.

Appellant testified under cross-examination: "Q. Didn't you just decide, yourself, to go to one particular church, and after that to determine where the boy was to go? A. Yes. Q. Without the father's knowledge? A. That's true. I know Dr. Cornwall's brother was a Catholic, and I saw no reason to object."

The change of name question:

The birth certificate signed 3 days after Tommy's birth shows his name as Thomas George Cornwall. The baptismal certificate shows that when baptized he was given the name Thomas *Laird* Cornwall.

The father was not consulted respecting this matter.

There was considerable testimony respecting the earlier choice of the middle name "George". The father testified:

"Q. What was the 'Tommy' for—of course, in your honor? A. For me, yes * * *.

"Q. And 'George' where does that come from? A. That was for my brother who passed away when he was 19 years old. In view of the fact that we were close—there was only two years between us; attended school together, the same classes, and high school, and our activities were together, and all our attentions were very, very close,—and Mrs. Cornwall agreed that the boy's name should be George, and she said she wished it to be Thomas George. I asked her how about the name of her father, and she said no. * * * She didn't want the name of 'Warren,' which was her father's—she didn't want that name. She wanted Thomas George. That was the name she would like. And we both felt that would be very satisfactory, and the birth certificate was registered in that way."

Elsewhere respondent testified that "George" was the name of his father and grandfather, and a family name. Appellant testified that the name "George" was for respondent's "brother, and grandfather, and maybe their father's, too; I am not sure" and that the name had been in the Cornwall family for some generations back. On appellant's cross-examination the following appears:

"Q. Now, I notice in the baptismal certificate the name, I believe, appears as Thomas Laird Cornwall, is that right? A. Yes, that's right.

"Q. Who authorized that change? A. We go by the name Thomas. I said I would like to have the name Thomas Laird Cornwall.

"Q. Did you consult your former husband, the doctor, as to whether or not he would agree before changing the boy's name? A. No. It is not his legal name; it is his baptismal name.

"Q. And known by that among his friends? A. Yes.

"Q. And the records of the Catholic Church, of course, he is known that way, too? A. Yes."

When Tommy started to school he was enrolled as Thomas Laird Cornwall and is so carried on the school's records and so known by his schoolmates and other companions. That, too, was without the knowledge of his father.

The school question:

When Tommy was old enough to attend school his mother entered him in a parochial school in Santa Barbara conducted by Catholic Sisters, which practically adjoins the Laird property. The father was not consulted respecting the kind or character of school which the boy should attend. He learned of it some time after Tommy had entered. Under cross-examination the defendant testified:

"Q. Did you ever protest to Mrs. Cornwall about her choice of a parochial school for your son? A. The fact had been accomplished. He had been entered in the school for some length of time before I knew about the matter.

"Q. Do you now protest? A. I have no comment on that."

Respondent testified elsewhere that he did not disapprove of the school.

Appellant was cross-examined on this subject as follows:

"Q. Now, have you discussed with him as you have discussed with us, now, the matter of what school he was going to? A. Well, he went to the parochial school because of the emotional problem that he was facing.

"Q. Because of what? A. The emotional problem that Tommy was having, and I wanted him to have a good, strong, moral background.

"Q. Now, will you please answer my question: Did you discuss with your former husband the matter of his schooling? A. No.

"Q. You just took it upon yourself, without discussing that matter? A. Yes."

The difficulties respecting week-end visits and vacations:

During the year between the interlocutory and final judgments respondent made but 3 trips to Santa Barbara. Within a month after the final decree he moved for a modification of the custody order so that he could have the boy in San Francisco every 3 or 4 months for a period of 4 or 6 weeks. The basis of that motion was that war conditions and railroad transportation made it difficult for respondent to visit the boy at Santa Barbara. The motion was opposed by appellant and in presenting her opposition she made a serious charge on which the court found in respondent's favor. The motion was denied because the court found there had been no change of circumstances.

Thereafter the respondent's practice was to visit the boy in Santa Barbara whenever he could do so. He usually went there on a Friday afternoon, took the boy to a nearby hotel, and returned him to his mother on Sunday evening.

With respect to the reasonableness of the times of these visits respondent habitually wired appellant well in advance. One wire gave 13 days notice, several gave 7 or 8, several 4, and none gave less than 2 days notice.

Respondent is a physician who has practiced in San Francisco as a child specialist since 1927. He has a busy practice and is on the staff of five San Francisco hospitals. He testified that whenever he made one of these trips he had to plan considerably in advance for the care of his patients in his absence. This meant employing another pediatrician at a considerable expense, and the briefing of the substitute doctor respecting the cases in hand.

Among the messages respecting these visits the record contains the following telegrams and notes exchanged between the parties from late in 1945 to the time of the hearing in 1950:

November 28, 1945 appellant to respondent: "My Christmas plans will not permit Tommy leaving me this season. Further it would be inconvenient to let Tommy go. He was available several times last summer. It seems strange that you should make this request immediately following recent court hearing."

December 17, 1946, respondent to appellant: "Expect to arrive by plane Friday afternoon December 20th" to which appellant replied "Tommy not available until Saturday morning December 21st."

July 15, 1947 respondent to appellant: "As per our arrangements together with you about three weeks ago I have planned to visit Tommy week end of July 19th and take him on vacation July 22nd. Expect to arrive afternoon July 19th" to which appellant replied: "You cannot have Tommy until case is settled. Do not come to Santa Barbara."

July 15, 1947 appellant to respondent: "Do not make plans to take Tommy this week. He is not available."

November 11, 1948, respondent to appellant: "Have planned to visit with Tommy during Thanksgiving holidays. Expect to arrive Wednesday afternoon November 24th" to which appellant replied by letter on November 15th: "Tommy should spend Thanksgiving in his own home. You may have him for the Thanksgiving week end beginning Friday morning."

March 14, 1949 respondent to appellant: "Plan to visit with Tommy this week end. Expect to arrive March 18th," to which appellant replied: "Not convenient to visit Tommy this week end. Please change plans to following week end."

March 15, 1949 respondent to appellant "Your telegram received. Stop. Will let you know later when I can again arrange to visit Tommy. For my future visits please advise by telegram collect whether first and third week ends or second and fourth week ends of each month will better suit your convenience." The Western Union reported that the wire was undelivered because the addressee had gone to the Clift Hotel, San Francisco. On March 23 Western Union advised respondent that the telegram had been delivered that day. On the 25th respondent wired appellant: "Please telegraph me collect your reply to my message which was sent to you on March 15th and which was delivered to you on March 23" to which appellant replied: "Continue visit as in the past. It is infrequent when inconvenience to me interferes with your visits."

An undated note was written by appellant to respondent reading as follows: "Dear Tom, I am planning to take Tommy to see Boulder Dam during the Easter holidays. I hope that will be all right with you. Tommy is leaning over my shoulder making suggestions. If this hot weather continues we will not go. Sincerely, Christine." By telegram dated April 18 [year?] respondent replied: "I consent that you take Tommy for a week's trip to Boulder Dam at this time with the understanding that you thereby consent to my taking him on a trip out of California at a later date. Please confirm by telegram collect" to which appellant replied by telegram dated April 18, 1949 "You have my permission to take Tommy on a trip out of the state provided Miss Cornwall does not accompany you."

On July 22 [year?] respondent wired appellant: "I am coming for Tommy on Sunday July 24 to take him on his annual thirty day vacation. Expect to arrive about noon. Please confirm by telegram collect." By a wire dated July 22, 1949 appellant replied "I cannot let you have Tommy until case is settled."

On July 26 [year?] respondent wired appellant: "Plan to visit with Tommy this week end. Expect to arrive July 29th or 30th," to which appellant replied by wire on July 28, 1949: "Tommy and I will be out of town this week end." On July 29 respondent wired appellant "Very sorry Tommy will be away from Santa Barbara this week end and thus prevent my visit with him as I had planned Stop Therefore I plan to visit with him in Santa Barbara next week end. Expect to arrive August fifth." A service message reported to respondent that his wire of the 29th was undelivered because addressee was out of the city for a week.

April 27, 1950 respondent wired appellant: "Plan to visit Tommy week end of May 5th. Expect to arrive afternoon May 5th" to which appellant replied on the 28th by letter "Tommy will not be available May 5th. You may visit with him on May 6th and 7th."

Other messages appear presently.

The 1948 Easter vacation incident:

The order of September 16, 1947 provided that "Defendant shall be permitted to have the said minor child with him in his own home at San Francisco * * * for the Easter vacation week in the year 1948 * * *."

On March 22, 1948 respondent wired appellant "As per our understanding four weeks ago I expect to arrive Wednesday March 24th to take Tommy for his Easter vacation" to which there was no response.

Accompanied by his sister and Mrs. Kirksey a family friend, respondent drove to Santa Barbara. The two ladies were to return to San Francisco by train on the "Daylight" and respondent drove them directly to the railroad depot at Santa Barbara. There he found appellant and Tommy, prepared to take the train to San Francisco. Respondent testified that appellant asked "What are you doing here?" and he replied "I came to get Tommy for the Easter vacation." Respondent had a copy of the court order in his pocket and when he produced it appellant turned the boy over to him and he drove back to San Francisco with Tommy while appellant went to San Francisco on the train. Respondent testified that he had had no prior advice of appellant's intentions.

Appellant's testimony respecting this episode was that she had not received the order and had wired her then attorney (not her present counsel) and had received no reply. She then determined to go to San Francisco to see Judge Meikle and was at the depot when she met respondent. She admitted that she had assumed respondent might be coming to Santa Barbara because "That was the date of * * * that vacation; that was at the beginning of it." Further:

"Q. You anticipated then, too, that the doctor was coming down to get the boy for the school vacation? A. I knew that was the day of the vacation and the beginning of the order, but I had not received the order * * *.

"Q. So knowing that the doctor was to have the boy you decided to come to San Francisco without telling anyone about it except the lawyers? A. The lawyers didn't even know I was coming. I was bringing up Tommy to Judge Meikle."

The 1949 Christmas episode:

The order of September 16, 1947, which provided that appellant should have the boy for Christmas of 1947 and 1948, and Easter of 1949, also provided that defendant should have him "in his own home at San Francisco * * * for the Christmas vacation period in the year 1949."

On December 8, 1949 respondent wired appellant: "I have planned to come for Tommy on December 16th to take him for his 1949 Christmas vacation. Expect to arrive Friday afternoon December 16th. Please telegraph collect that he will be ready." There was no reply.

On the day when this telegram was sent respondent served and filed a notice of motion which was set for hearing on December 13. The motion sought an order directing plaintiff to comply with the final decree and all modifications thereof, particularly the order of September 16, 1947. Respondent's affidavit in support of the motion alleged that plaintiff had "in defiance of said order of court made and entered on the

16th day of September, 1947, on many occasions not permitted defendant to visit with his said minor child at or near Santa Barbara, California, either on weekends or at any other reasonable time. Affiant is informed and believes that plaintiff, in defiance and disobedience of said order of court, will not permit defendant to have his said minor child with him for the Christmas vacation period this year as provided for in said order of court.

"Said Christmas vacation period in the year 1949 begins on the 16th day of December, 1949, and affiant prays that this Court issue its order directing the plaintiff above named to deliver up to affiant his said minor child at Santa Barbara, California, on the 16th day of December, 1949, so that affiant may have his said minor child with him for the Christmas vacation period this year, as provided for in said order of court."

A copy of the notice and of respondent's affidavit was served on appellant by mail and upon her attorneys personally. On December 13, 1949 the motion came before Judge Molkenbuhr, who found that there had been due service of the notice and affidavit. An order was then made reciting that no appearance had been made on behalf of the plaintiff and directing that "plaintiff * * * pursuant to the terms of the order made and filed herein on September 16, 1947, permit defendant * * * to have said minor child * * * with him for the vacation period in the year 1949;" and further "that the said vacation period is hereby fixed as commencing on December 16, 1949, and ending on January 1, 1950; and said plaintiff * * * is hereby ordered to deliver the said minor child of the parties to defendant on December 16, 1949 for the said vacation period."

With respect to respondent's wire to appellant dated December 8, the Western Union on December 16 wired respondent: "Santa Barbara advises Mrs. Cornwall out of city. Left Sunday. Return date unknown. They are unable to advise or confirm delivery."

Before school had closed appellant took Tommy to Pasadena and did not return to Santa Barbara until after the Rose Bowl game parade. On cross-examination appellant was asked "You knew under the existing court order that the doctor could have this lad for Christmas vacation in 1949, commencing the 16th of December 1949?" and answered "Yes. That's what we tried to have modified, and which precipitated all this action." Appellant testified further:

"Q. So, did you tell the doctor by phone, letter, or word of mouth, that you were going to take Tommy out of school prior to the vacation starting on December 16th? A. No, I didn't. * * *

"Q. Did that courtesy go to the extent of advising the doctor where the boy is when he is away from Santa Barbara, or whether he is sick? A. Well, in divorces you sacrifice something; that's all * * *.

"Q. Of course, the doctor didn't know where you were? A. Your detectives were looking for us, too.

"Q. Did anybody know where you were? A. No.

"Q. Your parents knew where you were? A. Yes."

Appellant testified that on her return to Santa Barbara her mother told her she had talked with respondent and had told him that appellant was not in Santa Barbara.

On January 25, 1950 an affidavit was filed by respondent referring to the order of September 16, 1947 and alleging several instances where he claimed appellant had defied and violated the court's orders. It alleged the matters just discussed; the telegram of December 8 reminding appellant of the court order dealing with the Christmas vacation; the motion and order of December 13; the mailing of the order to appellant; a telephone call by respondent to appellant's residence on December 16 and the answer therefrom that neither appellant nor Tommy was in Santa Barbara but that they had left during the early part of that week and that Tommy had been taken out of school before the vacation began; "that the plaintiff had not said where she was going with said minor child, or what her address would be" and that "Defendant has received no word or information from plaintiff since said telephone to her residence as to the whereabouts of said minor child or as to the reason for withdrawing him from school prior to the commencement of the vacation period or as to where the said minor child spent his Christmas vacation for 1949. Affiant alleges that plaintiff, with a determined intention of depriving the defendant of the pleasure of the company and association with his said minor child, and in disobedience and defiance of the orders of this court, deliberately took the said minor child, or hid the said minor child and herself, in a place or places unknown to this defendant."

The affidavit contained other allegations of claimed violations and concluded with the prayer "that this court make such appropriate order or orders as will compel the plaintiff to respect and to comply with the orders of the above entitled court concerning the defendant's right of visitation with and custody of his said minor child."

An order was issued by the Presiding Judge on January 25, 1950, requiring appellant to appear on February 9, 1950 and show cause why she should not be punished for contempt of court for failing to comply with the order of September 16, 1947 concerning the right of the defendant to have the boy during the Christmas vacation period of 1949. It was served by the Sheriff of Santa Barbara County on January 28.

Appellant did not appear at the time and place fixed nor was she represented by counsel. On February 16 a warrant of attachment was issued directing that she be brought before the court on February 21, and fixing bail. Plaintiff was arrested by the Sheriff of Santa Barbara County on February 20, and released on bail.

She was subsequently found guilty of contempt of court, and sentenced to 60 days in the County Jail with the sentence suspended.

The present proceedings followed.

The lengthy record contains testimony with respect to disputes as to other vacation trips, including one instance where the court permitted respondent to have the boy for an additional period during one summer vacation so as to make up for time the year previous when he could not get him. It contains, also, testimony which is in sharp conflict (a) as to what the parties are claimed to have said in the presence of the boy, in one instance—at the Santa Barbara depot—when respondent claims appellant called him a liar in the presence of the boy and of other persons; (b) as to the conduct and behavior of the boy—one group of witnesses testifying that it was excellent, or at least normal for a boy, the other that it showed a lack of training and discipline in manners and deportment, and (c) with respect to the boy's health, and the climate of Santa Barbara. We see no reason to narrate all this evidence since such conflicts were for the trial court to resolve.

Appellant states the question for decision as follows: "Did the trial Court abuse its discretion in taking custody of an eight-year old child away from its mother and awarding such custody to the father, in the face of uncontradicted evidence showing that the child was progressing, both physically and intellectually, in a perfectly proper home; and without either evidence or claim of evidence, that the mother was not a perfectly fit and responsible person?"

The question for decision as we see it is simply whether, in the light of all the evidence, both uncontradicted and contradicted, the court abused its discretion in making the order appealed from.

Appellant in her brief concedes "the familiar rule which holds that every intendment must be resolved in favor of the validity of the judgment under assault". Therein counsel also says: "In the resolution of problems of this kind, it is redundant to remark that 'each case must be decided upon its own particular facts'. Similarly, one who embarks upon an appeal of this kind faces the immediate proposition that the appellate court must sustain the court's ruling unless the record itself shows an abuse of discretion which is shocking to the reviewing court's conscience."

In Prouty v. Prouty, 16 Cal.2d 190, 191, 105 P.2d 295, 296, the court said: "It is the settled rule that, in determining who should have the custody of the minor children of the parties to divorce actions, a very broad discretion is vested in the trial courts. It is only when a clear case of abuse of said discretion is made out that this court will interfere with the determination of the trial court on appeal [citations]." It has been held that "a wider discretion is afforded the courts in dealing with matters pertaining to children than in many other cases". Taber v. Taber, 209 Cal. 755, 757, 290 P. 36, 37, quoting In re Johnson, 101 Cal.App. 110, 281 P. 435.

[1] The uncontroverted evidence, which we have summarized at some length, is unquestionably sufficient to sustain the order and to show that there was no abuse of discretion. With respect to the evidence which was controverted appellant in her brief recognizes "the rule which makes decisions upon conflicting issues of fact impregnable on appeal."

Moreover, as in other cases, it has been pointed out in cases of this kind that the trial judge "had the benefit of personally seeing and hearing all the parties to the controversy". Kelly v. Kelly, 75 Cal.App. 2d 408, 414, 171 P.2d 95, 98; see, also, Prouty v. Prouty, supra, 16 Cal.2d 190, 195, 105 P.2d 295.

Certain well settled rules control the trial court's determination of cases such as this.

"In awarding the custody the court is to be guided by the following considerations:

"(1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

"(2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father." Civ.Code § 138.

"Of course, the paramount interest of the court is the welfare of the child". Prouty v. Prouty, supra, 16 Cal.2d 190, 195, 105 P.2d 295, 298. "The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parties are not to be considered, except in so far as they affect the best interests of the child." Taber v. Taber, supra, 209 Cal. 755, 756–757, 290 P. 36, 37.

When the hearing was well along, and while a psychiatrist called by respondent was under examination, the judge said: "There is a lot of bickering back and forth between these people and the child is aware of that. Let's not argue that fact. We know that." Addressing the same witness he added: "Q. If I interpret your testimony here today, Doctor, it is in so far as these court hearings are concerned and the child being aware of the goings on and the disputes over his custody, what should be done, how much time he should spend with the mother and father, and the situation there, that you feel by reason of him knowing that alone it is a very unsatisfactory situation so far as he is concerned, and is damaging his mental health, is that right? A. Definitely. * * * It is impossible to keep a child in ignorance of anything of this sort."

The record shows that the boy was not only fully aware of the repeated and continuing disputes between his parents but was disturbed by them. The practical question before the trial court was whether there was a better probability that these disputes and difficulties would be minimized, and their recurrence reduced, by continuing the physical custody with the mother, or changing it to the father. That was the court's paramount consideration and in deciding that question the court had to weigh and compare the conduct of both the parties over a six year period.

Moreover it is to be presumed that in deciding the question as he did the trial judge gave weight to the respondent's definite commitment to place Tommy in a boarding school. At the close of respondent's case in chief the following assurance was given:

"Q. Doctor, you are asking for the entire custody of Tommy now, with the privilege of this mother, of course, to see him at all reasonable times, as indicated by the Court. What is your intention, should such an order be made by the Court, what is your intention to do with the boy in reference to his schooling? A. Well, my plan is to put him in a boy's boarding school that might be chosen by the Court, and to see that he has all the advantages of a growing and developing child, with proper training and discipline.

"Q. Some place in the Bay area? A. Yes—or whatever the Court might choose."

This was followed up toward the close of the hearing when respondent's counsel asked: "Doctor, have you inquired into the availability of a private school in this part of the state that would be suitable for Tommy's attendance and care?" and respondent answered "Yes". The Court then remarked: "As I recall it the doctor's proposition was were he to be given the custody, or a change made in the custody, the boy would be placed in some private school in this part of the country which would be approved by the Court."

The trial judge undoubtedly had that in mind when he decided the case.

Appellant contends that the court abused its discretion "because there is no actual conformity between the pleadings in the case and the proof adduced." Under this head counsel points to respondent's affidavit in support of the motion, and argues that "the *affidavit* of the moving party substitutes for the function of a *complaint* in the ordinary civil action." No authority is cited in support of this claim.

The notice stated that the motion would be "based on this notice of motion and upon the affidavit of said defendant, a copy of which is served and filed herewith, and upon all of the papers, pleadings, records and files herein, *and upon oral and documentary evidence to be adduced at the hearing of this motion.*" (Emphasis added.)

[2] The hearing consumed seven afternoon court sessions and, as appellant says, all the earlier proceedings were incorporated into the record. No ruling on the admission or rejection of evidence is now urged as error. The 331 page transcript contains comparatively few objections. *No objection was made that the inquiry was getting out of bounds or going beyond the issues tendered by the moving papers.* It is evident that both sides treated the hearing as taking in and embracing the whole field of controversy. There is no merit in this point.

The point is also made that "No 'change of conditions' was shown within the intendments of applicable California cases."

[3, 4] In the first place the so-called "change of conditions rule" is not at all "iron-clad". Foster v. Foster, 8 Cal.2d 719, 728, 68 P.2d 719; Kelly v. Kelly, 75 Cal. App.2d 408, 415, 171 P.2d 95. Secondly, change of conditions is an elastic phrase which cannot be said to be limited to such matters, for example, as the living conditions, household surroundings, family relations, schooling, or the recreation of a child. Thirdly, if the child's welfare is paramount then the change of conditions rule must be only subsidiary to the main consideration.

[5] Appellant's last point is that the court erred in failing to make written findings of fact and conclusions of law as requested. It is settled that in cases such as this, findings are not required. Crater v. Crater, 135 Cal. 633, 635, 67 P. 1049; Simmons v. Simmons, 22 Cal.App. 448, 456, 134 P. 791; Gavel v. Gavel, 123 Cal.App. 589, 591, 11 P.2d 654; Booth v. Booth, 69 Cal.App.2d 496, 499, 159 P.2d 93; Smith v. Smith, 85 Cal.App.2d 428, 433, 193 P.2d 56.

With respect to the custody cases cited by both sides, it is sufficient to say again that the circumstances of every custody case differ; only rarely is a parallel set of facts to be found. We have summarized earlier, in considerable detail, the salient facts and incidents which, in our opinion, are clearly sufficient to sustain the order. Nothing will be gained by a discussion of authorities dealing with altogether different factual situations.

The order is affirmed.

NOURSE, P. J., concurs.

108 Cal.App.2d 135

BERNSTINE et al. v. JONES et al.

Civ. 14901.

District Court of Appeal, First District,
Division 2, California.
Dec. 11, 1951.

Action by Albert Bernstine and another against Amos Jones and another for breach of contract to sell realty. The Superior Court, Alameda County, Thomas J. Ledwich, J., rendered judgment in favor of named defendant on original contract and against named defendant and in favor of plaintiffs on subsequent agreement to divide the loss by payment of one-half of the amount paid by plaintiffs to a third person as down payment and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that written contract to sell realty to which owner was not a party was not enforceable against owner under statute of frauds in absence of written authorization to third person, who executed contract as vendor, to act as owner's agent.

Judgment affirmed.

1. Principal and Agent ⟹123(7)
Vendor and Purchaser ⟹44

In action for breach of contract to sell realty, evidence sustained finding that defendant owner had not entered into a contract to sell the realty to plaintiffs and did not authorize codefendant who executed contract as vendor to act as owner's agent.

2. Frauds, Statute of ⟹116(5)

Written contract to sell realty to which owner was not a party was not enforcible against owner under statute of frauds in absence of written authorization to third person, who executed contract as vendor, to act as owner's agent.

3. Principal and Agent ⟹25(1)

Written contract to sell realty to which owner was not a party was not enforcible against owner on ground of estoppel on theory that owner had led purchasers to believe that third person who executed contract as vendor was owner's agent, in absence of any benefit to owner.

◆

John C. Henderson, Oakland, for appellants.

Amos Jones, in pro. per.

NOURSE, Presiding Justice.

Plaintiffs sued Amos Jones and James D. Miller for breach of contract to sell realty. Miller was not served and is not a party to the appeal. Judgment was given against Jones on a subsequent contract to pay $250 and in favor of Jones on the original contract. Plaintiffs appeal and the respondent has made no appearance. The appeal was submitted under Rule 17(b), Rules on Appeal.

Jones was the owner of certain real property which plaintiffs desired to purchase. Miller pretended to be the agent of Jones. The agency was not proved and it is undisputed that no written authority was given. Plaintiffs inspected the property in the presence of Jones and thereafter went to the office of Miller where the contract in suit was executed. Five hundred dollars was paid to Miller on that occasion which he appropriated to himself and absconded. Jones got nothing out of the abortive sale, but thereafter agreed with plaintiffs to split the loss by the payment of $250. It was on this contract that plaintiffs had judgment.

[1] The trial court found that defendant Jones never entered into a contract to sell the premises to plaintiffs and that he did not authorize Miller to do so on his behalf. There is no evidence to the contrary.

The contract upon which the action is based was executed by plaintiffs and James D. Miller "the seller." Defendant Jones was not named in the contract and there is no evidence of a valid authorization to Miller to act as his agent.

[2, 3] The appeal presents no legal problem. Plaintiffs sued on a written contract to sell realty to which defendant was not a party. There is no evidence of a written authorization to Miller which would take the case out of the statute of frauds. Plaintiffs argue estoppel on the theory that defendant Jones led them to believe that Miller was his agent. If this were true they should have taken their contract with Miller as agent for Jones rather than with Miller as owner and principal. But the lack of any benefit to Jones, which is an

essential element of estoppel, forecloses any recovery on that theory.

Judgment affirmed.

GOODELL, J., concurs.

108 Cal.App.2d 69

ZELKOWITZ v. TOBIN.

Civ. 18593.

District Court of Appeal, Second District,
Division 2, California.
Dec. 7, 1951.

Action by Jack Zelkowitz against Nathan R. Tobin to recover brokerage commissions on land allegedly sold by plaintiff. From a judgment of the Superior Court, Los Angeles County, Joseph W. Vickers, J., for the defendant plaintiff appealed. The District Court of Appeal, Moore, P. J., held that the contract entered into by the defendant with a prospect introduced to defendant by the plaintiff, to subdivide and construct homes on the lots for sale to the public was not a sale or exchange effected by the plaintiff which would entitle him to a commission.

Affirmed.

See also 97 Cal.App.2d 236, 217 P.2d 469.

1. Brokers 🔑57(1)

Where real estate broker, who had a listing to effect a sale or exchange of an owner's property, introduced a prospect to owner and prospect and owner entered into a contract for a joint adventure whereby they were to subdivide the property and construct homes on the lots for sale to the public and whereby owner was to receive $650 for each lot sold plus share of profits, no sale or exchange of the property was effected.

2. Brokers 🔑53, 54

Where real estate broker, who had listing to effect a sale or exchange of an owner's property, introduced a prospect, who was not financially able to purchase the property, to owner and owner and prospect entered into a contract to subdivide the property and build homes thereon for sale to public, broker did not produce a buyer ready, willing and able to buy, was not an efficient cause of the contract and was not entitled to commission.

3. Brokers 🔑84(1)

Where real estate broker, who had listing to effect a sale or exchange of an owner's property, introduced a prospect to owner and prospect and owner entered into a contract whereby they were to subdivide the property and construct homes on the lots for sale to the public and whereby owner was to receive $650 for each lot sold plus a share in the profits, even if a sale had been effected by broker, in absence of proof of value of prospect's promise or services, amount of sale, as basis for computation of broker's commission, could not be determined.

4. Brokers 🔑84(1)

Proof of price obtained from sale is indispensable to any recovery of commissions by broker who procures such sale.

5. Vendor and Purchaser 🔑70

"Price" is the consideration passing from buyer to seller in return for the latter's transfer of his interest in the thing sold. Civ.Code, § 1721.

See publication Words and Phrases, for other judicial constructions and definitions of "Price".

◆

Arthur V. Kaufman, Los Angeles, for appellant.

Warren & Lipson, Los Angeles, Louis Warren, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant, desirous of selling certain acreage, entered into a listing agreement with plaintiff, a real estate broker, on September 2, 1947, granting the latter 90 days within which to make a sale. It was provided that plaintiff should receive a commission of five per cent of the selling price "if a sale or exchange is effected by him" during the period of the agency. Upon receipt of the listing agreement, plaintiff commenced negotiations with one Dale E. Turner with a view of inducing him to purchase the Tobin acres and accompanied Turner to defendant Tobin's home. Several interviews occurred between Tobin and Turner in which plaintiff participated.

On November 18, 1947, defendant and Turner entered into an agreement for a joint adventure whereby they were to subdivide the Tobin property, construct homes on the various lots, sell the improved parcels to the public and, after sharing equally the expenses of subdivision, defendant was to receive $650 for each parcel thereafter sold plus one-half of any profits resulting from such sale. Their contract provided that any lots remaining unsold at the end of two years should be divided between Turner and defendant in proportion to their investment.

The decisive finding is that plaintiff was not the procuring cause of such transaction and that the agreement did not constitute a sale as contemplated by the listing agreement.

[1, 2] Contending that the evidence establishes without conflict that he had rendered the service required to entitle him to a commission, plaintiff appeals. Appellant cannot recover a commission by reason of the fact that he did not effect a sale or exchange of the Tobin acres. Neiswender v. Campbell, 119 Cal.App. 504, 507, 6 P.2d 584; see Lichtig & Rothwell, Inc., v. Holubar, 78 Cal.App. 511, 515, 248 P. 735; 10 West's Calif. Digest, Brokers ⚿53, p. 613 et seq. Moreover, his failure to prove that he was the efficient cause of the contract which respondent made with Turner forecloses his hope for recovery. Sessions v. Pacific Improvement Company, 57 Cal.App. 1, 15, 206 P. 653. He merely introduced respondent to Turner who testified that at the time he negotiated with respondent, he himself was not financially able to purchase the land and that he had discussed the matter at first with Tobin only with a view to interesting another in its purchase. The two subsequently executed the contract which involved respondent's sale of the acreage to others. Not having produced a purchaser ready, able and willing to buy respondent's property, appellant has not on that account earned a commission. McRae v. Ross, 170 Cal. 74, 78, 148 P. 215.

[3-5] Conceding arguendo, that the November agreement constituted a "sale or exchange" within the purview of the listing contract and that appellant was the procuring cause, he cannot recover by reason of the fact that it is impossible to determine from the evidence the amount of the "sale" which is essential to the computation of a commission. Proof of the price obtained from a sale is indispensable to any recovery by a broker. The "price" is the consideration passing from buyer to seller in return for the latter's transfer of his interest in the thing sold. Civil Code, sec. 1721. By the terms of the contract between Turner and Tobin the consideration for the latter's agreement to give Turner an interest in the land (assuming he did acquire some sort of interest) was Turner's promise to expend money and services in subdividing the land. Such promise to invest his time and money was the price to be paid by Turner. However, no proof of the value of such promise or of the services performed and moneys expended or to be expended was offered.

Appellant's argument that the sale price should be considered as $650 per lot, the sum to be paid respondent upon the sale of each parcel to a third party, calls for an inference not warranted by legalistic logic. That sum undoubtedly approximates the value of the property but it cannot be construed as the price paid by Turner for his indefinite and indeterminate interest.

From the evidence introduced, the court had no reasonable basis from which either it might calculate a commission or that by his service appellant earned one.

Judgment affirmed.

McCOMB, J., concurs.

108 Cal.App.2d 60

PEOPLE v. TIDWELL.

Cr. 2312.

District Court of Appeal, Third District, California.

Dec. 6, 1951.

Simpson L. Tidwell was convicted in the Superior Court, Stanislaus County, B. C. Hawkins, J., for rape, and he appealed. The District Court of Appeal, Adams, P. J., held that, where defendant made several admissions of guilt to charge of statutory rape of seventeen year old girl and expressed a desire to "get it over with," and committing magistrate and superior court judge advised defendant fully as to his rights to counsel and to an extension of time to secure counsel and told defendant that attorney would be appointed for him if he was unable to employ an attorney, and undue haste was not indicated by either the court or district attorney, and defendant was a 43 year old college graduate who was pastor of church and of more than average intelligence, denial of defendant's motions to change plea from guilty to not guilty and in arrest of judgment was not abuse of discretion.

Judgment affirmed.

1. Criminal Law ⚷1023(3, 8, 12)

Orders denying motions for change of plea, or denying motions for arrest of judgment, or to vacate a judgment of conviction, are not appealable.

2. Criminal Law ⚷274, 1149

A defendant desiring to change his plea must show good cause therefor, and the granting of such an application is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal except for an abuse of discretion.

3. Criminal Law ⚷274, 968(1)

Where defendant made several admissions of guilt to charge of statutory rape of seventeen year old girl and expressed a desire to "get it over with", and committing magistrate and superior court judge advised defendant fully as to his rights to counsel and to an extension of time to secure counsel and told defendant that attorney would be appointed for him if he was unable to employ an attorney, and undue haste was not indicated by either the court or district attorney, and defendant was a 43 year old college graduate who was pastor of church and of more than average intelligence, denial of defendant's motions to change plea from guilty to not guilty and in arrest of judgment was not abuse of discretion.

◆

Frank Damrell, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Wallace, Colthurst, Deputies, for respondent.

ADAMS, Presiding Justice.

Defendant, who at the time of his arrest was the pastor of a church in Long Beach, pleaded guilty to a charge of statutory rape of a seventeen-year-old girl, Patsy, who was, at the time of the commission of the offense, a member of the church of which defendant was then pastor in Turlock. The arrest was made on Friday evening, November 24, 1950, at which time defendant was taken to the Los Angeles jail where he was interviewed and then detained overnight. At that time he first denied the charge, but a few minutes later admitted that he had had sexual intercourse with Patsy on several occasions. The next morning he telephoned his wife at Long Beach, told her he was being taken to Modesto, that she was not to come up there, but should send him a toothbrush and $10. The next day he was taken to Modesto in an automobile by the Sheriff of Stanislaus County, accompanied by a Mr. Thompson who was an investigator for the district attorney's office. On the way north defendant discussed his case with Thompson, and requested the latter to get in touch with defendant's wife and tell her not to employ an attorney. At that time defendant asked Thompson what the probabilities were if he pleaded guilty, and was told that there was better than a fifty-fifty chance that he would go to San Quentin.

The following morning Thompson interviewed defendant again at which time the latter expressed the belief that he should get an attorney and was told that if he wanted one Thompson would call whomever he named. Defendant then said he wanted to pray, and, after being left alone, said he had "consulted with his God" and felt better. The following morning defendant stated that he wanted to plead guilty, to avoid embarrassment to the girl, and get it over with. On Monday afternoon defendant was taken to Ceres where, before a Justice of the Peace, the charge was read to him, he was advised that he was entitled to an attorney, an extension of time to get one if he desired, and process for witnesses. Defendant stated he desired to take the stand that day, and was admonished that any testimony he might give there would be held against him in case he was held over. Tidwell was then sworn and admitted having intercourse with the girl. He was bound over, after which he was returned to Modesto, and during the ride stated that he wanted Thompson to get in touch with his wife, tell her not to get an attorney because "I am guilty and I want to get it over with."

The following morning defendant was arraigned in the Superior Court at which time he was advised by the court that he was entitled to counsel, that if he had no means to employ one the court would grant further time, and would appoint an attorney to represent him. Defendant stated that he did not want a lawyer, and entered a plea of guilty. Probation was requested, and a report ordered. On January 15th the court convened to consider probation. Defendant then had counsel who made a motion to allow him to change his plea from guilty to not guilty. On January 23rd and 24th testimony was taken on appellant's motion to change plea, and on an additional motion in arrest of judgment. At the conclusion of the hearing both motions were denied, and, on January 25, 1951, the court denied probation, rendered judgment and sentenced defendant to imprisonment in the state prison for the term prescribed by law, said judgment being entered January 30, 1951.

This appeal was taken on January 25, 1951, from "the order denying defendant's motions to withdraw his plea of guilty and enter a plea of not guilty, and for arrest of judgment, and to set aside the judgment of conviction entered in said Superior Court January 25, 1951; and from the whole thereof."

[1] It is conceded by appellant in his brief that his motions to set aside his plea and for arrest of judgment were interposed before judgment, and that only after the denial of same was he sentenced. Orders denying motions for change of plea, or denying motions for arrest of judgment, or to vacate a judgment of conviction, are not appealable. See People v. Morgan, 9 Cal.App.2d 612, 617, 50 P.2d 1061; People v. Price, 51 Cal.App.2d 716, 718, 125 P.2d 529; People v. Dabner, 153 Cal. 398, 399, 95 P. 880; People v. Shaffer, 130 Cal.App. 749, 20 P.2d 345; People v. Ramey, 135 Cal.App. 573, 579, 27 P.2d 941; People v. Block, 134 Cal.App. 217, 218, 25 P.2d 242; People v. Vivian, 46 Cal.App.2d 163, 166, 115 P.2d 559; People v. Brown, 71 Cal.App.2d 669, 676, 163 P.2d 85; People v. Montgomery, 51 Cal.App.2d 444, 446, 125 P.2d 108. In his briefs appellant argues only that the court erred in denying his motions for change of plea and for arrest of judgment. And as for his asserted motion to "set aside the judgment of conviction entered in said Superior Court January 25, 1951, and from the whole thereof," the record contains no such motion.

It is doubtful from defendant's notice of appeal whether he has brought himself within the provisions of Penal Code section 1237 which prescribes the grounds of an appeal in a criminal case. But giving extreme latitude to the words in his notice of appeal, "and from the whole thereof," and assuming that appellant intended thereby to appeal from the final judgment of conviction, we have given consideration to his argument but find no ground for reversal.

[2] A defendant desiring to change his plea must show good cause therefor; and the granting of such an application is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal except for an abuse of

discretion. People v. Morgan, supra, 9 Cal. App.2d at page 615, 50 P.2d 1061; People v. Dabner, supra, 153 Cal. at page 403, 95 P. 880; People v. Price, supra, 51 Cal.App. 2d at page 718, 125 P.2d 529.

[3] No abuse of discretion is shown in this case. While appellant asserts that he was not accorded the benefit of counsel, but was prevailed upon by Mr. Thompson not to get counsel, and was taken advantage of by hurried proceedings, the record contains ample denials of any statements of Thompson which can be said to constitute inducements to defendant to plead guilty, or not to secure counsel. Both the committing magistrate and the judge of the Superior Court advised him fully as to his rights to counsel, to an extension of time to secure same, and he was advised that if he was unable to employ an attorney one would be appointed to represent him. And no undue haste is indicated by either the court or the district attorney. Defendant was arrested on a Friday evening, and it was not until the following Monday that he was brought into the Justice's Court, after he had, as he said, "consulted with his God," made several admissions of his guilt, and expressed a desire to "get it over with."

This defendant was by no means an ignorant defendant, but, on the contrary, was a pastor of a church and had been such for many years. He was 43 years old, and, according to the report of the Probation Officer, which report defendant's counsel introduced in evidence, he claimed to be a graduate of Hardin Simmons College and is a man of "undoubtedly above average intelligence"; and he admitted to such officer that his illicit relationship with the girl Patsy had continued over a period of years.

We are satisfied that the trial court did not abuse its discretion in denying defendant's motions. In re Jingles, 27 Cal.2d 496, 499, 165 P.2d 12; In re Tedford, 31 Cal.2d 693, 695, 192 P.2d 3; People v. Smink, 105 Cal.App. 784, 795, 288 P. 873; People v. Brahm, 98 Cal.App. 733, 735–736, 277 P. 896.

The appeals from the orders denying the motions made by appellant are dismissed as non-appealable, and the judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

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108 Cal.App.2d 48

ODDEN v. COUNTY FORESTERS, FIREWARDENS AND COUNTY FIRE PROTECTION DISTRICT FIREMEN'S RETIREMENT BOARD OF LOS ANGELES COUNTY et al.

Civ. 18731.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1951.

Rehearing Denied Dec. 26, 1951.

Hearing Denied Jan. 31, 1952.

Mandamus proceeding by Hjalmer Odden against County Foresters, Firewardens and County Fire Protection District Firemen's Retirement Board of Los Angeles County, California, and others, to compel the payment of a retirement allowance. The Superior Court of Los Angeles County, Frank G. Swain, J., rendered judgment directing payment of retirement allowance, and the defendants appealed. The District Court of Appeal, McComb, J., held that there was substantial evidence to sustain the board's finding that former county fireman's heart trouble did not result from his employment.

Judgment reversed with directions.

1. Mandamus 🔑172

On application for writ of mandate to review order of local quasi judicial body, trial court does not have right to judge intrinsic value of evidence nor to weigh it, and power of court is confined to determining whether there was substantial evidence before board to support its findings.

2. Mandamus 🔑168(4)

In mandamus proceeding by former county fireman to compel county fire protection district firemen's retirement board to pay retirement allowance, board's finding that fireman's heart trouble did not result from his employment was supported by substantial evidence and was binding on the superior court.

3. Evidence ⚿89

In the rebuttal of a presumption, it is not necessary to produce preponderant evidence to overcome it, and the presumption is overcome if sufficient evidence is introduced to balance the presumption.

4. Mandamus ⚿168(4)

In mandamus proceeding by former county fireman to compel county fire protection district firemen's retirement board to pay retirement allowance, substantial evidence introduced before board that fireman had been discharged for repeated drunkenness and that doctors had examined fireman was sufficient to overcome statutory presumption that fireman's disability was service connected. Government Code, § 32353.

◆

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellants.

Charles A. Son and John W. Hill, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of the trial court directing appellant, the County Foresters, Firewardens, and County Fire Protection District Firemen's Retirement Board, hereinafter referred to as the board, to pay a retirement allowance to petitioner, a former county fireman, the board appeals.

Facts: Petitioner, a member of a county fire service retirement system, alleged that he was incapacitated by "service connected disability" for the performance of his duty as a county fireman as a result of heart trouble occurring in and arising out of the course of his employment. The claim that petitioner's heart trouble resulted from his employment was denied by the board. Thereafter petitioner sought a writ of mandate from the superior court directing the board to pay him a retirement allowance.

[1, 2] *Questions:* First: *Was there substantial evidence to sustain the board's finding that petitioner's heart trouble did not result from his employment?*

Yes. On an application for a writ of mandate to review an order of a local quasi judicial body such as the board in the present case the trial court does not have a right to judge of the intrinsic value of evidence nor to weigh it. The power of the court is confined to determining whether there was substantial evidence before the board to support its findings. (Nishkian v. City of Long Beach, 103 Cal.App.2d 749, 751, 230 P.2d 156; Cantrell v. Board of Supervisors, 87 Cal.App.2d 471, 475, 197 P.2d 218.)

In the present case three doctors stated that petitioner's heart trouble was not service connected. It is true that two of them had previously expressed the opinion that defendant's heart trouble was service connected but upon its being brought to their attention that petitioner had been suspended because of intoxication they withdrew their opinion that petitioner's heart condition arose from the performance of his duties and expressed the view that it did not arise therefrom.

The most that can be said for such testimony is that it raised a conflict in the evidence whose determination was for the trier of fact, which, being supported by the evidence, was binding upon the superior court.

[3, 4] Second: *Was there substantial evidence to overcome the presumption of section 32353 of the Government Code, "If a member who has served 15 years or more develops heart trouble, it shall be presumed, in the absence of evidence to the contrary, in any proceeding under this chapter by the board and by the court, that such heart trouble is an injury or disease occurring in and arising out of his employment?"*

Yes. In the rebuttal of a presumption it is not necessary to produce preponderant evidence to overcome it. A presumption is overcome if sufficient evidence is introduced to balance the presumption. (Anderson v. Southern Pac. Co., 129 Cal.App. 206, 213, 18 P.2d 703; Estate of Eakle, 33 Cal.App.2d 379, 387, 91 P.2d 954.)

In the instant case there was substantial evidence introduced before the board that petitioner had been discharged for repeated drunkenness, and that the doctors had examined petitioner. This evidence was sufficient to overcome the presumption of the above mentioned Code section that petitioner's disability was service connected.

The judgment is reversed with directions to the trial court to enter a judgment denying petitioner's application for a writ of mandate.

MOORE, P. J., concurs.

RODABAUGH et al. v. TEKUS et al.

Civ. 4401*

District Court of Appeal, Fourth District, California.

Dec. 6, 1951.

Hearing Granted Jan. 31, 1952.

Action by Dessie S. Rodabaugh, and others, against Paul Tekus, and others, for wrongful death of Andrew C. Rodabaugh in an automobile collision at an intersection. The Superior Court, Orange County, Raymond Thompson, J., rendered a judgment in defendants' favor notwithstanding a verdict for the plaintiffs, and plaintiffs appealed from the order granting the motion and from the judgment. The District Court of Appeal, Mussell, J., held that questions under the last clear chance doctrine and of proximate cause were for the jury.

Judgment reversed, and cause remanded with instructions.

1. Negligence 🔑83.4

Doctrine of last clear chance applies if plaintiff by his own negligence got himself into position of danger, if it was then physically impossible for him through exercise of ordinary care to escape or he was totally unaware of impending danger, if defendant had actual knowledge of perilous situation, and it appeared or would have appeared in exercise of ordinary care that plaintiff was unaware or unable to escape to ordinary care, and if defendant after actual knowledge had clear opportunity to avoid accidents and could have done so and did not, and by negligent conduct proximately caused accident.

2. Appeal and Error 🔑934(1), 1014

On appeal from judgment for defendants notwithstanding verdict, court would analyze proof to determine whether it contained evidence of sufficient substantiality to support verdict for plaintiffs resolving all conflicts in evidence in favor of plaintiffs and giving them benefit of every fact pertinent to issues involved which could reasonably be deduced from the evidence.

3. Trial 🔑159

Court's power to direct verdict is same as power to grant nonsuit.

4. Trial 🔑165, 178

Nonsuit or verdict may be granted only when, disregarding conflicting evidence and giving to plaintiffs' evidence all value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff if it were given.

5. Automobiles 🔑245(61)

In action for wrongful death of motorist in collision at intersection, whether defendant's conduct proximately caused accident was a question for the jury.

6. Trial 🔑309

Knowledge of jury gained during view of scene of accident was independent evidence to be taken into consideration in determining issues.

7. Automobiles 🔑244(59)

In action for wrongful death of motorist in collision at intersection wherein principal question was whether last clear chance doctrine was applicable and defendant contended that it was inapplicable where emergency arises suddenly and defendant has only a second or two within which to act, evidence supported verdict for plaintiff.

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* Subsequent opinion 246 P.2d 663.

◆

Elmer R. Guy, Fullerton, Hirson & Horn, Los Angeles, Theodore A. Horn, Los Angeles, of counsel, for appellants.

Robert A. Cushman, Los Angeles, for respondent Paul Tekus.

MUSSELL, Justice.

Plaintiffs, the widow and adult sons of Andrew C. Rodabaugh, deceased, brought this action for damages for his wrongful death occurring in an automobile collision. After the denial of defendant's motion for a directed verdict, a jury returned a verdict in favor of plaintiffs for the sum of $2,500. Defendant then moved for a judgment in his favor notwithstanding the verdict. This motion was granted and plaintiffs appeal from the order granting the motion and from the judgment thereupon entered. The principal question involved is whether the last clear chance doctrine is applicable to the instant case.

The accident happened about 7:20 A.M. on August 24, 1948, in Orange county in the intersection of Bolsa Street, an east and west state highway, and Golden West Avenue, a county road running north and south. Both roadways are approximately 20 feet wide and are paved. The view of the intersection is unobstructed from all sides and at the time of the accident, visibility was about 500 feet. Bolsa Street is a through highway and at the north and south approaches to it from Golden West Avenue are regulation stop signs. The word "stop" and a white stop line are painted on the pavement of Golden West Avenue a few feet south of Bolsa Street. There is a wavering white line crossing and recrossing the white center line of Golden West Avenue for approximately 300 feet south of the intersection. Decedent was driving north on Golden West Avenue in a Buick sedan at 35 to 40 miles per hour and when defendant first observed him, he was approximately 500 feet south of the intersection. Decedent failed to observe the stop signs and continued north at the same rate of speed until the accident occurred. Defendant Tekus was traveling west on Bolsa Street in a Nash automobile at a speed of approximately 40 miles per hour and when he was approximately 500 feet east of the intersection, first observed the decedent traveling north and about 500 feet south of Bolsa Street. Defendant continued to watch the decedent's car and "kept his eye on it all the time." When he saw that decedent's car did not slow down, defendant started to put his brakes on at a point approximately 75 to 100 feet from the intersection. He testified that he put them on gently at first, thinking that the decedent would probably stop "but he didn't stop so I slammed them on;" that "about 75 feet was when I started to apply them a little more strongly and the last about 35 feet, that is where the skid marks show where I applied the brakes hard." He further testified that when he started to put on the brakes, he could have stopped his car in approximately 60 feet; that as decedent approached, he appeared to be looking straight ahead and did not slacken his speed at any time before the impact occurred. Defendant did not turn to the right or left before the impact and his car struck the Buick on its right side at the rear door and wheel. The collision occurred in the northeast quadrant of the intersection and when the vehicles came to rest, the Buick was in a ditch near the northwest corner of the intersection, approximately 90 feet from the point of impact. The Nash was approximately 25 feet west of this point, facing east. Decedent was found dead in the ditch near his automobile.

An automobile mechanic riding with the defendant testified that when he first saw the decedent's car it was about 150 feet south of the intersection and the defendant's car was about 200 feet east of it; that decedent's car was traveling at about 30 miles per hour; that he did not notice any change of speed in it before the impact; and that he did not know whether defendant applied his brakes before the accident.

[1] As noted, the controversy herein is as to the applicability of the last clear chance doctrine. The necessary elements

of this doctrine are correctly stated in the following instruction, Root v. Pacific Greyhound Lines, 84 Cal.App.2d 135, 137, 190 P.2d 48, 50:

" 'The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:

" 'First: That plaintiff, by his own negligence, got himself into a position of danger.

" 'Second: That thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position.

" 'Third: That the defendant had actual knowledge of plaintiff's perilous situation.

" 'Fourth: That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that plaintiff either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.

" 'Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.

" 'Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

" 'If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff.' "

In the instant case the jury was instructed as to the elements of the doctrine substantially in the above quoted language. After the case was submitted to the jury, it returned into court and this instruction was again read at the request of the foreman.

[2, 3] It is the contention of the defendant that there is no evidence to establish the existence of elements five and six in the above quoted instruction and hence, that the doctrine of the last clear chance is inapplicable. This contention must be considered in the light of the rules governing an appellate court in reviewing the correctness of an order directing judgment notwithstanding a jury verdict. We must analyze the proof to determine whether it contains evidence of sufficient substantiality to support the verdict for plaintiffs, resolving all conflicts in the evidence in favor of plaintiffs and give them the benefit of every fact pertinent to the issues involved which can reasonably be deduced from the evidence. Champion v. Bennetts, 37 Cal.2d 815, 236 P.2d 155; Shannon v. Thomas, 57 Cal.App. 2d 187, 192–193, 134 P.2d 522. As was said in Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579, 580: " 'It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted "only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence,* the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." (Citing cases.) Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228, 263 P. 799.' "

[4–6] Whether defendant had a clear opportunity to avoid the accident after he had actual knowledge of the perilous situation of the decedent, whether he could have avoided the accident by exercising ordinary care and whether defendant's conduct proximately caused the accident were questions of fact for the jury. Under the evidence, the jury was entitled to draw the inference that the decedent was totally unaware of his position of impending danger; that he failed to see the stop sign and defendant's approaching car; that the defendant acquired knowledge of the perilous position of the decedent when he, the defendant, was 75 to 100 feet from the intersection and that by the exercise of ordinary care, he could then have avoided the accident by slowing down, stopping his car or turning to the left. Moreover, after hearing the testimony, the jury viewed the scene of the accident and the knowledge so gained was independent evidence to be taken into consideration in determining the issues in the case. MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 466, 271 P. 509; People v. Oliver, 86 Cal.App.2d 885, 887, 195 P.2d 926. The question of whether defendant's negligence was the proximate cause of the accident was for the jury. Mosley v. Arden Farms Co., 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; Wright v. Sniffin, 80 Cal.App.2d 358, 362, 363, 181 P.2d 675.

Defendant contends that the doctrine of last clear chance is inapplicable where the emergency arises suddenly and the defendant has only a second or two within which to act. In Bragg v. Smith, 87 Cal.App.2d 11, at page 15, 195 P.2d 546, at page 548, this court, in considering the application of the doctrine of last clear chance in a collision of trucks where the time element was involved, said: "The defendant actually discovered the situation and realized the danger while it was still possible to avoid the collision by the use of ordinary care on his part. The opportunity was clearly open to him to avoid the accident by turning either to his right or to his left. While it may be true that he had to act quickly, it is not unusual for a motorist to be confronted with such a necessity and it cannot be said, as a matter of law, that a distance of approximately 100 feet was not sufficient to enable him to have a clear chance to slightly alter the course of his vehicle. Common experience is to the contrary, and the evidence here is sufficient to support the court's finding that a last clear chance to avoid the accident existed after the defendant actually knew that the plaintiff was in a position of danger from which he would be unable to escape by any action which he could then take. Cady v. Sanford, 57 Cal. App. 218, 207 P. 45."

[7] We conclude that there was substantial evidence to support the findings of the jury and that the trial court erred in rendering a judgment notwithstanding the verdict. The judgment is reversed and the cause is remanded to the trial court with instructions to enter judgment in conformity with the verdict of the jury.

BARNARD, P. J., and GRIFFIN, J., concur.

107 Cal.App.2d 710

K. & M., Inc. et al. v. LE CUYER et al.

Civ. 17974.

District Court of Appeal, Second District,
Division 3, California.
Nov. 29, 1951.

K. & M. Inc., a corporation, brought action to recover installments due under contract for sale of cocktail room and restaurant, against George LeCuyer, and others. The defendants filed cross-complaint against plaintiff and Paul E. Tapley for rescission of the contract on ground of fraud. The Superior Court of Los Angeles County, Walter R. Evans, Judge assigned, rendered judgment in favor of plaintiff, and defendants appealed. The District Court of Appeal, Bartlett, J. pro tem., held that where buyers of cocktail room and restaurant knew that lease of cocktail room and restaurant provided for execution of chattel mortgage on fixtures and equipment as security for lease, and contract of sale provided for assignment of lease and fixtures and equipment to buyers free of encumbrances and liens upon payment of balance of purchase price, buyers tendering such payment could not demand transfer of fixtures and equipment free of chattel mortgage.

Judgment affirmed.

Prior opinion, 233 P.2d 569.

1. Appeal and Error 🔑931(1), 989, 996

In reviewing findings, it is duty of District Court of Appeal to accept as true all the evidence which would support the findings, excluding all evidence in conflict therewith, and take every inference from the evidence which is favorable to plaintiff.

2. Chattel Mortgages 🔑150(1)

Where owner of cocktail room and restaurant executed and recorded chattel mortgage on furniture, fixtures and equipment as security for rentals, buyers of the business had constructive knowledge of terms of mortgage. Civ.Code, §§ 1213, 1215, 2963.

3. Sales 🔑38(1)

Where owner of cocktail room and restaurant, under lease, withdrew $2500 deposited as security for payment of rentals of $36,000 plus percentage of gross sales, and executed and recorded in its place a chattel mortgage on furniture, fixtures and equipment, and terms of security deposit were stated in lease and mortgage, buyers of business could not rescind sale contract for alleged misrepresentation that the business was hypothecated for performance of lease in sum of $2,500. Civ.Code, §§ 1213, 1215, 2963.

4. Sales 🔑137

Where buyers of cocktail room and restaurant knew that lease of cocktail room and restaurant provided for execution of chattel mortgage on fixtures and equipment as security for lease, and contract of sale provided for assignment of lease and fixtures and equipment to buyers free of encumbrances and liens upon payment of balance of purchase price, buyers tendering such payment could not demand transfer of fixtures and equipment free of the chattel mortgage. Civ.Code, § 1493.

5. Landlord and Tenant 🔑80½

An assignee of lease is presumed to take leasehold estate in the condition which characterized it at the time of the assignment.

6. Contracts 🔑279(2)

Tender of balance due under a contract must be made in good faith and in such manner as to most likely, under the circumstances, benefit the creditor, and must be free from any condition which creditor is not bound to perform. Civ. Code, § 1493.

7. Appeal and Error 🔑1033(7)

Appellants could not complain of failure to make a finding which would necessarily have been adverse to them.

8. Appeal and Error 🔑1071(6)

In cross-action to rescind a contract for sale of business for fraud, failure of trial court to find on allegations that representations allegedly fraudulently made were untrue and amount of damages suffered thereby was not prejudicial error where court found that the representations were not made.

9. Trial 🔑404(1)

Findings of a court are to receive such construction as will uphold rather than defeat its judgment thereon, and are to be read and considered together and liberally construed in support of the judgment.

10. Evidence 🔑471(29)

In action to recover installments due on contract for sale of business, wherein cross-action for rescission was filed, question to agent of seller's lessor as to whether chattel mortgage executed by seller as security for rentals could be released by depositing $2,500 with lessor, was properly excluded as calling for a conclusion.

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Charles A. Thomasset and Lee D. Mathews, Los Angeles, for appellants.

Arthur V. Kaufman and George Appell, Los Angeles, for respondents.

BARTLETT, Justice pro tem.

Plaintiff alleged in its complaint filed March 14, 1949, that on or about May 24, 1948, the parties entered into a written agreement whereby plaintiff sold defendants a cocktail room and restaurant for $19,000, $9,750 of which was paid in an escrow between the parties and the balance was to be paid by defendants in installments of $700 per month, commencing August 1, 1948. Plaintiff further alleged that defendants had failed and refused to pay the installments due January 1, February 1 and March 1, 1949, and prayed judgment for the sum of $2,100.

Defendants denied all of the allegations of the complaint, except an allegation contained therein, that defendants had paid plaintiff the sum of $9,750, plus installments of $700 per month up to and including December of 1948. As an affirmative defense defendants, after setting forth their conception of the legal effect of the contract of sale, alleged that they tendered plaintiff, on March 10, 1949, the entire balance remaining due under the contract upon certain conditions set forth therein. They further alleged that plaintiff made no objection to the tender and refused to transfer to them those things to which they deemed themselves entitled. As a second affirmative defense defendants, after incorporating as a part thereof the allegations as to the tender set forth in their first affirmative defense, alleged that on March 19, 1949, they had rescinded the contract and offered to return to plaintiff everything of value received by them on condition that plaintiff likewise return to them everything of value received by it. Defendants also filed a cross-complaint for a rescission and a supplemental answer. The cross-complaint in substance alleged that at and prior to the execution of the contract, plaintiff represented that the restaurant and cocktail business was hypothecated for the faithful performance of the lease covering the premises in the sum of $2,500 and that upon receipt of payment in full plaintiff would transfer concurrently with said payment, all property, free and clear of encumbrances and liens; that defendants believed and relied upon said representations; that said representations were false in that said restaurant and cocktail business was hypothecated to secure the lease which provided for rentals in the total sum of $36,000 plus a percentage of the gross sales; that payment in full had been tendered by defendants to plaintiff on March 10, 1949, upon condition that plaintiff perform its part of the agreement, but that plaintiff had failed so to do; that had defendants known of the falsity of the representations they would not have executed the agreement nor paid the sum of $13,250 above mentioned; that upon discovery of the fraud, defendants had rescinded; and that by reason of the premises, defendants had been damaged in the sum of $10,000 and prayed for the return of its payment and for the said damages.

The supplemental answer set forth, in substance, that on September 30, 1949, defendants tendered to plaintiff the full amount due under the agreement upon condition that plaintiff perform its obligations thereunder and that plaintiff failed and refused so to do.

The court found that the allegations of the complaint were true and that the allegations of fraud contained in the cross-complaint were untrue and rendered judgment in favor of the plaintiff and against the defendants for the sum of $2,100.

Defendants contend that the judgment should be reversed for the reasons "that the judgment is not supported by the evidence and is contrary thereto," that certain specific findings made in regard to the allegations of the cross-complaint are not supported by the evidence, that the court failed to find on certain affirmative allegations of the answer and the cross-complaint and that the court erred in sustaining objections made by plaintiff to certain questions asked by defendants.

[1] Defendants nowhere contend that the findings did not support the judgment and we take it, therefore, it is their contention that the evidence was insufficient to justify the findings as a whole. In reviewing findings it is our duty to accept as true all the evidence which would support the findings, excluding all evidence in conflict therewith, and take every inference from the evidence which is favorable to the plaintiff. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. With those principles in mind, we will briefly summarize the evidence which was before the court. Prior to the dealings with defendants, the plaintiff had entered into a lease with Louise I. Roessler for the premises in question for a period of five years com-

mencing on the 16th day of October, 1947, and ending on the 15th day of October, 1952. Paragraph 3 of this lease provided, in part as follows: "Lessee covenants and agrees to pay to Lessor as and for rent for said premises during the full term of this Lease, and in addition to all other payments and considerations herein provided for, each and all of the following respective sums of money at the time hereinafter specified:

"(a) A minimum rental of the sum of $36,000.00 payable as follows:

"$600.00 upon the making and execution of this agreement, receipt whereof is hereby acknowledged; and a like sum of $600.-00 on the 16th day of each and every month thereafter until the full sum of $36,000.00 shall be paid.

"(b) In addition to the foregoing payments of minimum monthly rental, Lessee shall pay to Lessor as rent the following additional sums:

"Of any all gross sales of and income from, the business of Lessee in the demised premises, such sums as 7% (seven percent) of such gross sales and income exceeds in any month the sum of $600.00."

Another paragraph of the lease which is of importance in the case was paragraph 15 reading as follows: "Lessee has delivered to Lessor, as security for the faithful performance of Lessee hereunder, the sum of $2,500.00, receipt whereof is hereby acknowledged. It is agreed that at any time during the life of this Lease, said deposit of $2,500.00 may be withdrawn by Lessee upon substitution therefor, as such security, a good and sufficient chattel mortgage of the furniture, furnishings, fixtures and equipment, of the reasonable value of $5,000.00, contained within the demised premises."

Under the terms of this paragraph of the lease the plaintiff, after depositing the sum of $2,500 in cash, withdrew this sum and executed the chattel mortgage referred to therein. This fact was disclosed to the defendants. The chattel mortgage was recorded in the Office of the County Recorder of Los Angeles County on December 16, 1947.

The contract between the parties in this case was dated May 24, 1948. It provided that for the consideration therein stated plaintiff would assign the lease to which we have just referred to defendants and would also transfer to them the liquor license on the premises, the stock in trade, goodwill and fixtures "free of all encumbrances and liens of every kind and description except those mentioned herein." By the terms of the agreement Paul E. Tapley was chosen by the parties to act as an escrow agent.

The evidence showed that the defendants were in default in the installments which, under the terms of the contract of sale, were due January 1, February 1, and March 1 of 1949. It further showed that at the time of the meeting in the office of the escrow agent of the parties, the lease between plaintiff and the owner of the premises was examined by the defendants and clause 15 thereof containing the provisions regarding a chattel mortgage on the fixtures to secure rents was discussed and acquiesced in by defendants. The evidence further shows that defendants accepted the benefits of the contract, entered into possession of the premises on June 12, 1948, operated a cocktail room and restaurant on the premises for months thereafter and never raised any question regarding the chattel mortgage until after they were in default in their payments due to plaintiff.

[2, 3] Defendants strenuously contend that the court's finding that there was no fraud or deception on the part of the plaintiff is not supported by the evidence. We have heretofore set forth the allegations of the cross-complaint regarding fraud. The defendants admit that it was disclosed to them that the plaintiff had withdrawn the sum of $2,500 mentioned in paragraph 15 of the lease and had executed the chattel mortgage provided for in that paragraph. There is much discussion in the brief regarding the question as to whether or not the chattel mortgage could be released by returning the $2,500 to the lessor but that is all beside the point as that matter is all governed by the terms of the written contracts, the lease and the chattel mortgage, and the conclusions of either the plaintiff

or the defendants and their lawyer who represented them in this proceeding, regarding that matter are immaterial. They had knowledge that the $2,500 referred to in paragraph 15 of the lease had been withdrawn, that the chattel mortgage provided for therein had been executed and, as it had been recorded, they had constructive notice of its terms. Civ.Code, secs. 2963, 1213, 1215. This documentary evidence negatives any idea that there could have been any fraud on the part of plaintiffs as these documents disclosed all of the matters as to which it is alleged representations were made. As the attempted rescission was on the ground of fraud and there was no fraud, defendants were in no position to rescind. There can be no question as to the correctness of the court's findings as to the amount unpaid on the contract or as to the other findings of fact made by the court.

[4–7] Defendants urge also that the court erred in failing to find on certain issues raised by the special answers and the cross-complaint. The first of these to which they refer is the allegation of tender which is set forth in their special defense. These tenders, as shown by the testimony, the tender made in court, and by defendants' briefs, were made upon the theory that inasmuch as the contract of sale provided among other things that the license, goodwill and fixtures were to be assigned to defendants free of all encumbrances and liens except those mentioned in the contract, that therefore upon defendants' tendering the balance of the purchase price, the plaintiff became obligated to transfer the property free of the lien of the chattel mortgage given as security for the performance by the lessees of their obligations under the lease. This theory is not tenable. Their tender, as alleged in their answer, demanded among other things an assignment of the lease "free and clear of all encumbrances and liens of every kind and description". This demand was made in spite of the fact that the defendants knew that paragraph 15 of this lease which they demanded be assigned to them, provided for the execution of a chattel mortgage under certain circumstances to secure the payment of rents and that the chattel mortgage had in fact been executed. True, they were entitled to an assignment of the lease, but they were not entitled to an assignment coupled with a condition that they should not assume the burdens of the lease on the property which they had long occupied. Being in actual occupancy of the premises, if the lease were assigned to defendants in accordance with their own demand made in the alleged tender, they would stand in the shoes of their assignor, the plaintiff, subject to all the terms of that lease. Childs Real Estate Co. v. Shelburne Realty Co., 23 Cal.2d 263, 267, 143 P.2d 697. Defendants make this statement: "Nor is the problem solved by concluding that 'while defendants are in possession' (assuming an assignment of the lease) they take it burdened with the chattel mortgage. Nowhere have they agreed to assume the lease." They contracted that the lease be assigned and while in possession demanded that it be assigned. The law governing the assignees of a lessee who are in possession of the premises is stated in 15 California Jurisprudence 751 as follows: "Assignees of a lessee who are in possession stand in his shoes and so long as they occupy that relation to the lessor and his property are bound by the terms of the lease and the obligations implied therefrom by law. An assignee is presumed to take the leasehold estate in the condition which characterized it at the time of the assignment." All of this shows that the phrase in the contract of sale to the effect that the transfer should be made free of all liens except those referred to in it is not susceptible to the interpretation placed on it by defendants. No liens are mentioned in the contract except that the sentence preceding the one just referred to did provide for the assignment of the lease and therefore the acceptance by defendants of all the burdens that went with it. A literal compliance with the terms of the tender would require the plaintiff to pay the rental of the entire term of the lease to the lessor to satisfy the chattel mortgage provided for in the lease which would have secured defendants' obligation to pay rent as it became due to the lessor. It is no answer to this to suggest, as do the defendants, that perhaps plaintiff could have made other arrangements "or, they could have taken over the lessor's interest, say, through a trustee." The way that chattel mortgage may be satisfied is in accordance with the provisions of that document. In the event the defendants, the occupants of the premises, pay the rent as it becomes due under the terms of the lease of which they demand an assignment, the chattel mortgage will be automatically discharged. It is evident, therefore, that defendants' tender was not made in good faith. Civil Code, section 1493 provides that tenders must be made in good faith and in such manner as to most likely under the circumstances, benefit the creditor. Clearly the tender contained conditions which plaintiff was not bound to perform and was therefore ineffective. Kruger v. Vernon, 73 Cal.App. 476, 483, 238 P. 1062; Civ.Code, sec. 1494. Any finding which the court might have made on the issues of tender would, necessarily, have been adverse to the defendants. Under such circumstances they cannot complain of the failure to make such a finding. Chamberlain v. Abeles, 88 Cal.App.2d 291, 300, 198 P.2d 927.

[8, 9] Defendants also complain of the court's failure to find on the allegations of the cross-complaint that the representations alleged to have been fraudulently made by plaintiff were untrue and also to find on the amount of damage suffered by the defendants by reason of these representations. The court having found that the representations in question were not made, these other issues become immaterial, and there was no prejudicial error in failing to find on them. Petersen v. Murphy, 59 Cal.App.2d 528, 533, 139 P.2d 49. As was held in Chamberlain v. Abeles, supra, 88 Cal.App.2d 291 on pages 299 and 300, 198 P.2d 927, the findings of a court are to receive such a construction as will uphold rather than defeat its judgment thereon, and are to be read and considered together and liberally construed in support of the judgment.

[10] Defendants cite no authorities in behalf of their contentions that the court erred in sustaining certain objections made to questions asked the defendant Gould and the witness Catts. As the questions asked Gould clearly called for conclusions, and as the questions asked Catts, the agent of the lessor, as to whether or not the chattel mortgage could be released by depositing $2,500 with the lessor certainly asked for his conclusion, the sustaining of the objections to these questions was proper.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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107 Cal.App.2d 845

K. & M., Inc., a corporation, Plaintiff, Cross-Defendant and Respondent, Paul E. Tapley, Cross-Defendant and Respondent, v. George LE CUYER et al., Defendants, Cross-Complainants and Appellants.

Civ. 17975.

District Court of Appeal, Second District, Division 3, California.

Nov. 29, 1951.

Appeal from Superior Court, Los Angeles County; Walter R. Evans, Judge assigned.

Prior opinion, 233 P.2d 574.

Charles A. Thomasset and Lee D. Mathews, Los Angeles, for appellants.

Arthur V. Kaufman and George Appell, Los Angeles, for respondents.

BARTLETT, Justice pro tem.

This was an action brought to recover subsequent installments due April 1, May 1 and June 1 of 1949 under the provision of the same contract of sale which was the subject of Civil No. 17974, K. & M. Inc., v. LeCuyer, Cal.App., 238 P.2d 28. At the time of the trial of these actions, it was stipulated that in the event the court found for the plaintiff and cross-defendants in case Civil No. 17974, then the court should find for the plaintiff in this case, and that in the event the court should find for the defendants and cross-complainants in case Civil No. 17974, then the court should find for the defendants in this case. The court having rendered judgment for the plaintiffs in the preceding case, Civil No. 17974, rendered judgment in this action for the plaintiffs and against the defendants in the sum of $2,100. For the reasons expressed in the opinion in Civil No. 17974, K. & M. Inc., v. LeCuyer, Cal.App., 238 P.2d 28, the judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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108 Cal.App.2d 72

POWELL v. STIVERS et al.

Civ. 18619.

District Court of Appeal, Second District,
Division 2, California.
Dec. 7, 1951.
Rehearing Denied Dec. 21, 1951.
Hearing Denied Jan. 31, 1952.

Action by Minnie A. Powell against Morgan A. Stivers, and others for injuries sustained when plaintiff tripped and fell over an electric cord between a piano and the wall while attending a fraternal meeting in a room leased by the fraternal order from the owners of the building managed by defendants. The Superior Court, Los Angeles County, Joseph M. Maltby, J., granted defendants' motion for a nonsuit and entered judgment of dismissal and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence established without conflict the presence of coils of cord lying in passageway between piano and wall and that such condition was patent, an open and obvious danger which a reasonable inspection could not fail to reveal.

Judgment affirmed.

1. Landlord and Tenant 🔑164(7)

A landlord is generally exempt from liability for injury to a tenant caused by defects in leased premises unless landlord fails to disclose concealed defects in premises, or a hidden danger thereon, known to lessor at time of making lease and which is not apparent to lessee.

2. Landlord and Tenant 🔑164(1)

A lessor can be held responsible for defects in leased premises only in event dangerous condition of premises would not be discoverable by a reasonable inspection.

3. Landlord and Tenant 🔑164(7)

If defect or danger in leased premises would be apparent to lessee on a reasonably careful inspection there is no duty on lessor to notify lessee of condition, and lessee assumes all risks arising from defects obvious to ordinary observation.

4. Landlord and Tenant 🔑169(8)

In action for injuries sustained when plaintiff, a member of a fraternal group, tripped and fell over a coiled electric cord between piano and wall, while attending fraternal meeting in room leased by fraternal order from owners of building managed by defendants, evidence established without conflict presence of coils of cord lying in passageway and also that such condition was patent, an open and obvious danger which a reasonable inspection could not fail to reveal.

Cameron & Perkins, Long Beach, for appellant.

Ball, Hunt and Hart, Long Beach, Clarence S. Hunt, Long Beach, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from the judgment of dismissal entered after respondents' motion for a nonsuit had been granted in an action to recover damages for personal injuries.

Respondents are owners of a building in the city of Long Beach known as the Masonic Temple. Appellant is a member of an unincorporated social group known as Palos Verdes Court No. 69 of the Order of Amaranth. For over ten years this group has leased and occupied a large, furnished, third floor room in the Temple for the purpose of holding fortnightly meetings. At the south end of the room is a raised platform on one corner of which is situated, among other objects, a piano, bench, chair and floor lamp. Between the piano and the south wall is a two-foot space across which extends a cord from an electric outlet in the south wall to a lamp standing next to the piano keyboard. Inasmuch as the cord was much longer than was necessary to reach the lamp, a surplus of several yards thereof was loosely wadded together and lay on the floor near the piano and partially extended into the two-foot passageway.

On the night of April 3, 1950, appellant was in attendance at a meeting of the order of the Amaranth in its room in the Temple. While engaged in placing flowers on the piano and while traversing the space between piano and wall, appellant tripped over the loose cord, fell and received extensive injuries.

[1–3] The parties are in agreement that the relationship existing between respondents, as owners and managers of the Temple, and appellant, as a member of the Order of Amaranth hiring the meeting room, is that of landlord and tenant in common. De Motte v. Arkell, 77 Cal.App. 610, 247 P. 254. Also, they are in accord as to the statement of the universal principle that a landlord is generally exempt from liability for injury to a tenant caused by defects in the leased premises unless the landlord fails to disclose concealed defects in the premises, or a hidden danger thereon, known to the lessor at the time of making the lease and which is not apparent to the lessee. Shotwell v. Bloom, 60 Cal.App.2d 303, 140 P.2d 728. But the lessor can be held responsible only in the event the dangerous condition of the premises would not be discoverable by a reasonable inspection. Hassell v. Denning, 84 Cal.App. 479, 481, 258 P. 426; Zavalney v. Donovan, 70 Cal. App.2d 182, 184, 160 P.2d 558. If the defect or danger would be apparent to the lessee on a reasonably careful inspection there is no duty upon the lessor to notify his tenant of the condition. Such tenant assumes all risks arising from defects obvious to ordinary observation. Zavalney v. Donovan, supra; Kearns v. Smith, 55 Cal.App. 2d 532, 534, 131 P.2d 36.

[4] Viewing appellant's evidence in the light most favorable to her, it is clear that she cannot recover. Her testimony and that of other witnesses established without conflict the presence of the coils of cord lying in the passageway, and also that such condition was patent, an open and obvious danger which a reasonable inspection could not fail to reveal.

Moreover, not only did appellant's evidence demonstrate the peril to be patent and dangerous, but the complaint itself declares the fact for it affirmatively alleges that defendants had "allowed a surplus quantity of electric cord * * * to be lying loose in folds upon the carpeted floor, near the piano * * *."

Respondents' motion was properly granted.

Judgment affirmed.

McCOMB, J., concurs.

Hearing denied; CARTER, J., dissenting.

RENNER v. HUNTINGTON HAWTHORNE OIL & GAS CO. et al.*

Civ. 4182.

District Court of Appeal, Fourth District, California.

Nov. 30, 1951.

Rehearing Denied Dec. 20, 1951.

Hearing Granted Jan. 28, 1952.

Wilvian Jewell Renner, lessor, brought action to quiet title against Huntington Hawthorne Oil & Gas Co., and others, lessees, wherein lessees relied on an oil and gas lease providing that lessees shall hold for twenty years and so long thereafter as oil gas can be secured in paying quantities, and providing that by paying quantity is meant a well from which there may be pumped for 30 consecutive days a quantity of oil which averages 50 barrels per day. The Superior Court of Orange County, Franklin G. West, J., entered a judgment for the lessor and the lessees appealed. The District Court of Appeal, Mussell, J., held that where, after the twenty year period had expired, the lessor continued to accept royalty payments

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* Subsequent opinion 244 P.2d 895.

on oil produced in quantities less than 50 barrels per day, the lessor waived right to cancel lease without notice.

Judgment reversed.

1. Mines and Minerals ⟾73½

In lessor's action to quiet title wherein lessees relied on oil and gas lease providing that lessees shall hold for 20 years and so long thereafter as oil or gas can be secured in paying quantities, record failed to support finding that lease expired by its own terms 20 years after date thereof.

2. Mines and Minerals ⟾78(7)

In lessor's action to quiet title wherein lessees relied upon oil and gas lease providing that lessees shall hold for twenty years and so long thereafter as oil or gas can be secured in paying quantities, and providing that by a paying quantity is meant a well from which there may be pumped for 30 consecutive days a quantity of oil which averages 50 barrels of oil per day, evidence was sufficient to support finding that 50 barrels a day for 30 consecutive days were not produced after expiration of 20 year period.

3. Evidence ⟾568(1)

Testimony of an oil producer in answer to a hypothetical question as to whether a certain oil well could pump 50 barrels of oil per day for period of 30 consecutive days, which was not based upon witness' personal knowledge, was insufficient to support finding that oil could not be so produced within oil and gas lease providing that lessees shall hold for twenty years and so long thereafter as oil or gas can be secured therefrom in paying quantities, and providing that by a paying quantity is meant a well from which there may be pumped for 30 consecutive days a quantity of oil averaging 50 barrels per day.

4. Mines and Minerals ⟾78(1)

Where oil and gas lease provided that lessees shall hold for twenty years and so long thereafter as oil or gas can be secured in paying quantities, and provided that by paying quantity is meant a well from which there may be pumped for 30 consecutive days a quantity of oil which averages 50 barrels per day, and after the twenty year period, had terminated, lessor accepted royalties and consented to production of oil and gas, lessor and lessees placed their own construction on lease to the effect that it was binding and not subject to cancellation.

5. Mines and Minerals ⟾78(5)

Waiver of a termination clause of an oil and gas lease may be shown by conduct, and may be result of an act which, according to its natural import, is so inconsistent with intent to enforce right in question as to induce a reasonable belief that such right has been relinquished.

6. Mines and Minerals ⟾78(4)

Where oil and gas lease provided that if lessees shall fail for period of 60 days after written notice given by lessor to comply with provisions of lease, lessor may at his option terminate lease, it would only be upon giving of notice and failure to perform conditions that forfeiture could be declared.

7. Mines and Minerals ⟾78(5)

Where oil and gas lease provided that lessees shall hold for twenty years and so long thereafter as oil or gas can be secured in paying quantities, and provided that by paying quantity is meant a well from which there may be pumped for 30 consecutive days a quantity of oil which averages 50 barrels per day, and that lessor may terminate if lessees fail to comply with provisions of lease for 60 days after written notice is given by lessor, and lessor for many years after expiration of twenty year period accepted royalties from production of oil in quantities less than 50 barrels a day, lessor could assume that production at lesser scale was satisfactory, and lessor waived right to and could not cancel lease without written notice of default.

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Mize, Kroese, Larsh & Mize, Santa Ana, and Newby, Holder & Newby, Los Angeles, for appellants, Invader Oil Co., William Elvert McCaslin and E. B. Kenney.

Ben F. Griffith, Los Angeles, for appellants Huntington-Hawthorne Oil & Gas Co. and L. L. Vogel.

Blodget, Morris & Blodget, L. W. Blodget and June E. Blodget, Santa Ana, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment for plaintiff in an action to quiet title to real property in Orange county. It was stipulated that plaintiff is the owner of the fee title to the real property involved, subject to the validity of the claims of the stipulating defendants, which claims are based upon and grew out of an oil and gas lease on the premises, executed April 23, 1921, by A. J. Miller, plaintiff's predecessor in title. It was further stipulated that plaintiff's contention is that the term of said lease has expired; that subject to the validity of said contention, the defendants, by mesne assignments and agreements, are the owners of certain production interests under the lease and that Invader Oil Company, a corporation, is in physical possession of the property.

The lease contains the following pertinent provisions:

"1. The Lessee shall hold said lands with appurtenances for a period of twenty (20) years from and after the date hereof and so long thereafter as oil or gas or other hydrocarbon substances can be secured therefrom in paying quantities within the definition hereinafter particularly specified, unless otherwise surrendered or forfeited by the Lessee, and the Lessee hereby leases from the Lessor the above described lands for the purposes and term aforesaid and upon the conditions and considerations herein set forth.

"2. Oil in paying quantities shall be understood to mean a well drilled from which there may be pumped for a period of thirty (30) consecutive days a quantity of oil which shall average fifty (50) barrels of oil of forty-two (42) gallons each per day.

"3. The Lessee agrees to operate each completed well on the premises to its full capacity, so long as such well shall produce oil in quantities deemed paying quantities within the definition aforesaid, while this lease is in force as to the portion of the premises on which such well is situated; provided, however, that nothing in this paragraph shall be construed as to require the Lessee to maintain such well to such capacity as would, within the judgment of experienced oil men, possibly result in the destruction of such well."

There is only one oil well on the property and it is designated in the record as "Miller Well No. 1 A". It commenced production on or about August 1, 1923, and initial production was about 650 barrels of oil per day. From January 1, 1941 to January 1, 1949, the oil produced averaged less than 50 barrels of 42 gallons each for 30 consecutive days. However, total production for this period was over 90,000 barrels and averaged over 11,000 barrels per year. At the time of trial and for several years prior thereto the well produced between 30 and 40 barrels per day.

The trial court found that the lease involved expired by its own terms on April 23, 1941 and further found "that said well cannot be made to produce at the rate of 50 barrels of oil per day for 30 consecutive days, and it is not true that since April 23, 1941, oil or gas or other hydrocarbon substances may be pumped therefrom in paying quantities within the definition particularly specified in the lease."

[1, 2] Defendants appeal from the judgment decreeing a termination of the lease and quieting plaintiff's title to the property. The first contention is that the trial court's finding "that said oil and gas lease expired by its own terms on April 23, 1941", is not supported by the evidence and is in conflict with other findings. This contention is supported by the record before us. The lease, by its terms, does not automatically terminate twenty years from the date of its execution but continues in full force and effect "so long thereafter as *oil or gas can be secured* therefrom in paying quantities as defined in the lease." (Italics ours.) The evidence fully supports the finding that oil was not produced to the extent of 50 barrels for 30 consecutive days since January, 1941. However, the finding that it could not be made to produce the stated quantity is not supported by substantial evidence.

In this connection, Mr. Camp, experienced in drilling and producing wells, and well acquainted with the well involved, testified that in his opinion it could be made to produce 50 barrels of oil per day for 30 consecutive days and "may be some time longer." Mr. Thompson, an oil well drilling contractor, stated that the Miller well could be pumped so that it would produce an average of 50 barrels a day over a 30-day consecutive period, but that such production might result in its destruction in 80 or 90 days, or longer. Mr. Kenney, an oil producer with 28 years experience, also testified that oil could be secured or pumped from this well averaging 50 barrels per day for a period of 30 days but that such production would probably result in the destruction of the well any time after approximately 45 days. Mr. Maderas, an oil producer called by plaintiff, when asked a lengthy hypothetical question stating many of the conditions existing in the Miller well, stated that it could not be made to produce 50 barrels of oil per day for a period of 30 days "for long and have oil." As the trial court remarked, this witness was testifying from a hypothesis rather than from personal knowledge.

[3] The foregoing testimony is not sufficient to support the finding that the Miller well could not be made to produce 50 barrels of oil per day for 30 consecutive days.

The lessees were not required by the lease to maintain the Miller well to such capacity as would, within the judgment of experienced oil men, possibly result in the destruction of the well. The record clearly shows that defendants chose to operate the well on a 30 to 40 barrel a day production, economically, efficiently and without possibly destroying the well. All parties apparently were satisfied with this arrangement until the filing of the present action.

[4, 5] It was stipulated that from January 1, 1941, to and including December, 1948, plaintiff and her predecessors in interest received 14% royalty or percentage of cash received by defendants for oil and gas produced from the Miller well. The plaintiff and her predecessors in interest consented to the production and sale of oil and gas under this arrangement for a period of several years and thereby placed their own construction on the lease to the effect that it was and is a binding lease and not subject to cancellation under the circumstances shown. The acceptance by plaintiff of the royalties due her under the lease over a period of years without objection and her consent to the continued production of oil, though less than 50 barrels per day, amounted to a waiver of the right to cancel the lease without notice. Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 443-444, 6 P.2d 71, 80 A.L.R. 453. As was said in Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 432, 132 P.2d 457, 469: "Waiver may be shown by conduct; and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished."

In this connection, it is to be observed that the provision of the lease defining "oil in paying quantities" does not refer to "gas" to be produced from the well, and the evidence shows that gas was at all times produced and sold from the well involved of the approximate value of $3,100 per year and that plaintiff received as royalty 14% of said amount in monthly installments to the date of trial.

[6] The lease also contained the following provision: "If the Lessee shall fail for a period of sixty (60) days after written notice given to it by the Lessor to comply with any provision of this lease, the Lessor may, at his option terminate this lease."

The trial court expressly found that no such notice was given. As was said in Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 3-6, 167 P. 369, 371: "It is only upon the giving of this notice and the failure to perform the conditions mentioned therein that the forfeiture can be declared. This is the condition which must happen in order to give a right to declare the forfeiture. The condition cannot be said to have happened upon notification given by some of the parties of the first part or any number of them less than all. After the notification has been given by all of the parties a forfeiture may be brought about only 'if said first parties shall so elect.' Here again the action of all of said first parties is necessary to the happening of the condition."

[7] In the instant case we conclude that cancellation of the lease could not take place without written notice of default since the lessee under the circumstances shown had the right to assume that the continued production of the Miller well on the same scale for many years was satisfactory and that the lessee would not be put in default until the expiration of the specified written notice of sixty days and its failure to remedy the breach if any existed. If such a notice had been served, the lessee would have had an opportunity to produce the specified quantity of oil for a period of thirty days even though such production might, in the opinion of experienced oil men, result in the dstruction of the well.

In support of her contention that the lease herein expired by its terms when the well ceased to produce 50 barrels of oil per day for 30 consecutive days, plaintiff cites Woodruff v. Brady, 181 Okl. 105, 72 P.2d 709, 113 A.L.R. 391. In that case the lease was for the term of five years and contained the following provision: "It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee". It was admitted that there was no well upon the premises from which oil could be produced. In the instant case the Miller well was producing 30 to 40 barrels per day. In the Woodruff case there was no mention of a provision in the lease such as we have here, viz.: that the lessee need not destroy the well in order to produce from it 50 barrels of oil per day. In Macco Construction Co. v. Fickert, 76 Cal.App.2d 295, 172 P.2d 951, also cited by plaintiff, the lease involved was for a term of 20 years with a provision that lessee might retain and operate all wells on the premises then producing oil in paying quantities. Paying quantities was defined as production of at least an average return per month of 150 barrels of oil. The court held that the lease had expired without the presence of the conditions specified therein as prerequisite to its extension and that a notice of termination of the lease was unnecessary; that a forfeiture is not involved where an oil lease provides that the premises must be producing oil or gas in paying quantities at the expiration of the term specified. The well involved was not producing oil in any amount but was in an abandoned state and the court said, 76 Cal.App.2d at page 302, 172 P.2d at page 956: "Since it was producing nothing and was incapable of producing anything on the expiration date of the lease by reason of the failure on the part of appellants to maintain a pumping equipment, the rights of the lessees thereafter to produce from the well terminated on the expiration date."

The court also stated, 76 Cal.App.2d at page 304, 172 P.2d at page 957: "Production is specified as a condition precedent to an extension, and unless it be established that the well was producing on the expiration date or that a condition excusing such production obtained the lessee fails to present a valid claim to possessory and exploratory or operative rights."

In the instant case the evidence is that the well was producing and a condition excusing production obtained, in that the parties by their acts and conduct approved production in a quantity less than 50 barrels of oil per day. Both of the cases cited by plaintiff are factually different from the case at bar. Furthermore, in the instant case no test was made to determine whether the Miller well could be made to produce 50 barrels of oil per day, and, as noted, the evidence was that the well could be made to produce such an amount of oil but that such production would be likely to destroy the well in time.

Since we have concluded that the trial court's findings that the lease terminated April 23, 1941, and that the Miller well could not be made to produce at the rate of 50 barrels of oil per day are not supported by substantial evidence, it is unnecessary to pass upon the remaining questions presented in this appeal.

Judgment reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

107 Cal.App.2d 778

PICKENS et ux. v. JOHNSON et ux.

JOHNSON et ux. v. PICKENS et ux.

Civ. 7970.

Sac. 6156.

District Court of Appeal, Third District, California.

Dec. 1, 1951.

Action by Lawrence L. Pickens and Elfrieda Pickens against Fred C. Johnson and Fosteen Johnson for judgment declaring rights of parties under agreements by which plaintiffs leased certain premises to defendants and agreed to sell business and liquor license, and, action by Fred C. Johnson and wife, against Lawrence L. Pickens and wife, for forcible entry. The Superior Court, Sacramento County, Percy G. West, J., entered judgment for the Pickenses in both actions, and the Johnsons appealed. The District Court of Appeal, Schottky, J. pro tem., held that evidence was insufficient to sustain finding that the Johnsons had abandoned the leased premises.

Judgments reversed.

1. Declaratory Judgment 🔑347

In action for judgment declaring rights under lease and contract for conditional sale of business and liquor license, wherein it was contended that lessees-buyers had breached conditions of agreements, and that lessors-sellers had right of re-entry under terms of agreement as result, evidence was insufficient to sustain finding that buyers had wilfully incurred obligations for merchandise in said business in name of sellers in amount in excess of $800.

2. Declaratory Judgment 🔑347

In action for judgment declaring rights under lease and contract for conditional sale of business and liquor license, wherein it was contended that buyers had breached conditions of agreements and that such breach gave sellers right of re-entry in accordance with agreements, evidence was insufficient to sustain finding that sellers had been informed by Board of Equalization that liquor license would be revoked unless sellers opened up business which had been temporarily closed by attachment.

3. Landlord and Tenant 🔑277(4)

Where lease of premises for operation of liquor business provided that lessors had right of re-entry upon default in any covenants and that lessees agreed not to permit any liens to be filed against premises, and attachment was issued against lessee, and property was levied upon and padlocked by marshal, when lessors broke padlock and entered leased premises for purposes of redecoration there was forcible entry, since right to possession conferred by provision of lease giving lessor right of re-entry may be exercised only when same can be done without force or violence.

4. Landlord and Tenant 🔑132(2)

Provision in lease giving lessor right to re-enter upon default by lessee is not a defense to an action by lessee for forcible entry.

5. Landlord and Tenant 🔑277

Where lease provided that lessees agreed not to permit any liens to be filed against premises and that lessors had right of re-entry upon default of any covenants of lease, attachment against goods, wares and merchandise located on premises for an obligation of lessees, was not "lien" filed against premises of lessors, and did not give rise to right of re-entry.

See publication Words and Phrases, for other judicial constructions and definitions of "Lien".

6. Landlord and Tenant 🔑112½

In action of forcible entry by lessees of premises against lessor, wherein it appeared that lease provided that lessees should personally occupy premises, evidence was insufficient to sustain finding that lessees had abandoned premises and had repudiated their obligations and forfeited their rights under lease.

7. Landlord and Tenant 🔑110(1)

In order to constitute abandonment or surrender of premises by lessee, which on acceptance by lessor will constitute surrender of lease by operation of law, there must have been intention to abandon coupled with an external act by which intention is carried into effect, of such nature as will justify an immediate resumption of possession by lessor.

McAllister & Johnson, Walter C. Frame, Sacramento, for appellants.

Floyd H. Bowers, Roseville, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from the judgments in two cases, consolidated for trial, the first brought by respondents for declaratory relief and the second brought by appellants for forcible entry.

In the complaint for declaratory relief it is alleged that the Pickenses, being owners of premises known as the Hawaiian Hut, leased the same to the Johnsons; that the lease contained a provision that the lessee would not permit any liens to be filed against the premises because of any contract of any nature made by the lessee and third parties; that the lease further provided that upon default in any covenant, the lessor might reenter; that at the time of making the lease the parties entered into an agreement to sell the "Business and Liquor License," under which the Pickenses agreed to sell the Johnsons the business, fixtures and liquor license, title to remain in the seller until the purchase price was fully paid; that the lease provided that a default in the lease should be a default in the contract of sale; that possession, operation and control of all property mentioned in the two instruments was delivered to the Johnsons on January 5, 1948, who retained exclusive possession together with the profits thereof until September 14, 1949; it is alleged upon information and belief that prior to September 14, 1949, the Johnsons incurred obligations for merchandise in the operation of the Hawaiian Hut in excess of $3,000; that in an action against the Hawaiian Hut, a copartnership, alleged to consist of the Pickenses and the Johnsons, an attachment was issued pursuant to which the marshal levied upon and took possession of the leased premises and property; that the Johnsons thereupon abandoned the premises and refused to satisfy the attachment lien; that the Pickenses were informed by the State Board of Equalization that unless the Hawaiian Hut was opened and operated the liquor license would be revoked; that the Pickenses, on September 20, 1949, took possession of the Hawaiian Hut; that the Johnsons have since refused to sign the documents necessary to transfer the liquor license, and have served a written demand upon plaintiffs for the return of possession of the premises; that an actual controversy exists between the parties as to their rights under the lease and the contract to sell. The prayer is for a declaration of rights under the two instruments, a decree ordering the Johnsons to transfer the liquor license to the Pickenses, a judgment quieting the Pickenses' title in and to the realty, and attorney's fees in the amount of $500. The answer contains denials that the Pickenses own the liquor license, that the Johnsons breached the lease and abandoned the premises, that the Board of Equalization threatened to revoke the liquor license.

In the complaint in the second action it is alleged that the Johnsons were in possession of the Hawaiian Hut from January 5, 1948, to September 20, 1949; that the monthly value of the use of the property was in excess of $1,000; that on September 20, 1949, while the Johnsons were still in possession, and during their temporary absence, the Pickenses forcibly entered upon said premises, and unlawfully took possession thereof; that the Johnsons have made a written demand on the Pickenses for surrender of the premises, but the latter have refused so to do. The prayer is for restoration of the premises and damages in the amount of $39,000. The answer sets up as affirmative defenses the matters alleged in the complaint in the first action.

The two actions were consolidated and tried without a jury. In the first action the court found that the Pickenses are the owners of the realty, the fixtures, the business and the liquor license; that the Johnsons violated the express obligations of the lease and contract of sale by incurring obligations for merchandise in the operation of the business on the credit of the Pickenses in an amount in excess of $800; that when the marshal attached the Hawaiian Hut, the Johnsons repudiated their obligations, abandoned the premises, and refused to satisfy the attachment lien; that the Pickenses were informed by the Board of

Equalization that the liquor license would be revoked if they did not open and conduct the business of the Hawaiian Hut; that on September 14, 1949, the Pickenses gave written notice to the Johnsons to perform under the lease or quit possession; that following the notices the Johnsons did not release the attachment or retake possession; that because of this the Pickenses, on September 20, 1949, reentered possession of the premises as they were entitled to do; that the Johnsons refuse to sign the papers necessary to transfer the liquor license, to which transfer the Pickenses are entitled. The court concluded that the contract of sale should be decreed cancelled; that the lease be adjudged null and void; that the Johnsons should be ordered to transfer the liquor license to the Pickenses; that the Pickenses should be given judgment for $250 for attorney's fees. Judgment was entered accordingly.

In the second action the court found that the Pickenses did not unlawfully enter into possession of the Hawaiian Hut but that the Johnsons abandoned the premises; that the Johnsons have no interest in the premises or the possession thereof, and are estopped, by reason of their abandonment, to claim any right or title thereto. The court concluded that the Johnsons were entitled to take nothing by their action. Judgment was entered accordingly The Johnsons have appealed from both judgments. In view of the fact that the Johnsons are defendants in the declaratory relief action and plaintiffs in the forcible entry action, we shall refer to appellants in both actions as the Johnsons and to respondents in both actions as the Pickenses.

As grounds for a reversal of the judgments the Johnsons make the following contentions: 1. The findings are not supported by the evidence; 2. The uncontradicted evidence clearly establishes that there was no breach of the terms of the lease by the appellants; 3. Appellants did not abandon the premises; and 4. The evidence establishes the right of the appellants to recover damages for forcible entry. Before discussing these contentions we shall summarize briefly the evidence as shown by the record.

The lease and contract of sale were both executed on January 5, 1948. The following provisions of the lease are pertinent here:

"That if any rent shall be due and unpaid, or a default shall be made in any of the covenants herein contained, the Lessor or Lessor's representative or agent may reenter said premises and remove all persons therefrom, whereupon such default in the performance of this Lease shall be construed to be a default in the contract of sale wherein the Lessor has concurrently herewith sold to the Lessee the business equipment and fixtures and liquor license issued to the Hawaiian Hut, operated upon said premises, and shall be a default in the contract of sale between the Lessor and the Lessee wherein the Lessor has sold to the Lessee the stock of goods, wares and merchandise upon said premises, which said last mentioned contract was also executed on this day concurrently with this lease; and upon such default, the Lessor may take such action as Lessor deems necessary to declare each default in each of said contracts, and the Lessor's remedies under such contracts shall be cumulative.

* * * * * *

"(3) That the Lessee shall personally occupy said demised premises. * * *

* * * * * *

"(16) Lessee agrees not to permit any liens to be filed against said premises because of any contract of any nature made by the Lessee and third parties, and further agrees to save the lessor harmless from any action at law or otherwise, because of the injuries to persons or property resulting directly or indirectly from the use and occupancy of the premises by the Lessee."

The contract of sale contains the following pertinent provisions:

"1. * * * the Buyer agrees to purchase from the Seller, that certain tavern, cafe and business known as the Hawaiian Hut, * * * together with the equipment therein, * * * ; together with an On Sale General Liquor License, issued to the Seller by the State of California for use within said premises. * * *

"2. It is understood and agreed that the title to said property shall remain in the Seller until the purchase price herein specified shall have been fully paid, together with accrued interest thereon; and in the event of the failure of the Buyer to make the payments at the time and in the manner herein specified, the Seller shall be relieved of all obligation in law or in equity to convey said property to the Buyer and the amounts paid by the Buyer at the time of default shall be construed as rental for the use of the property, and shall belong to the Seller.

* * * * * *

"5. It Is Further Understood and Agreed that in the event the Buyer fails or refuses to make the payments as herein specified, that the Buyer shall upon such default forthwith sign such applications and documents as may be necessary or required to transfer the liquor license issued for use upon said premises to the Seller; and in the event the Buyer shall fail or refuse to do so, upon such default, then and in that event the Superior Court of the State of California in and for the County of Sacramento, may designate the Clerk of the Court as its agent for the specific performance of this clause of this contract."

The Johnsons were in possession of the Hawaiian Hut until September 14, 1949, when Stephen Marietta, Marshal of the Municipal Court, posted notices of attachment on the premises and placed padlocks on the doors. The Johnsons were not physically present on that date, however, but had their bartender, Hunter, on duty at the Hut. Hunter continued to occupy the sleeping quarters, and operated the bar on the 15th, under the direction of the marshal. He did not operate the bar the following day, and he left the premises on the 19th, and when he returned on the 20th a new padlock was on the door to his sleeping quarters. Mrs. Pickens, who was on the premises, unlocked the door for him and permitted him to remove his clothing and other personal possessions. The Pickenses had entered the Hut on the 20th, removing the locks placed there by the marshal. On the 14th they had posted a notice on the premises giving the Johnsons until the 18th to fulfill their obligations under the lease, but they were unable to personally contact the Johnsons. Notice was mailed to the Johnsons, however, and their attorney was contacted. The notice was admitted as plaintiffs' Exhibit 3. After reentering the premises, the Pinkenses began immediately to redecorate and remodel the place. On October 10th Mrs. Johnson appeared and tendered the rental due for the following month, which was refused. Rent had been paid up through the 10th of October, and payment on the sale of the business fixtures, etc., was not due until February. The evidence is in conflict as to whether the Johnsons made any demands for return of possession during the month of October. Around the middle of October, Mrs. Johnson had taken a truck out to the Hut to remove her belongings and liquor, although she testified that she did not remove *all* her things. Prior to September 14th, Mrs. Johnson had moved into town in order to send her children to school. Prior to September 14th Mr. Johnson had discussed with several persons his desire to go to Arabia to work for an oil company, although Johnson testified that he had thought he could make the trip so long as he kept the business going, and that he did not contemplate abandoning the lease. The attachment arose out of a suit by W. H. Sneed against both the Johnsons and the Pickenses for liquor sold on an open book account, the amount sued for being $830.72. The attachment was upon the goods, wares and merchandise of the business. The Pickenses, in contempt proceedings arising out of the attachment, on December 8, 1949, were adjudged not guilty of contempt. Snead's attorney released the attachment at some time subsequent to September 20th. H. E. Johnson, of the Board of Equalization, testified that the Hut was four months delinquent in sales taxes, as of September, 1949; that sales taxes were supposed to be paid every month; that he saw Mrs. Pickens and told her that the taxes due would have to be paid before the Hut could be reopened. Pickens was not permitted to testify as to his conversations with a person from the Board of Equalization pertaining to the liquor license, but in an affidavit answering the charge of contempt, admitted as Defendant's Exhibit A, Pickens stated that on September 20th, 1949, he was informed by Mr. Smith, District Agent for the State Board of Equalization at Sacramento, that the liquor license would be cancelled unless the business was reopened within ten days from the date it closed. While the Johnsons never paid the debt for which the attachment was levied, they had arranged to borrow the money necessary to do so from Mrs. Johnson's sister, who backed out of the deal when she learned that the Pickenses were in possession. On October 23rd the Johnsons served notice on the Pickenses to deliver immediate possession of the Hut. Other material facts will be hereinafter set forth.

The Declaratory Relief Action.

[1] Appellants make a forceful attack on the findings in said action. They first attack the finding that "defendants [the Johnsons] wilfully incurred obligations for merchandise in said business * * * in the name of and on the credit of the plaintiffs [the Pickenses] in an amount in excess of Eight Hundred ($800.00) Dollars" as being unsupported by the record, and we must agree with this contention. The only evidence in the record as to this point is that an action was brought against appellants and respondents for that amount, but there is no evidence that said obligation was incurred by appellants in the name of or on the credit of respondents. The fact that the liquor license was being purchased by appellants from respondents on a conditional sales contract may have been a reason why respondents were joined in action for liquor sold to appellants, but where said action did not proceed to judgment against respondents, the mere filing of such an action is not sufficient to support a finding that appellants incurred said obligation on the credit of respondents.

Appellants also attack the findings that they repudiated their obligations under the lease and agreement of sale and abandoned the premises. In view of the fact that the question of abandonment is the principal question involved upon this appeal as to both actions we shall discuss it in more detail hereinafter.

[2] Appellants also attack the finding that the respondents were informed by the Board of Equalization that the liquor license would be revoked unless the respondents opened up the business. We find no evidence in the record to support this finding, but even if it were supported, it would be difficult to understand how such a statement by an employee of the Board could affect the rights of appellants under the lease and agreement.

The Forcible Entry Action.

Appellants attack the findings in this action that (1) it is not true that respondents forcibly entered the premises while appellants were in peaceable possession thereof; (2) it is not true that respondents have detained the property from appellants; (3) that appellants abandoned the property, and respondents, in order to protect their interest, took possession.

[3, 4] It requires little argument to show that respondents forcibly entered the premises while appellants were in possession. Appellants' rent was paid to October 5, 1949; the marshal had placed a padlock on the door of the premises, and on September 20, 1949, respondents broke said padlock and entered and took possession of the premises and started redecorating and remodeling. In Rutledge v. Barger, 82 Cal.App. 356, 255 P. 537, it was held that breaking a lock in order to enter a building proves the force necessary to establish forcible entry. See, also, Saferian v. Baer, 105 Cal.App. 238, 287 P. 142. In Calidino Hotel Co. v. Bank of America Nat. Trust & Savings Ass'n, 31 Cal.App.2d 295, 87 P.2d 923 it was held that in an action for forcible entry the plaintiff need only prove, in addition to the forcible entry, that at the time of the entry he was peaceably in the actual possession of the property entered; that a provision providing for reentry upon defaut by the lessee is not a defense to an action for forcible entry.

The court said, 31 Cal.App.2d at page 307, 87 P.2d at page 929: "The authorities amply support the rule that where a right to take possession is given to a mortgagee in a mortgage or is reserved to a seller in a contract of sale or to a lessor in a lease, such right to possession may be exercised only where it can be exercised peaceably and without force or violence. If such right cannot be exercised without force or violence, the possessor of such right must resort to a court of law."

It is apparent that the judgments in favor of respondents must be sustained, if at all, upon the basis that the court's findings in both actions that appellants repudiated and forfeited their obligations under the lease and agreement of sale and abandoned the premises are supported by the record.

The real property in question was leased by respondents to appellants for a term of five years from January 5, 1948, at a monthly rental of $225 per month, payable on the 10th day of each month. The business, equipment and liquor license were sold by respondents to appellant for $10,000 upon a conditional sales contract, $5,000 being the down payment, and $500 plus interest at the rate of 5%, being payable on August 1, 1948, February 1, 1949, and on February 1st and August 1st of each year thereafter. On September 14, 1949, the day the attachment was levied, the rent was paid to October 5, 1949, two payments of $500 had been paid on the contract, and no payment was due thereon until February 1, 1950.

[5] The attachment, according to a stipulation appearing in the record, was upon the goods, wares and merchandise, and not upon the real property, so the contention of respondents that appellants were guilty of a violation of the provision of the lease that "the lessee agrees not to permit any liens to be filed against said premises because of any contract made by Lessee and third parties" is without merit. An attachment against the goods, wares and merchandise located on the premises for an obligation of the lessee cannot be considered a lien filed against the premises of the lessors.

Respondents contend that abandonment by appellants was proved by their acts and conduct as hereinbefore set forth. They assert that there was evidence that appellant Fred Johnson had told some people that he was going to Arabia; that appellant Mrs. Johnson moved off of the premises in August; that after seeing a copy of respondents' notice to perform or quit, appellants abandoned the premises; that appellants never offered to resume the business, and did not demand possession of the premises until October 23rd; and also that in October appellants removed all of their property from the premises except a stove and a refrigerator.

Appellants argue that the record shows clearly that there is no basis for a finding of abandonment. They point out that appellants were not in default under the lease; that their rent was paid to October 5th; that they were in possession, conducting the business when the place was padlocked by the marshal; that on October 20th, while the marshal's padlocks were still on the property, respondents broke the locks, entered the premises and began redecorating and remodeling; that the rent for the month of October was tendered to respondents on October 10th and the rent for November on November 10th, but both tenders were refused by respondents.

[6] We are convinced that the court's findings that appellants repudiated their obligations and forfeited their rights under the lease, and that they abandoned the premises, are unsupported by the record.

[7] The general rule as to abandonment is well stated in 1 American Jurisprudence, secs. 8, 9, pages 6–7:

"Sec. 8. The primary elements of abandonment are the intention to abandon and the external act by which the intention is carried into effect. The intention to abandon is considered the first and paramount inquiry.

"Abandonment may arise from a single act or from a series of acts. Time is not an essential element of abandonment, and is of no importance except as indicative of intention.

"Sec. 9. The abandonment of property necessarily involves an act by which the possession is relinquished, and this must be a clear and unmistakable affirmative act indicating a purpose to repudiate the ownership; the mere relinquishment of the possession of a thing is not an abandonment of it in the legal sense of the word, for such an act is not wholly inconsistent with the idea of continuing ownership. Abandonment consists of two elements—act and intention. The act of relinquishment of possession or enjoyment must be accompanied by an intent to part permanently with the right to the thing; otherwise there is no abandonment. * * *"

And in 51 C.J.S., Landlord and Tenant, § 125, pages 718–719, it is stated:

"In order to constitute an abandonment or surrender of the premises, which on acceptance by the landlord will constitute a surrender of the lease by operation of law, there must be such a relinquishment by the tenant as will justify an immediate resumption of possession by the landlord, and, where there is such a relinquishment, there is a sufficient abandonment or surrender. Although it has been said that the lessee of a term may abandon the lease by words or equivalent acts, a surrender cannot be implied by operation of law when the tenant retains possession, as tenant, of the leased premises, or any material portion of them.

"* * * Likewise, there is no surrender by the lessee * * * where he surrenders the key on demand of a sheriff attaching his personal property; * * *."

While abandonment is a matter of intent which may be proved by the acts and conduct of the party who is alleged to have abandoned the property in controversy, a finding of abandonment must be based upon evidence from which an inference of abandonment can reasonably be drawn. Where, as in the instant case, appellants had paid $6,000 on the total of $10,000 purchase price of the business, equipment and liquor license, leaving a balance of only $4,000, and there was no payment due on said purchase price for nearly five months; where, according to the testimony of respondents the liquor license itself was worth at least $7,500 where the rental on the leased premises was paid to October 5, 1949 (15 days after respondents broke the locks on the door and took possession of the premises); and where the appellants tendered the rent for the month of October, it must be held that the evidence shows affirmatively that there was no abandonment by appellants.

As to the findings in the declaratory relief action that appellants violated the express obligations of the lease and contract of sale by incurring obligations for merchandise upon the credit of respondents, we have already pointed out that this finding is not sustained by the evidence, and that, even if true, it could not be considered a breach of any provision of the lease or agreement; and the same may be said as to the findings that appellants refused to satisfy the attachment lien on the personal property and that respondents were informed by the Board of Equalization that the liquor license would be revoked if they did not open and conduct the business of the Hawaiian Hut. We, therefore, conclude that the findings of the court in the declaratory relief action, upon which the court based its conclusions that the contract of sale and lease should be cancelled and the appellants ordered to transfer the liquor license to respondents, lack substantial support in the record.

The rights of a lessee under a lease and of a vendee under an agreement of sale cannot be taken away by the method pursued by respondents in the instant case. The law provides and encourages a legal and orderly method of procedure if the right to terminate such rights exist. Respondents were not justified in breaking the locks on the leased premises, and in taking possession of said premises and business and excluding appellants therefrom. Appellants had been paying the rent for more than eighteen months and had paid three-fifths of the purchase price, and the evidence in the instant case is insufficient to support the judgments that they had forfeited their rights under the lease and their payments under the contract of sale.

In view of the foregoing the judgments appealed from are reversed.

ADAMS, P. J., and VAN DYKE, J., concur.

PEOPLE v. BUFFUM et al.*

Cr. 4619.

District Court of Appeal, Second District, Division 3, California.

Nov. 28, 1951.

Rehearing Denied Dec. 13, 1951.

Hearing Granted Dec. 28, 1951.

Roy L. Buffum and Reginald L. Rankin were convicted in the Superior Court of Los Angeles County of conspiring to bring about abortions, and they appealed. The District Court of Appeal, Shinn, P. J., held that women on whom abortions were allegedly performed by third party, were accomplices of the defendants, and that therefore defendants were entitled to instructions as to the necessity for corroboration of the testimony of accomplices.

Judgments and orders denying motions for new trial reversed.

1. Criminal Law 🔑507(6), 780(1)

In prosecution for conspiracy to bring about alleged abortions, women on whom abortions were allegedly performed by third person, were "accomplices" of the defendants, and therefore defendants' requested instructions dealing with necessity of corroboration of testimony of accomplices should have been given. Pen.Code, §§ 182, 274, 275, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

2. Conspiracy 🔑28

One need not be liable to prosecution for a given crime in order to be guilty of conspiracy to commit it. Pen.Code, § 182.

3. Conspiracy 🔑28

Agreements to commit crimes, followed by overt acts, are themselves crimes.

4. Conspiracy 🔑28

Though a woman who solicits and submits to an abortion is not an accessory in the attempted or committed offense, she nevertheless conspires to procure the commission of the crime and is subject to a prosecution for conspiracy to bring about the abortion. Pen.Code, §§ 182, 274, 275, 1111.

5. Conspiracy 🔑28

Amenability to prosecution for an objective crime need not exist in order that those who conspire to commit the crime or cause it to be committed may be guilty of conspiracy. Pen.Code, § 182.

6. Conspiracy 🔑48

In prosecution of physician and layman for conspiracy to bring about alleged abortions, which were to be performed by third party in Mexico, wherein there was no direct evidence of any agreement between physician and layman to have abortions performed, court erred in refusing physician's requested instruction that he should be acquitted if the jury found that he agreed with the women, on whom the abortions were allegedly performed, to assist them but that he did not have an agreement with the layman that they would both render the woman assistance. Pen.Code, §§ 182, 274.

7. Statutes 🔑241(1)

A construction of a criminal statute favoring effectiveness must prevail over a construction which would place the criminal forces and activities beyond the reach of the law.

8. Conspiracy 🔑38

In prosecution for conspiracy to bring about alleged abortions to be performed by third party, it was no defense that alleged abortions were to be performed in Mexico. Pen.Code, §§ 182, 274.

9. Conspiracy 🔑48

In prosecution for conspiracy to bring about alleged abortions which were allegedly to be performed by third party in Mexico, defendants' requested instructions to the effect that it is not a crime to conspire within the state to commit a crime elsewhere were properly refused. Pen.Code, §§ 182, 274.

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* Subsequent opinion 256 P.2d 317.

10. Criminal Law ⚷382, 1169(1)

In prosecution for conspiracy to bring about alleged abortions allegedly performed by third party in Mexico, evidence that abortion is a crime under the laws of Mexico was immaterial, confusing, and clearly inadmissible for any purpose, but the admission thereof was not prejudicial error. Pen.Code, §§ 182, 274.

11. Criminal Law ⚷784(8)

In prosecution for conspiracy to bring about alleged abortions, wherein the prosecution depended entirely on circumstantial evidence to prove the alleged conspiracy, court should have given defendants' requested instruction that the law makes no distinction between circumstantial evidence and direct evidence, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Pen.Code, §§ 182, 274.

12. Criminal Law ⚷811(2), 1172(2)

In prosecution for conspiracy to bring about alleged abortions, wherein the prosecution depended entirely on circumstantial evidence to prove alleged conspiracy, instruction that jury may lawfully find an accused guilty of crime on circumstantial evidence, and that insofar as circumstantial evidence shows any acts, declarations, conditions or other circumstances tending to prove crime in question, or tending to connect defendant with commission of such crime, it may be considered by jury in arriving at a verdict, and that the law makes no distinction between circumstantial evidence and direct evidence as to degree of proof required for conviction, but respects each for such convincing force as it may carry, was erroneous as placing undue emphasis on circumstantial evidence relied on by the prosecution, but was not reversibly erroneous. Pen.Code, §§ 182, 274.

Joseph A. Ball, Long Beach, for appellant Roy L. Buffum.

Leonard Wilson, Los Angeles, for appellant Reginald L. Rankin.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Roy L. Buffum, a physician and surgeon, and Reginald L. Rankin, a layman, were indicted for violation of section 182 of the Penal Code, in that they conspired to use certain means to bring about miscarriages which would be in violation of section 274 of the Penal Code. Section 182 makes it a felony for two or more persons to conspire to commit any crime which is a felony. Section 274 defines the crime of abortion and makes the offense a felony. Section 275, in brief, makes it a felony for a woman to solicit and take any substance or submit to the use of any means with intent thereby to produce a miscarriage. Overt acts of Buffum listed in the indictment consisted of conversations which he had with each of the four women, his giving one of the women a slip of paper (which contained Rankin's telephone number); and with respect to defendant Rankin, his meeting with the four women at an appointed time and place and transporting them by automobile to a place in Mexico. It will appear in the recital of the evidence that there was testimony as to these and other overt acts. Each defendant appeals from the judgment against him and from the order denying his motion for a new trial.

A statement of the evidence sufficient for our purpose may be made without a detailed recitation of the testimony. Each of four women appeared at the office of Dr. Buffum, stated to him that she was pregnant and asked him to relieve her of that condition. In each case the doctor declined to do anything himself. He told one woman he would see what he could do for her and if he could do anything she would receive a telephone call. To another woman who was accompanied by her mother he said: "A man will call you tomorrow," and that the cost would be $200.

When woman number three explained her condition, the doctor said: "I never touch anything like that," and endeavored to persuade her to have her baby. He wrote down the telephone number which she gave him. She left his office, and did not see him thereafter. The fourth woman, divorced and unmarried, was advised: "Either to get married or find a good doctor." He gave her a telephone number which she wrote down. Shortly after these occurrences three of the women received telephone calls from Rankin. The fourth woman called a number Dr. Buffum had given her and talked with Rankin. Each woman explained her condition and her desire to be relieved of it. Rankin quoted the cost of an operation at $250 in some cases, and $500 in one case. Arrangements were made with Rankin by telephone for the women to meet him at a designated point in Long Beach. The appointments were kept, Rankin drove them to Tijuana where abortions were performed by a Dr. Estrada. Rankin then returned the women to their homes in California. The evidence with respect to the matters just related consisted of the testimony of the four women, and in one case the testimony of the mother of one of them. There was no direct evidence of any communication between Buffum and Rankin, although there was a strong inference that they were acting in concert. Defendants did not take the stand. Testimony was given by police officers that Buffum at the time of his arrest and afterwards made statements that he knew Rankin, knew that he was taking the women somewhere and that he had had previous dealings with him in such matters. This testimony was contradicted in material respects by a witness who heard the conversations. There was also evidence that Buffum had reimbursed the parents of one of the women for the cost of her hospitalization. So far as concerns the matter of evidence corroborative of the testimony of the women, it may be said that while we assume for present purposes that it was legally sufficient it was by no means of such weight as to force the jury to accept it as sufficient.

[1] We shall consider first what we deem to be the most important and a decisive claim of error. It is the contention of defendants that the four women were accomplices in the offense of conspiracy to violate section 274, and that the jury should have been so instructed. They requested instructions so stating, and appropriate instructions as to the necessity for corroboration. These instructions were refused and none of like import were given. The court did not instruct with respect to the principles of corroboration, nor was the jury instructed as to the definition of accomplices. Pen.Code, sec. 1111. The court also refused an instruction that if the women aided and abetted in the offense charged, they would be principals in the commission of that offense. We are of the opinion that the women witnesses were accomplices and that the requested instructions should have been given. A contrary conclusion was reached by the court in People v. Stone, 89 Cal.App.2d 853, 202 P.2d 333. One of the defendants in that case, H. V. Stone, had been convicted only of the offense of conspiracy to commit abortion, although other defendants were convicted of committing abortions as well. Stone requested and the court refused an instruction that the women witnesses upon whom abortions were alleged to have been committed were accessories to the conspiracy and that the defendants might not be convicted of that crime unless the evidence of such witnesses was corroborated by other competent evidence. It was held that refusal of the instruction was not error. The court said in 89 Cal.App.2d at page 869, 202 P.2d at page 343: "Our courts have recently held definitely that a woman who voluntarily submits to an abortion is not, as a matter of law, an accessory to the crime of abortion charged under Section 274 against another person. People v. Wilson, 25 Cal.2d 341, 346, 153 P.2d 720; People v. Clapp [24 Cal.2d 935 [835] 839, 151 P.2d 237]; People v. Malone, 82 Cal.App.2d 54, 68, 185 P. 2d 870; People v. Alvarez, 73 Cal.App.2d 528, 531, 166 P.2d 896; People v. Wilson, 54 Cal.App.2d 434, 446, 129 P.2d 149. * * * Upon the reasoning of the last cited author-

ities, which hold that a woman who submits to an abortion is not an accessory to the crime of abortion prohibited by Section 274, *it necessarily follows that, under the undisputed evidence of this case, that woman could not be an accessory to the crime of conspiracy charged against the defendants in the first count of the indictment.* * * * *If, upon a charge of abortion committed contrary to Section 274, the woman who submits thereto is not an accessory, certainly she would not be an accessory to an alleged conspiracy with other named defendants to commit that same abortion. The crime of abortion and that of conspiring to commit an abortion are separate and distinct offenses as provided by the California statutes.*" (Emphasis added.) We are of the opinion that the conclusion reached in the Stone case did not necessarily, or at all, follow from the holdings in the cited cases. Believing the court to have fallen into error, we cannot do otherwise than state our disagreement. With due respect for the court we are firmly of the opinion that its conclusion has no support in the cited cases, and that it is contrary to important and well settled legal principles. Essentially the holding in the Clapp case, 24 Cal.2d 835, 151 P.2d 237 was that in taking the conduct of a woman who participates in acts, through the use of substances or submission to an operation, with the intention of producing a miscarriage, and making of her acts a separate offense applicable to her, which is described and defined in section 275, it was the legislative intent to exclude her from guilt of violation of section 274. The woman was held not to be an accomplice under section 1111,[1] inasmuch as she would not be liable to prosecution under section 274. In the Stone case the only reason given by the court for its conclusion was that since a woman cannot be prosecuted for a violation of section 274, her conspiring with others to bring about a violation of the section would not be a criminal offense. The decision necessarily rests upon the proposition that one who is not liable to prosecution for the commission of an offense cannot be guilty of the crime of conspiracy to commit that offense. This proposition was accepted without citation of authority or discussion as to whether such is the law. The Stone case was followed in People v. Miner, 96 Cal.App.2d 43, 214 P.2d 557 without discussion of the point. It appears from the briefs that the cases which establish a contrary rule were not cited to the court.

[2] The prevailing rule, both state and federal, is that one need not be liable to prosecution for a given crime in order to be guilty of conspiracy to commit it.

The decisions are numerous and uniform. The leading federal cases are Williamson v. U. S., 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278, conspiracy to suborn perjury and U. S. v. Holte, 236 U. S. 140, 35 S.Ct. 271, 59 L.Ed. 504, conspiracy to violate the Mann Act, 18 U.S.C.A. § 2421 et seq. They have been cited and applied in cases of conspiracies with bankrupts U. S. v. Rabinowich, 238 U.S. 78, 86, 35 S.Ct. 682, 59 L.Ed. 1211; Shaffman v. U. S., 3 Cir., 289 F. 370; Tapack v. U. S., 3 Cir., 220 F. 445; Cohen v. U. S., 2 Cir., 157 F. 651; U. S. v. Rhodes, D.C., 212 F. 513, and in other conspiracy cases, U. S. v. Stevens, D.C., 44 F. 132, conspiracy to violate the census laws; Chadwick v. U. S., 6 Cir., 141 F. 225, conspiracy with a bank officer to fraudulently certify a check; Farnsworth v. Zerbst, 5 Cir., 98 F.2d 541, conspiracy with one having diplomatic immunity to violate the Federal Espionage Act, 18 U.S.C.A. §§ 794, 2388; Curtis v. U. S. 10 Cir., 67 F.2d 943, conspiracy to falsify records of a national bank; Ex parte O'Leary, 7 Cir., 53 F.2d 956, conspiracy to accept a bribe; U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 224,

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[1] Sec. 1111. "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

60 S.Ct. 811, 84 L.Ed. 1129, conspiracy to violate the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1–7, 15 note; Vannata v. U.S., 2 Cir., 289 F. 424, conspiracy to violate the National Prohibition Act, 27 U.S.C.A. Among the conspiracy cases from state courts often cited by both state and federal courts are Solander v. People, 2 Colo. 48, and State v. Crofford, 133 Iowa 478, 110 N.W. 921; Others are Johnson v. People, 33 Colo. 224, 80 P. 133; State v. Gilmore, 151 Iowa 618, 132 N.W. 53, 35 L.R.A.,N.S., 1084; Fields v. State, 107 Neb. 91, 185 N.W. 400; Edwards v. State, 113 Neb. 698, 204 N.W. 780; State v. Timm, 244 Wis. 508, 12 N.W.2d 670; Kraut v. State, 228 Wis. 386, 280 N.W. 327; Commonwealth v. Mannos, 311 Mass. 94, 40 N.E.2d 291, 301, accepting bribe; State v. Myers, 36 Idaho 396, 211 P. 440, accepting bribe; State v. Martin, 199 Iowa 643, 200 N.W. 213, adultery; State v. Davis, 203 N.C. 13, 164 S.E. 737, 745. See also People v. Wood, 145 Cal. 659, 79 P. 367; Wharton on Criminal Law, 12th Ed., Vol. 1, sec. 786, p. 1079.

[3] Accepting, as we must, the testimony of the women witnesses in the present case, it cannot be doubted that they actually conspired with the defendants to accomplish a violation of section 274. While it is true that they were immune from prosecution for violation of that section, it is only because the legislature created, by section 275, not an offense in addition to the one denounced by section 274, but a different and distinct offense for which, alone, they were liable to prosecution. It is clear from reading the two sections that there are acts which would be in violation of section 275 but not section 274. The Attorney General maintains that the reasoning of the court in People v. Clapp applies to the charge of conspiracy to violate section 274 and is authority for the proposition that the women here involved were not accomplices. As already stated, we cannot agree. As recognized in the Stone case, they are separate and distinct offenses. Agreements to commit crimes, followed by overt acts, are themselves crimes. We think there are sound reasons for our opinion that exemption from prosecution for the crime agreed to be committed is not exemption from liability to prosecution for conspiracy to commit it.

In People v. Lima, 25 Cal.2d 573, 154 P.2d 698, 701, the court stated the rule that one who receives stolen property and the thief, are ordinarily not accomplices in either crime but recognized an exception to the rule in the following language: "Where, as here, the prosecution evidence discloses the existence of a conspiracy or agreement whereby the principal prosecution witnesses were to steal and defendant was to purchase the stolen property, it is both logical and reasonable to hold that they are accomplices in the offense or offenses resulting from execution of such plan." Speaking of the holding in People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, supra, the court said: "We announced the rule that where the commission of a crime as defined in a statute requires participation of two or more persons but prescribes punishment for the acts of certain of the participants only, and another statutory provision prescribes punishment for the acts of others not subject to the first provision, the acts so distinguished are punishable as a separate and distinct crime and the statutory provision specifically defining the separate crime supersedes the general provisions of section 31 of the Penal Code which makes a person who aids and abets in the commission of any crime a principal therein. The present case, however, does not relate to a situation where different statutory provisions separately prescribe punishment for the acts of certain participants in a crime. On the contrary, the same sections of the Penal Code, namely, sections 489, 490 (theft) and section 496 (receiving stolen property), provide for the punishment of the acts perpetrated by each and all of the parties in execution of the conspiracy or prearranged plan to deprive owners of their olives. Section 31 of the Penal Code is therefore applicable to each of them since there is no provision superseding that section. And while, as stated above, the prosecution under the peculiar facts of this case may have had a right to elect which of the group should be prosecuted for theft and which for receiving stolen property, it could not thereby eliminate the conspiracy element and resulting accomplice relationship."

[4, 5] Although a woman who solicits and submits to an abortion is not an accessory in the attempted or committed offense she nevertheless conspires to procure the commission of the crime. She is subject to prosecution under section 182, if that section means what it says.[2] It specifies no exception. The implied exclusion of the woman from prosecution under section 274, recognized in People v. Clapp, has no parallel in a prosecution for conspiracy. An agreement to violate section 274 falls within the conspiracy section 182, namely, as a conspiracy to commit "any crime." If we were to hold otherwise, we would not only have to disregard the settled principle that amenability to prosecution for an objective crime need not exist in order that those who conspire to commit the crime or cause it to be committed may be guilty of conspiracy, but we would also have to indulge in judicial legislation on the subject, by narrowing the scope of section 182 in a material respect. The crime of conspiracy is not limited by statute to conspiracies to commit crimes for which the conspirators are liable to prosecution. If immunity of a woman from prosecution for conspiracy to violate section 274 exists for the reason that she is not liable to prosecution under that section, the same would be true of conspiracy to commit any other crime for which one of the conspirators would not be subject to prosecution. As we have said, to so delimit the scope of section 182 would be judicial legislation amounting to a rewriting of the section.

In concluding that the women witnesses in the present case were accomplices in the offense charged, we believe we are conforming to the ploicy of the State, as defined by legislation on the subject. It is declared in section 1108 of the Penal Code that upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence. Whatever may have been the considerations which led the legislature to erect this shield for the protection of those accused of the crime of abortion is of no moment. They were sufficient for the legislature, and the enactment was intended not only to shield the accused from conviction, but also from prosecution where the evidence would be merely that of the woman involved. But if the woman be held not to be an accomplice in conspiracy to violate section 274, then, notwithstanding section 1108, the accused could be charged with conspiring to violate section 274 and convicted upon her uncorroborated testimony. If such were the case, section 1108 would fail of its purpose, since every abortion, unless self induced, involves an agreement to commit it.

In People v. Lima, supra, 25 Cal.2d 573, 154 P.2d 698, 701, this ground of objection to dispensing with the necessity for corroboration of the testimony of those who are, in reality, accomplices, was pointed out by the Supreme Court. Immediately following its holding that the evidence disclosed the existence of a conspiracy to steal the property, and also for its purchase by one of the conspirators, the court said: "If we were to allow the conspiracy element to be disregarded and the accomplice relationship thereby eliminated, the prosecution could circumvent the rule, requiring corroboration of accomplice witnesses." A situation in which the accused could not be convicted of violation of section 274 because of the lack of corroboration of the testimony of the woman witness, and yet could be convicted of conspiracy to commit the offense upon her testimony alone, would be illogical and inconsistent. We cannot hold this to be the law.

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[2] Section 182. "If two or more persons conspire:

"1. To commit any crime;

"2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime;

"3. Falsely to move or maintain any suit, action or proceeding;

"4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises;

"5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

"They are punishable as follows:

"When they conspire to commit any felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony.

"When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the State prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both.

"All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done."

There is yet another reason which lends support to our views. If it were true that because a woman cannot be prosecuted under section 274 she cannot unlawfully conspire with others for the commission of an abortion upon herself, it would follow that her conspiracy with another person for the commission of acts in violation of that section would not be conduct for which either could be prosecuted, since, without her assent, there could be no agreement or conspiracy. This would also be true of any conspiracy between two people, one of whom could not be prosecuted for commission of the agreed crime. Section 182 contains no such exception. The case law is that there is none.

There can be no doubt that upon the evidence the four women, as well as the defendants, were subject to prosecution for conspiracy to violate section 275, even though they may not have been guilty of acts within this State which constituted a violation of that section. If they had been thus charged, all would have been accomplices whose testimony would require corroboration. It would be illogical if, for identical acts, conviction could be had for conspiracy to violate section 274 upon the uncorroborated testimony of the women, when the contrary would be true of conspiracy to violate section 275. All the confusion and inconsistencies we have pointed out are avoided when we give effect to the absence of any exception in section 182, and the absence of any other enactment, indicating a legislative intention to give women immunity from liability for conspiracy to violate section 274.

Defendants' instructions with respect to the necessity for corroboration should have been given. We do not feel assured that the verdicts would not have been different had they been given.

[6] Another claim of error is that the court refused an instruction requested by defendant Buffum that he should be acquitted if the jury found he agreed with the women to assist them but did not have an agreement with Rankin that they would both render them assistance. The court noted as a reason for refusing the instruction: "Girls might be guilty of conspiracy to violate section 275, not section 274." This was precisely the point defendant Buffum was making. He also could have been guilty of conspiracy to violate section 275. It was his contention that if the evidence disclosed that he made any agreement, it was with the women and not with Rankin. Proof of a conspiracy with the women to violate section 275, would not have supported a conviction of Buffum of the offense charged. In view of the women's testimony as to Buffum's willingness to help them, and the absence of direct evidence of any agreement between Buffum and Rankin, there was a basis in the evidence for the contention advanced in the requested instruction. It was for the jury to determine under proper instruction whether this theory of defense advanced by defendant Buffum was reasonable. Even if full credit had been given to the testimony of the women, the jury could have entertained a doubt as to whether a conspiracy existed between Buffum and Rankin. We do not question that the circumstances strongly indicated the existence of such an agreement, but we cannot say that it was an inference the jury would have been required to draw. In the absence of instructions the jury could not have been expected to distinguish between a conspiracy to violate section 274 and one to violate

section 275. It is a technical distinction, but it went to the foundation of the offense charged and the defense urged by Buffum. Defendants' argument that proof of an agreement between Buffum and the women, and of a separate agreement between Rankin and the women, would not of itself prove an agreement between Buffum and Rankin, could have been of little force or effect without an instruction such as the one requested. It was error to refuse the instruction. People v. Carmen, 36 Cal.2d 768, 228 P.2d 281.

Both defendants insist that an agreement in California to procure the commission of a crime in Mexico, followed by acts consistent only with an intent to consummate the crime outside the State, is not an offense under the laws of this State. They requested instructions to this effect, which were refused. They also contend, for like reasons, that if the conspiracy was to commit abortions in Mexico there was a fatal variance between the indictment and the proof. They insist that if any agreement and any overt acts were proved they were for the commission of offenses in Mexico and, further, that if the evidence was not conclusive to this effect it was a question for the jury to decide.

[7] The thread of the argument is: California cannot punish for abortions committed in Mexico; therefore the commission of an abortion in Mexico is not a crime under section 274; the conspiracy must be one to commit acts which would constitute a crime under the laws of California; abortions committed in Mexico are not crimes under our laws; wherefore, a conspiracy to commit abortions in Mexico is no crime at all. We agree with everything but the conclusion. Section 182 must be given a meaning which is consistent with a broad purpose to punish all activities which our laws define as crimes. A construction which favors effectiveness must prevail over one that would place criminal forces and activities beyond the reach of the law.

[8] The overt acts were charged in the information to have been committed in this State.[3] We have concluded that if they were shown to have been committed to effect the object of an agreement to commit abortions the prosecution was required to go no further in order to prove the offense; it was immaterial whether other acts were committed or agreed to be committed elsewhere.

Acts which are essential under a charge of conspiracy bear a relationship to acts "in execution or part execution" of an intent to commit a crime, which, under section 778a give the courts of our State jurisdiction to punish for a crime that is completed elsewhere. Whenever our courts have denied jurisdiction for territorial reasons it has been because no act constituting an essential ingredient of the crime was committed within the State. See People v. MacDonald, 24 Cal.App.2d 702, 76 P.2d 121; People v. McGowan, 127 Cal. App. 39, 14 P.2d 1036. Where jurisdiction has been upheld in cases of offenses committed partly in this State and partly elsewhere it has been because some act essential to a completed offense was committed within the State. People v. Harden, 14 Cal.App.2d 489, 58 P.2d 675.

If it were not for the principle stated in section 778a such acts would go unpunished. If, as defendants contend, the crime of conspiracy embraces only those agreements which plan consummation of the objective acts within the State we would have an absurd situation. Acts in part execution of an intent to commit a crime which would render one answerable for the objective crime under section 778a would not amount to a conspiracy under section 182. And yet the criminal intent and the overt acts in each case would be equally vicious and effective. There is no such inconsistency. If the objective crime is committed elsewhere, section 778a applies; if it is planned and partly executed within the State, section 182 applies, even though it is never consummated. We therefore reject the proposition that one may in California agree to commit acts which our laws declare to be crimes, proceed up to the State line in furtherance and part execution of the object of the agreement, consummate the crime over the border and say that he has committed no crime in California.

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[3] Section 184, Pen.Code. "No agreement amounts to a conspiracy, unless some act, besides such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done."

[9] Defendants' instructions to the effect that it is not a crime to conspire within this State to commit a crime elsewhere were properly refused. The People were not required to prove the agreement was to commit abortions in California. Under the views we have stated, even if the agreement had been to commit them in Mexico and sufficient overt acts had been committed in California, there would have been no variance in substance between the indictment and the proof.

[10] Defendants complain of error in the introduction, over their objection, of evidence that abortion is a crime under the laws of Mexico. Their contention is that the jury may have been confused by this evidence to the extent of believing that evidence of a conspiracy to violate the laws of Mexico, rather than those of California, would justify a conviction. They point out that no instruction was given that defendants were charged with conspiring to violate a law of California. The evidence was wholly immaterial, confusing, and clearly inadmissible for any purpose. We cannot hold the error to have been prejudicial in view of our conclusion that proof of an agreement to commit abortions in Mexico and of the overt acts, would have sustained a conviction of the offense charged.

The court gave an instruction on direct and circumstantial evidence, reading as follows: "Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testimony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect a defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either or a combination of both will support a verdict of guilt if it carries the convincing quality required by law, as stated in my instructions."

[11, 12] Defendants requested the following instruction: "Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, juries may lawfully find an accused either guilty or innocent of an offense charged. One is direct evidence and the other is circumstantial evidence. Direct evidence consists of the testimony of every witness who, with any of his own physical senses, perceived any conduct or act. All other evidence admitted in the trial is circumstantial, and insofar as it shows acts, declarations, conditions, or other circumstances, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof." This instruction was refused. The one that was given spoke only of the circumstantial evidence which tended to prove the commission of the crime and which would support a verdict of guilt, thus ignoring the circumstantial evidence that might have been favorable to the defendants. It placed undue emphasis upon the circumstantial evidence relied upon by the People. It was especially harmful because

the People were depending entirely upon circumstantial evidence to prove the alleged conspiracy. The defendants did not testify. Their defense was that the circumstances in evidence were consistent with non-existence of a conspiracy between them. The instruction they requested was fair and adequate. It was error to refuse it and to give the one that invited a consideration of the circumstantial evidence solely from the viewpoint of the prosecution. However, we do not hold the error to have been sufficiently prejudicial to justify a reversal. Other instructions were given to the effect that a conviction could not be had upon circumstantial evidence unless it was found to be consistent with guilt and inconsistent with innocence. These instructions minimized the effect of the error of directing special attention to the circumstances which were consistent with guilt, but the error remained. But in so holding we would observe that the continued use of an erroneous instruction cannot be justified by the fact that in various circumstances the error is not of sufficient gravity to cause a miscarriage of justice. It cannot be said too often that the primary requisite in the statement of guiding legal principles by means of instructions is utter impartiality and freedom from emphasis which tends to favor either of the parties.

The judgments and orders denying motions for new trial are reversed.

WOOD and VALLÉE, JJ., concur.

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108 Cal.App.2d 129

PEOPLE v. VAN WAY.

Cr. 4645.

District Court of Appeal, Second District,
Division 3, California.
Dec. 10, 1951.

Joseph R. Van Way was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., for procuring a place for a female as an inmate of a house of prostitution, and he appealed. The District Court of Appeal, Shinn, P. J., held that one accepting into his house of prostitution a woman procured by another is guilty of procuring a place for her as an inmate of such house and that appellant, who furnished the house, and another man, who furnished the girl, were both principals, and being jointly interested in the operation, the acts of each of them in furtherance of their common purpose were the acts of both in legal effect.

Judgment affirmed.

1. Prostitution 🔑1

One accepting into his house of prostitution a woman procured by another is also a procurer of such woman and guilty of procuring a place for her as an inmate in such house. Gen.Laws, Act 1906.

2. Prostitution 🔑1

One furnishing a girl as inmate of house of prostitution and one furnishing the house aided and abetted each other and were both principals in commission of offense of procuring a place for a female as an inmate in such a house, and being jointly interested in operation, acts of each in furtherance of their common purpose to keep inmates in house were acts of both in legal effect, so as to render owner of house, as well as man procuring girl, guilty of such offense. Pen.Code, § 31; Gen.Laws, Act 1906.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant Van Way and one Schooley were accused by information in two counts of procuring for a named female a place as an inmate in a house of prostitution. (Stats.1911, p. 9, Deering's Gen.Laws, Act 1906.) In a nonjury trial they were convicted on one count and dismissed as to the other. Their applications for probation and motions for new trial were denied. Van Way appeals, and urges as the sole ground for reversal insufficiency of the evidence.

Defendants did not testify. There was evidence of the following facts: Schooley operated a service station; One Hayes, assisted him in the station; two doors away from the station, in an alley, Van Way maintained and operated a house of prostitution with several inmates; Schooley directed men to the house, in which he was assisted by Hayes. Van Way managed the house and each night took half the earnings of the inmates. He paid Schooley $1 for each customer directed to the house and Hayes $5 per night for counting the visitors.

The woman in question, whom Hayes had met previously, came to the service station, where Hayes introduced her to Schooley; the latter offered her a place to work in appellant's house, which she accepted. Although appellant was unacquainted with her he accepted her as an inmate; she worked in the house for a number of weeks, and each night turned over to appellant half of her earnings, out of which he paid Schooley and Hayes.

The thread of the argument of insufficiency of evidence is that it was Schooley and not appellant who procured a place for the woman as an inmate of the house, and that appellant did nothing but provide the place and take half the woman's earnings. The conclusion urged is that although Schooley was guilty of the acts charged appellant was not. There are two complete answers.

[1, 2] It has been held that one who accepts into his house of prostitution a woman "procured" by another is himself a "procuror" of the woman. People v. Montgomery, 47 Cal.App.2d 1, 22, 117 P.2d 437. Under the same circumstances he is guilty of procuring a place for her as an inmate, the offense charged here. Schooley could not have procured a place for the girl in appellant's house until appellant had accepted her as an inmate. Appellant's acceptance was an indispensable element of the offense. Inasmuch as Schooley furnished the girl and appellant furnished the house, each had an equal part in the commission of acts which constituted the offense. Each aided and abetted the other and was a principal. (Pen.Code, sec. 31.) Moreover, we think the learned trial judge correctly inferred from the facts in evidence that Schooley and appellant, being jointly interested in the operation, had a common purpose and agreement to keep inmates in the house, and that each expected the other to do whatever was necessary to accomplish that purpose. The acts of one in furtherance of the common purpose and design were, in legal effect, the acts of both. The actions of Schooley, as described, could not be disavowed by appellant.

The judgment and order denying appellant's motion for a new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

PIRKLE et al. v. OAKDALE UNION GRAMMAR SCHOOL DIST. et al.*

Civ. 7954.

District Court of Appeal, Third District,
California.

Nov. 28, 1951.

Hearing Granted Jan. 24, 1952.

Action by John H. Pirkle, as guardian ad litem of William H. Pirkle and individually, against the Oakdale Union Grammar School District, City of Oakdale, County of Stanislaus, State of California, and others for personal injuries and medical, hospital and surgical expenses alleged to have resulted from negligence of defendants in failing to properly supervise and conduct play between school classes. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered judgment for the plaintiffs, and the defendants appealed. The District Court of Appeal, Van Dyke, J., held that, though statutory requirement for filing claim for damages within 90 days was procedural and subject to waiver by estoppel, evidence did not sustain implied finding that timely filing of claims had been waived.

Judgment reversed with directions.

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* Subsequent opinion 253 P.2d 1.

1. Estoppel ⚿62(4)

Statutory requirement that claim for damages against school district must be filed within 90 days is procedural and subject to waiver by estoppel. Education Code, § 1007.

2. Estoppel ⚿118

In action by son and father against school district for personal injuries and medical, hospital and surgical expenses based upon claim not filed within statutory period of 90 days, evidence did not sustain jury's implied finding that timely filing of the claims had been waived by the school district. Education Code, § 1007.

3. Schools and School Districts ⚿112

Claims statute, requiring verified claims for damages to be served on public officers and employees within 90 days, is applicable to claims against employees of school district, and compliance with statute is prerequisite to suit against such employees. Government Code, §§ 1980, 1981.

4. Municipal Corporations ⚿741(1)

Statute making service of verified claims for damages upon public officers and employees a prerequisite to suit, is concerned with liability of public officers and employees, and is not concerned with liability of public agencies. Government Code, § 1981.

5. Schools and School Districts ⚿112

Where father and son sought to recover damages from principal and athletic director of school for personal injuries and medical expenses alleged to have resulted from negligence of defendants, statute requiring verified claims for damages to be served on public officers and employees within 90 days as prerequisite to suit was applicable, notwithstanding provisions of Education Code relating to liability of school districts and employees, and, therefore, in absence of timely service of claim, upon director and principal, claimants were not entitled to recovery against defendants in their official capacities. Education Code, § 1007; Government Code, § 1981.

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Fred W. Reyland, Jr., County Counsel, William R. Mitchell, Asst. County Counsel, Modesto, Vernon F. Gant and Carlos J. Badger, Modesto, for appellants.

C. Ray Robinson and Herbert Hawkins, Merced, for respondents.

VAN DYKE, Justice.

On September 23, 1947, respondent William H. Pirkle was an 8th grade student at appellant Oakdale Union Grammar School. On that day he engaged in an interclass touch football game during the noon recess. The game was between the 7th and 8th grades. In the course of play he received an injury which necessitated removal of his spleen and one of his kidneys. Through his father, John H. Pirkle, as guardian ad litem, he brought action against the school district, the principal and the athletic director. John H. Pirkle also brought action to recover medical, hospital and surgical expenses incurred by him as a result of the accident. Both plaintiffs in their respective counts alleged that William's injuries were caused by the negligence of the defendants in failing to properly supervise and conduct the play between the classes. The jury's verdict awarded William $7,500 general damages and awarded his father $800. From the judgments entered thereon defendants appeal.

It is conceded that no claim was filed within ninety days of the injury as required by Section 1007 of the Education Code, formerly School Code Section 2.801. It is also conceded that William's claim against the district was filed 138 days after the injury occurred. With respect to the claim of John, the respondents assert and appellants dispute that the claim as filed for William included the claim of John.

Appellants all contend that the evidence is insufficient to support the implied findings of the jury that the school district and the two individual defendants were negligent and that such negligence, if any, was a proximate cause of the injuries sustained by William. We find it unnecessary to determine these matters since in our opinion we must sustain other contentions of appellants which dispose of the appeal.

Appellants contend that the failure on the part of either William or his father, John

Pirkle, to file and serve their respective claims as required by statute was fatal to their causes of action. The reply of respondents is that appellants were estopped by their conduct from objecting that the claims were not filed within time. They rely upon Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, claiming that the facts here justify the application of the rule therein declared. It is not and could not be contended that the filing of a claim is not mandatory and a condition precedent to suit. But the Farrell case held that the time requirement is procedural in nature and may be excused by estoppel, and the facts there pleaded were held sufficient, if proven true, to support a finding of such estoppel.

[1] Appellants first argue that the language of the statute here involved is so different in context from the statute dealt with in the Farrell case that the rule there laid down is inapplicable. We think there is no merit in the argument. Specifically, appellants say that a proper consideration of the statute here shows that the statute is the measure of the power of the governmental agency, the school district, in respect of the claim, and hence that no deviation from the procedure laid down by the statute can be dispensed with in any way. We see no significant difference in the statutes, and accordingly hold that the requirement as to the time within which a claim must be filed is procedural and subject to waiver by estoppel.

[2] However, we are unable to uphold respondents' claim that the facts relied upon by them do constitute an estoppel and on the contrary hold that the implied finding of the jury that the timely filing of the claims had been waived is without support in the evidence. The facts disclosed by the record are these: Within a day or two after William had been injured his father, John Pirkle, interviewed the principal, Gripenstraw, asking him if the school carried liability insurance and indicating to him that he, Pirkle, believed his son had been injured through the negligence of defendants. He was told that there was such insurance and that a report of the accident had been made to representatives of the insurance carrier. John Pirkle did not discuss the matter at all with Perrin, the athletic director, except in a casual way, having to do with the progress of William toward recovery. Gripenstraw told Pirkle that he might expect a representative of the insurance company to discuss the matter with him. Nothing was said to Pirkle by any of the defendants at any time with respect to the filing of claims. Some five or six weeks after the date of the injury one Drew called on John Pirkle and discussed the accident with him. Nothing was ever said between Drew and John Pirkle about the filing of claims. But Drew told John Pirkle that he was reporting on the matter to the insurance carrier and that they would consider whether or not there was negligence. He asked Pirkle what he would consider would be a proper amount of compensation to be paid if the insurance carrier should determine that there was negligence casting liability upon the district. Pirkle did not choose to state any amount at that time. Later, and within about three weeks of the expiration of ninety days from the date of the injury, Pirkle contacted Drew and remarked to him that he "had been requested by a number of friends to seek legal advice." Drew then advised him that before doing anything he should contact him again because he was expecting an answer from his company. Pirkle replied that "time was wasting" and that unless something within a reasonable length of time one way or another was told him he would seek legal advice. Drew replied that the report was due at any time and should be in any day. About a week later Pirkle telephoned Drew who said no reply had been received. Pirkle again stated he was going to seek legal advice if somthing wasn't done and Drew replied "Before you seek legal advice and put this with any attorney talk to me first." Notwithstanding the foregoing, and some two weeks prior to the expiration of the time for filing claims, Pirkle consulted attorneys. He first went to a Mr. Scott to whom he fully stated all of the facts concerning the injuries of his son. Mr. Scott considered the matter, but on the succeeding day told Pirkle he would

not take the case himself due to pressure of practice, but would send him to other attorneys. He gave Pirkle the names of two, and Pirkle immediately called upon one of them, a Mr. Damrell, to whom he also made a full statement of the situation. Mr. Damrell, according to Pirkle, examined into the matter, contacted the broker for the insurance carrier, learned that no settlement could be expected and finally reported to Pirkle that he also would decline the case. One other attorney refused to consider the case, basing his refusal, however, upon the fact that by the time he was consulted more than ninety days had elapsed since the injury. Thereafter respondents' present counsel were contacted and a claim was filed. These facts fall significantly short of the estoppel pleaded in the Farrell case. There was no duty upon the part of any of the defendants to counsel and advise Mr. Pirkle that the law required the filing of a claim. They were not called upon to speak on the matter by any inquiry of Pirkle's. The only facts which tend to support an estoppel are the statements attributed to Drew whereby he requested, as Pirkle put it, that Pirkle should not consult an attorney. But his request was ignored and Pirkle did consult, not one, but two attorneys in ample time to have filed the claim, and this he did shortly after he claims he was asked by Drew to refrain from doing so. Drew's endeavor to dissuade Pirkle from consulting an attorney was not the proximate cause of his failure to file claims. It must be borne in mind that the parties hereto throughout were adversaries, and at no time were respondents led to believe that liability was admitted or that a settlement would be made. No facts which would support a finding of estoppel against any of the defendants are presented by the record here.

The remaining question is whether it was necessary to file a verified claim for damages with the individual defendants, Gripenstraw and Perrin. Appellants Gripenstraw and Perrin contend that Section 1981 of the Government Code requires the filing of claims with them and that the failure to file such claims is fatal to the action against them. Section 1981 provides: "Whenever it is claimed that any person has been injured or any property damaged as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee, within 90 days after the accident has occurred a verified claim for damages shall be presented in writing and filed with the officer or employee and the clerk or secretary of the legislative body of the school district, county, or municipality, as the case may be. In the case of a State officer the claim shall be filed with the officer and the Governor."

Section 1980 of the Government Code defines "Officer" or "Officers" as follows: "Includes any deputy, assistant, agent or employee of the State, a school district, county or municipality acting within the scope of his office, agency or employment." The section defines "Person" as including any pupil attending the public schools of any school or high school district.

[3, 4] We hold that Section 1981 is applicable to employees of school districts, and compliance with the section is a prerequisite to suit against such persons. Numerous cases have held that this section is concerned with the liability of public officers and employees, and is not concerned with the liability of public agencies. In Veriddo v. Renaud, 35 Cal.2d 263, at page 264, 217 P.2d 647, at page 648, the court states: "Division 4 of Title 1 of the Government Code deals with 'Public Officers and Employees' and Chapter 6 of Division 4 treats of the 'Liability of Officers and Employees.' Study of the sections (1950–2002) which make up Chapter 6, and of the prior statutes upon which such sections are based, clearly indicates the intention of the Legislature to (1) define certain conditions of, and to prescribe procedural requirements for enforcing, the liability of public officers and employes for acts performed or damages arising in connection with performance of the duties of their office or employment (see §§ 1953, 1953.5, 1954, 1955, 1981); (2) permit the public agencies involved (the

state, school districts, counties and municipalities) to provide liability insurance to officers and employes at agency expense (§ 1956); (3) specifically, to require the filing of a claim with the public officer or employe and with the public agency (in the case of a state employe the filing is to be with the employe and with the Governor) in the cases specified in section 1981, quoted hereinabove; and (4) provide for the defense at public expense of certain damage actions brought against specified public officers and employes (§§ 2000, 2001, 2002), including this action against the state employe who is defendant here (sub. (b) (1) of § 2001)."

In discussing the applicability of Section 1981 to public employees the court stated in 35 Cal.2d at page 265, 217 P.2d at page 648: "As already pointed out, section 1981 falls within a chapter of the Government Code dealing with the liability of officers and employes, and if compliance with its provisions is not a prerequisite to suit against such persons on account of the claims specified in that section, then the section appears to be wholly meaningless, since it is not applicable to claims against a public agency. Such a viewpoint does not overlook the common law liability of an employe as an individual for his own negligence (see Mock v. City of Santa Rosa (1899), 126 Cal. 330, 344, 58 P. 826; Payne v. Baehr (1908), 153 Cal. 441, 444, 95 P. 895; Moore v. Burton (1925), 75 Cal.App. 395, 401, 242 P. 902), but simply recognizes that the Legislature has extended to public officers and employes, who incur liability in the performance of government service, the protection of a claims statute and the privilege of having defended at public expense those damage suits which are enumerated in Chapter 6."

The respondents contend that Section 1981 of the Government Code does not apply to defendants Gripenstraw and Perrin upon the ground that Section 1007 and following sections of the Education Code cover the entire field on the subject of claims and actions against school districts and employes thereof, and that these sections do not require that claims be filed with employes. Section 1007 provides: "The governing board of any school district is liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees in any case where a verified claim for damages has been presented in writing and filing with the secretary or clerk of the school district within ninety (90) days after the accident has occurred. The claim shall specify the name and address of the claimant, the date and place of the accident, and the extent of the injuries or damages received."

[5] We find this contention without merit upon a consideration of the purposes to be accomplished by these sections. Section 1007 of the Education Code requires the filing of a claim where the injured party seeks to impose liability upon the school district, whereas Section 1981 of the Government Code deals with the enforcement of claims against officers or employees.

Motion for judgment notwithstanding verdict was made by each defendant. They were denied. They should have been granted. Section 629 of the Code of Civil Procedure provides that in such cases an appellate court may order judgment to be so entered. This case was fully tried. Therefore, it is ordered that the judgments appealed from be reversed and the trial court is directed to enter judgment in favor of each defendant-appellant.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

107 Cal.App.2d 816

VARELA v. BOARD OF POLICE COM'RS et al.

Civ. 18499.

District Court of Appeal, Second District, Division 3, California.

Dec. 3, 1951.

Hearing Denied Jan. 31, 1952.

Raymond E. Varela brought a proceeding for a writ of mandate to compel the Board of Police Commissioners and the Board of Civil Service Commissioners of the City of Los Angeles to reinstate plaintiff as a sergeant in the Los Angeles police force. From a judgment of the Superior Court of Los Angeles County, Frank G. Swain, J., for defendants, plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the action was barred by plaintiff's failure to file a written demand for reinstatement with the Board of Civil Service Commissioners within the time required by the city charter under alleged facts clearly establishing his failure to prosecute his claims with the diligence demanded by the circumstances.

Judgment affirmed.

1. Municipal Corporations 🔑185(14)

Reinstatement of city police sergeant by Los Angeles City Board of Police Commissioners after his resignation to avoid threatened prosecution for offense of which he was subsequently acquitted was ineffectual, in view of charter provision vesting power to reinstate suspended or discharged members of police department in Board of Rights exclusively.

2. Municipal Corporations 🔑184(4)

The rule that threats to take lawful action do not amount to duress is inapplicable to case of city police sergeant resigning because of threats by officers of police department personnel division to prosecute him for offense of which he was subsequently acquitted.

3. Municipal Corporations 🔑185(14)

One asserting that his resignation as city police sergeant was wrongfully obtained by threats of officers of police department personnel division to prosecute him for offense of which he was innocent had rights of one claiming to have been unlawfully discharged, and hence was entitled to trial of such fact question by administrative board in first instance.

4. Municipal Corporations 🔑185(14)

A city administrative Board of Rights could lawfully repudiate threats by officers of city police department personnel division to prosecute city police sergeant for offense of which he was subsequently acquitted and such officers' alleged promise to refrain from such prosecution, if he resigned, as intolerable, seriously detrimental to department's morale and integrity, and contrary to public policy, and had discretionary power to reinstate him.

5. Mandamus 🔑13

Compliance with Los Angeles city charter provision, requiring suspended or discharged city employee to file written demand for reinstatement with city board of civil service commissioners within ninety days, by one seeking reinstatement as city police sergeant after his resignation because of threats by officers of police department personnel division to prosecute him for offense of which he was innocent, was prerequisite to maintainance of his action for writ of mandate to compel such board and board of police commissioners to reinstate him, though board of civil service commissioners has no jurisdiction to reinstate or refuse to reinstate suspended or discharged member of city police department.

6. Officers 🔑76

One seeking reinstatement in public employment must act promptly in prosecution of his claim and exercise diligence related to circumstances of case.

7. Officers 🔑76

Whether one seeking reinstatement in public employment acted diligently in prosecution of his claim depends, not only on lapse of time, but also on consequences attributable to delay, such as changed circumstances.

8. Municipal Corporations 🔑185(14)

Though section of Los Angeles city charter, authorizing Board of Rights to suspend or remove police department employee on finding him guilty of acts charged against him or to vacate action taken against employee found not guilty does not provide for trial of question whether employee resigning under duress should be reinstated, Board has implied power to reinstate him.

9. Estoppel ⚿62(4)

The principles of estoppel may not be applied to bar Los Angeles city board of police commissioners and board of civil service commissioners from asserting defense of laches because plaintiff in mandamus proceeding to compel such boards to reinstate him as city police sergeant failed to act with diligence demanded under circumstances after his resignation from such possession because of threats by officers of police department personnel division to prosecute him for offense of which he was innocent.

10. Estoppel ⚿99

The doctrine of estoppel is applied defensively and operates to prevent one from taking unfair advantage of another, but not to give unfair advantage to one seeking to invoke doctrine.

11. Mandamus ⚿143(2)

Where time for filing of charges against city police sergeant expired while he was negotiating for reinstatement after his resignation because of alleged threats by police department personnel division officers to prosecute him for offense of which he was subsequently acquitted, his action for writ of mandate to compel city boards of police commissioners and civil service commissioners to reinstate him was barred by his failure to file written demand for reinstatement with board of civil service commissioners within time required by city charter under alleged facts clearly establishing his failure to prosecute claims with diligence demanded by circumstances.

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Victor O. Geretz, Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., George William Adams and John F. Feldmeier, Deputy City Atty., all of Los Angeles, for respondents.

SHINN, Presiding Justice.

Raymond E. Varela petitioned the superior court for a writ of mandate to compel defendants to reinstate him as a sergeant in the Los Angeles Police Force. The demurrer of all defendants to the petition was sustained without leave to amend and Varela appeals from the judgment thereafter entered.

It was alleged in the petition that in December, 1948, appellant, then a police sergeant, was accused of accepting a bribe. The accusation was made by officers of the personnel division of the Police Department who interrogated appellant for a period of five hours, during which time he was not allowed counsel. During the interrogation Varela was told that if he did not resign he would have to face prosecution for the offense, but that if he resigned there would be no prosecution with its attendant disgrace, humiliation and adverse publicity; as a result of this pressure appellant resigned, although he was innocent. His resignation was accepted by the Chief of Police and the acceptance approved by the Board of Police Commissioners December 8, 1948. Shortly thereafter he was charged with bribery by criminal complaint, was tried and acquitted of the charge in February, 1949. Soon after his acquittal Varela met with two members of the Board of Police Commissioners who assured him they would reinstate him if he would refrain from filing a claim for reinstatement until after the municipal elections of May 31, 1949. Varela relied on these representations and did not at that time file a demand for reinstatement as required by section 112½ of the City Charter. After the election Varela did not file a demand but corresponded with the Police Commissioners from June 14, 1949, to November 2, 1949, seeking the promised reinstatement. On November 23, 1949, the Board of Police Commissioners adopted a resolution rescinding the action of the board taken December 8, 1949, ordering his immediate restoration to his position as a member of the department, and ordering a citation of appellant before a Board of Rights for a hearing on the charge leading to his resignation.

On November 30, 1949, the Board of Civil Service Commissioners refused to accept the reinstatement. On February 9, 1950, Varela filed a demand for reinstatement with the Civil Service Commission, which was denied. On July 19, 1950, the petition for writ of mandate was filed and on October 11, 1950, the alternative writ issued.

If the resignation of plaintiff was wrongfully obtained he was in the position of one who had been wrongfully discharged. Moreno v. Cairns, 20 Cal.2d 531, 127 P.2d 914. Conceding that such was the status of appellant, if the resignation was involuntary, the parties advance the following contentions; appellant says that he has been reinstated by the Board of Police Commissioners and that respondents should be compelled to respect his rights as a member of the department. Respondents say that the facts alleged in the petition were insufficient to show that appellant's resignation was involuntary in a legal sense. They deny that the Board of Police Commissioners had authority to reinstate appellant. They assert that appellant cannot maintain the present action without having first made a demand upon the Board of Civil Service Commissioners for reinstatement, which he failed to do within the time prescribed by section 112½ of the City Charter. They maintain also that appellant's claims must be rejected because of his failure to prosecute the same with diligence. Appellant replies that respondents are estopped to take advantage of his failure to make a timely demand for reinstatement, and that the facts which he has pleaded sufficiently excuse his failure to act more promptly.

In discussing appellant's first contention we must look to the charter provisions which invest certain boards with authority in the matter of lay-off, suspension or removal, and reinstatement of city employees.

Section 112 provides in substance that removal, discharge or suspension of an employee, other than members of the Police Department and Fire Department in the classified civil service, is subject to review by the Board of Civil Service Commissioners which may, after investigation, sustain a removal, discharge or suspension, or vacate the same.

Section 112½ [1] provides that a person who has been laid off, suspended or discharged, may not maintain an action for reinstatement or for compensation unless within 90 days he files with the Board of Civil Service Commissioners a written demand for reinstatement.

[1] The charter does not invest the Police Commission with the power to reinstate members of the department who have been laid off, suspended or discharged. That power is vested exclusively in Boards of Rights.

Sections 135, applying to firemen, and 202, applying to policemen, provide (except as to resignations or temporary suspensions) that no employee of either department shall be suspended, removed, deprived of his office or otherwise separated from the service except upon a finding of "guilty" of specific acts charged against him. The sections outline procedure for trial of the accusation before a Board of Rights where the employee has been suspended or relieved from duty. The board has the power to impose penalty by way of suspension or removal upon a finding of "guilty," or to vacate the action taken against the employee. The attempted reinstatement of appellant was ineffectual.

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1. "Whenever it is claimed by any person that he has been unlawfully suspended, laid off or discharged, and that such lay-off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended or discharged. Such demand for reinstatement must be filed with the Board of Civil Service Commissioners. * * * Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. * * *"

[2–4] We shall consider next the contention of respondents that under the facts pleaded appellant's resignation must be regarded as having been given voluntarily. They rely upon the rule that threats to take action which may be taken lawfully, do not amount to duress, and they say that since it was not unlawful for the members of the Police personnel division to prosecute appellant, there was nothing wrong in their uttering threats of prosecution; therefore, they say, appellant's resignation if induced by such threats was nevertheless a voluntary one. We cannot agree that the rule has application to the case of appellant. When appellant asserted that his resignation was wrongfully obtained, he had the rights of one claiming to have been unlawfully discharged, that is to say, a right to the trial of that question of fact. It was a question in the first instance for an administrative board. The question here is whether the triers of facts could, within their discretionary powers, upon the facts alleged, find that plaintiff's resignation was not given voluntarily. We do not doubt that an administrative board could lawfully repudiate the alleged threat of prosecution and the alleged promise to refrain therefrom if plaintiff would resign, as intolerable, seriously detrimental to the morale and integrity of the police department, and contrary to public policy. It would be presumptious for the courts to so limit the discretionary powers of a city administrative board as to require it to withhold reinstatement of an employee whose resignation had been obtained by such unfair and oppressive means. We hold, therefore, that upon the facts alleged plaintiff was in the position of one who had been wrongfully discharged.

[5] Appellant tacitly admits that he was required to file a demand for reinstatement as required by section 112½. It was so held in 20 Cal.2d 531, 127 P.2d 914, supra, a case which involved a fireman who claimed his resignation had been obtained unlawfully. Following this decision, we hold that compliance with section 112½ was a prerequisite to the maintenance of the present action, although the Board of Civil Service Commissioners has no jurisdiction to reinstate or refuse to reinstate a member of the police or fire departments who has been suspended or discharged.

[6, 7] We are thus brought to the question whether the facts pleaded by appellant are sufficient to excuse noncompliance with section 112½. Inextricably involved is the further question whether the facts alleged show that appellant has acted diligently in the prosecution of his claim to reinstatement. In support of his argument that his failure to make demand for reinstatement within 90 days was excusable, plaintiff relies upon Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323, in which a claimant for damages against the county was held to have been excused from filing a claim with the county by the representations, assurances and promises of an agent of the county in his efforts to negotiate a settlement. If plaintiff had in other respects acted diligently we would have occasion to decide whether the failure to comply with section 112½ was excusable under the salutary doctrine applied in the Farrell case; but there is another rule which applies to the efforts of one seeking reinstatement in public employment, namely, that he must act promptly in the prosecution of his claim. Diligence, of course, is related to the circumstances of the case. It is required of those seeking reinstatement in public positions for the reason that many changes may take place, especially in the classified civil service, because of the removal of a single employee. Whether one has acted with diligence depends not alone upon the elapse of time, but also upon consequences attributable to a delay, consisting, perhaps, of changed circumstances. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 680, 62 P.2d 1047, and cases there cited.

[8] Appellant engaged in negotiations with the Board of Police Commissioners until November 23, 1949, at which time the board purported to reinstate him and ordered that he be cited to appear before a Board of Rights. It was not until the following February that he filed a demand with the Board of Civil Service Commissioners; in July, following, he instituted

the present action and in October obtained an alternative writ. Appellant, being in the position of one who had been wrongfully discharged, was entitled to a trial before a Board of Rights, as the Board of Police Commissioners had directed. It is true that section 202 does not provide for the trial of the question whether one who has resigned under duress should be reinstated, but the board nevertheless has that power. It is the only body authorized by the charter to sustain an order of suspension or removal or to vacate it. It is the only body invested with the power to remove a member of the police force or to otherwise separate him from the service. Either the authority must be implied or it does not exist in any officer or body. There is an expressed provision in section 112 which deprives the Civil Service Commission of all authority with respect to the removal or reinstatement of members of the police and fire departments.

It may not be questioned that appellant and the members of the police commission believed that the board had power to reinstate appelant. When the board attempted to reinstate him it also ordered that he be cited before a Board of Rights, which order could have related only to the trial of charges based upon appellant's conduct which had led to his prosecution for bribery. Appellant is here confronted by a difficulty which, in our opinion, is decisive of the case. It is provided in section 202 that a member of the police department may not be tried except upon a complaint charging misconduct within a year immediately preceding the filing of the complaint. In the absence of an allegation in the petition as to the date of the acts of appellant which led to his prosecution, we may assume that a year had not expired on the 23rd day of November, 1949, when the board ordered that appellant be cited. The alleged conduct must have occurred prior to December 8, 1948, the date appellant's resignation was accepted. It is not alleged that any complaint was filed against appellant, and we must assume none was filed. Therefore, while appellant was negotiating for his reinstatement, the time expired for the filing of charges against him.

[9, 10] The principles of estoppel may not be applied here to bar respondents from asserting the defense of laches, consisting of the failure of appellant to act with the diligence which the circumstances demanded. The doctrine of estoppel is applied defensively; it operates to prevent one from taking an unfair advantage of another but not to give an unfair advantage to one seeking to invoke the doctrine. Franklin v. Merida, 35 Cal. 558, 575; Little v. Union Oil Co., 73 Cal.App. 612, 621, 238 P. 1066; Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 89 P.2d 732. If the delay was due to a mutual misconception of the authority of the Board of Police Commissioners, the fault was no less that of appellant than it was of the board. Due to the delay the city has lost a right to put appellant on trial before a Board of Rights, and if he should prevail in the present proceeding he will have gained a corresponding advantage. Estoppel may not be used to bring about this unjust result.

[11] We hold, therefore, that appellant's action was barred by his failure to comply with section 112½ of the charter under the facts alleged, which facts clearly establish a failure upon his part to prosecute his claims with the diligence which the circumstances demanded. The demurrer of respondents was properly sustained without leave to amend.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

In re CANFIELD'S ESTATE.

EASTMAN v. KOPASZ.

Civ. 18601.

District Court of Appeal, Second District,
Division 3, California.

Nov. 28, 1951.

As Modified Dec. 5, 1951.

Rehearing Denied Dec. 27, 1951.

Hearing Denied Jan. 24, 1952.

Proceedings in the matter of the estate of Lee Canfield in which petition of Dorothy O. Eastman, executrix of the estate of Lee Canfield, for confirmation of sale of an apartment house was objected to by John C. Kopasz as representative of one of the heirs of Canfield. The Superior Court of Los Angeles County, George Francis, J., entered order confirming the sale of real and personal property and John C. Kopasz appealed. The District Court of Appeal, Shinn, J., held that when property was such that it could be partitioned without prejudice to the owners and without inconvenience, court had no authority to order the sale rather than to partition.

Order reversed with directions.

1. Executors and Administrators ⚷326

Under statute providing that executor may make sale of estate assets to satisfy obligations of estate or when it is shown to be for the advantage of the estate, sale by executrix of realty when only purpose thereof was to dispose of property in order to distribute to heirs in cash was not sustainable as sale for advantage of estate when estate was ready for distribution without necessity of sale. Probate Code, § 754.

2. Executors and Administrators ⚷326

Where estate was ready for distribution without sale of realty, that certain realty which constituted portion of assets of estate was losing value was not a sufficient reason for sale under statute allowing sale for advantage of estate. Probate Code, § 754.

3. Partition ⚷36

Where heirs of estate had entered into agreement for compromise as to their distributive shares and had indicated therein that they desired certain real property sold to facilitate distribution of estate, and none of heirs wished to take property at its then appraised value, proper procedure to be followed by executrix was to petition court to make such partition, allotment or division of property as would be equitable and would avoid distribution of undivided interest. Probate Code, § 1100.

4. Partition ⚷77(3)

Under statute providing that when parties entitled to distribution in realty or personalty of decedent have not agreed among themselves to partition or other division thereof, any one of parties, or executor or administrator, may petition court for partition or division in such manner as will be equitable and will avoid distribution of undivided interest, court acts as it would in action for partition or sale of property held under tenancy in common, and if property is such that it can be partitioned without great prejudice to owners, or can be conveniently allotted to any one party, court has no authority to order sale rather than to partition. Probate Code, § 1100.

5. Partition ⚷77(3)

Where three devisees and legatees were entitled to equal distributive shares of estate and compromise agreement, gave executrix right to sell realty in order that there might be distribution in cash in lieu of undivided interest to parties in realty, order confirming sale of realty for sum less than one third total value of estate was improper when one of parties entitled to distribution indicated his willingness to accept property as part of his distributive share at higher bid than was offered at sale, since partition in kind must be made by court when same can be done without prejudice to owners and without inconvenience. Probate Code, § 1100.

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Blanche & Fueller, Pasadena, Montgomery G. Rice, La Habra, of counsel, for appellant.

Walker & Horn, Long Beach, Roger W. Young, Long Beach, of counsel, for respondent.

SHINN, Presiding Justice.

Dorothy Eastman, executrix of the Estate of Canfield, filed a petition for confirmation of sale of an apartment house. John Kopasz (surviving husband and personal representative of the estate of Marvel I. Canfield Kopasz, deceased, a daughter of Canfield) objected to the sale, contending there was no reason for it, since the estate was ready for final distribution and the estate of Mrs. Kopasz was willing to take the property in question in partial distribution of the Canfield estate. The court confirmed the sale under Prob.Code, sec. 754, and Kopasz appeals.

Lee Canfield died testate in March, 1948, leaving an estate of approximately $500,000 which consisted of securities, a substantial amount of cash and several parcels of improved and unimproved real estate in Los Angeles and Long Beach. The will left the estate to the surviving spouse, Alice Canfield, and two daughters, Dorothy O. Eastman and Marvel I. Canfield Kopasz. Dorothy Eastman was appointed executrix. During 1948 and 1949 there were disputes among the three heirs involving money claims against the estate, as well as efforts by the widow and Marvel to have the executrix removed. On February 24, 1950, an agreement compromising the removal proceeding and all of the claims was entered into by the three heirs. By this agreement the claims were allowed in part and the remaining estate, after creditors claims, taxes and administrative expenses, was to be divided one-third to each of the parties. Insofar as it concerned claims against the estate the agreement was approved by the court prior to the present proceeding.

In addition to compromising claims, the agreement provided for compromise as to the distributive shares of the parties. At the time the agreement was made the estate was ready for final distribution. The estate consisted of over $70,000 in cash, $95,000 in notes receivable, substantial amounts of stocks and bonds and several parcels of real property including that here involved (which was then appraised at $42,000). The only reason for delaying distribution was that the three beneficiaries did not want to take undivided interests in the real property and it was not considered feasable to distribute any part of it in kind. They attempted to solve this problem by inserting in the agreement a section[1] authorizing the executrix to sell the real property and then distribute cash. It was also provided that any of the parties could take trust notes at their appraised values and that the stocks and bonds should be divided equally as far as that was possible, adjustment for odd amounts to be made in cash. Subsequent to the date of the agreement the property in question was reappraised at $38,500. The executrix offered the property for sale and accepted a bid of Mr. and Mrs. Hancock of $35,000. Immediately upon hearing of the proposed sale, appellant John C. Kopasz, as executor of the estate of Marcel I. Canfield Kopasz, who had died in July, 1950, sent a telegram to the executrix informing her that the estate of Mrs. Kopasz would be willing to take the parcel in partial distribution of the

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[1] Insofar as here pertinent the section reads as follows: "*Sixth* That after the payment of administration expense and Federal estate taxes, and the allowed claims the rest and remainder of the estate will be distributed in the following manner: * * * [one-third to each of the three heirs].

"*Said distribution shall be made* in cash so far as possible, and *in kind if division can be made in severalty and not jointly.* * * *

"The real property now on hand for distribution *is such that the same cannot be allotted or divided in kind*, and therefore it is agreed among the parties that the Executrix shall sell the said real property and furniture in accordance with the provision of Division III, Chapter XIII, Articles 1, 2 and 3 of the Probate Code [secs. 751–64], and the proceeds likewise shall be divided equally between the parties. In connection with said sales, each of the parties shall be apprised of the highest and best bid offered to the Executrix for the said properties, and any of the parties may elect to bid a greater amount than the highest and best offer received, in which event said sales shall be consummated with the party so offering, subject to confirmation by order of the Superior Court." [Emphasis added.]

Canfield estate at a valuation of $35,001. On the ground the offer was not to pay cash, the executrix rejected it and petitioned the probate court for approval of the sale to Hancock. Appellant filed timely objection to approval of the sale and also filed a petition for partition before distribution, whereby the Marvel Kopasz estate would get the real property in question at a valuation of $35,001 and the other two heirs would receive a like amount in cash. The sale was approved.

Sales of estate property may be made by an executrix only as directed in the will or as provided for by statute. Haynes v. Meeks, 20 Cal. 288, 312. The only statutory provisions authorizing approval of such sales are Probate Code, section 754[2] (probate sale), and 1103[3] (sales on petition for partition under section 1100[4]). The question presented by this appeal is whether the proposed sale would properly be held under section 754 or under section 1103. Respondent contends the former section is proper, appellant the latter.

[1, 2] Under section 754, a sale of estate assets may be made by the Executor only where it is to satisfy obligations of the estate or is shown to be for the "advantage" of the estate. In her petition the executrix stated that this sale was necessary in order to "liquidate the estate for distribution." This is not a ground for a probate sale under section 754, nor was it a fact. In confirming the sale the court found that it was to the advantage of the estate to sell the property. This finding is not supported by the evidecne, by which it was shown that the only reason for the sale was to dispose of the property in order to distribute cash. Evidence was introduced to show the property was losing value but this was wholly immaterial under the circumstances and not a sufficient reason for a sale when the estate was ready for distribution without the necessity of a sale. See Estate of Rawitzer, 175 Cal. 585, 592, 166 P. 581. The court erred in treating the petition as one under section 754, and in finding that a sale would be to the advantage of the estate.

[3, 4] The procedure of section 1103 should have been followed. The heirs by their agreement indicated they wanted the property sold to facilitate distribution of the estate.[5] None of them wished to take the property at its then appraised value. The executrix should have proceeded at the request of the heirs to petition the court under section 1100, pursuant to which the court may partition the property or order a sale under section 1103. The grounds for

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[2] Sec. 754. "In selling property to pay debts, legacies, family allowance or expenses, there shall be no priority as between personal and real property. When a sale of property of the estate is necessary for any such purpose, or when it is for the advantage, benefit, and best interests of the estate and those interested therein that any property of the estate be sold, the executor or administrator may sell the same, either at public auction or private sale, using his discretion as to which property to sell first, except as provided by Sections 750 and 751 of this code.

"The executor or administrator in making any such sale may sell the entire interest of the estate in the property or any lesser interest or estate therein."

[3] *Sec. 1103.* "The court shall proceed to take evidence and to partition, allot and divide the property so that each party shall receive property of a value proportionate to his interest in the whole, and for that purpose it may direct the executor or administrator to sell any property which cannot be partitioned without great prejudice to the owners and which cannot conveniently be allotted to any one party. The sale shall be conducted and confirmed in the same manner as other probate sales. Any two or more parties may agree to accept undivided interests."

[4] *Sec. 1100.* "When two or more heirs, devisees or legatees are entitled to the distribution of undivided interests in any real or personal property of the decedent and they have not agreed among themselves, before distribution, to a partition, allotment or other division thereof, any one or more of them, or the executor or administrator, at the request of any one or more of them, may petition the court to make such partition, allotment or division of the property as will be equitable and will avoid the distribution of undivided interests."

[5] See *infra,* note 1.

the petition would be that the heirs did not want to hold undivided interests in realty and could not agree among themselves as to a division of the property. In proceeding under section 1103 the court is acting as it would in an action for partition or sale of property held under tenancy in common. If the property is such that it can be partitioned without great prejudice to the owners, or can be conveniently allotted to any one party, the court has no authority to order a sale rather than to partition. Prob. Code, sec. 1103; Williams v. Wells Fargo Bank, 56 Cal.App.2d 645, 133 P.2d 73; Faires v. Pappmeier, 104 Cal.App.2d 713, 232 P.2d 41. The "property," insofar as it is presently involved, consists of real property with a valuation of $35,000 and cash in the sum of at least $70,000. Three tenants in common had an equal interest, so division would be of $35,000 in value to each. If the sale to Hancock were approved the estate would receive $35,000 and each of the heirs would be entitled to distribution of $35,000 in cash. If the order of partition were made according to appellant's offer, the estate of Kopasz would receive their shares in cash. It is apparent that the position of Mrs. Eastman and Mrs. Canfield would be identical whether the sale were made *or* the partition and distribution in kind were made as requested by appellant.

[5] It would appear that by its order the court was attempting to give effect to the provision of the agreement for a sale of the property which, at the time of the agreement, none of the heirs was willing to accept at a valuation of $42,000. But whether or not appellant was substantially complying with the agreement, effect should have been given to the mandatory provisions of the statute by granting partition. We think the situtation well illustrates the wisdom of requiring partition in kind where it can be accomplished without great prejudice to the owners, and the property can conveniently be allotted to any one party. Appellant evidently regarded the proposed sale as a sacrifice of the property. A clear purpose in placing limitations upon the powers of the court in partition proceedings is to protect owners from deprivation of their property for less than they consider it to be worth.

The undisputed facts were such as to require the court to deny confirmation of the sale and to grant the petition of appellant.

Included with the real estate for which Hancock and wife offered $35,000 and which the Estate of Marvel I. Canfield was willing to accept at a valuation of $35,001, was furniture located on the premises of the value of $100. Our holding applies to the furniture as well as to the real estate.

The order is reversed with directions to deny the petition of the executrix and to take further proceedings in accordance with the views herein expressed.

PARKER WOOD and VALLÉE, JJ., concur.

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107 Cal.App.2d 823

FRANCIS v. McCOLGAN.

Civ. 18504.

District Court of Appeal, Second District,
Division 1, California.

Dec. 4, 1951.

Hearing Denied Jan. 31, 1952.

Action by Ada Davis Francis, executrix of the will of J. D. Perry Francis, deceased (substituted as party plaintiff in lieu of J. D. Perry Francis), against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, seeking refund of tax payments on ground that deceased, as resident of California, when computing his state income tax, could deduct from his gross income alimony paid to a non-resident former wife. The Superior Court, Los Angeles County, F. Ray Bennett, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Drapeau, J., held that resident husband, when computing his state income tax, could deduct from his gross income, alimony paid to non-resident former wife under property settlement incident to foreign divorce decree where situs of property from which alimony payments were made was in California.

Affirmed.

Taxation ⚿1031

Resident husband when computing his state income tax could deduct from his gross income alimony paid to non-resident former wife under property settlement incident to foreign divorce decree where situs of property from which alimony payments were made was in state. Revenue and Taxation Code, §§ 17104, 17317.5.

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Edmund G. Brown, Atty. Gen., James E. Sabine and Edward Sumner, Deputy Attys. Gen., for appellant.

Heaney, Price, Postel & Parma and Paul D. Kolyn, all of Santa Barbara, for respondent.

DRAPEAU, Justice.

J. D. Perry Francis was a resident of the State of Missouri for many years. While in that state he was divorced from his wife. Incident to the divorce, he made a property settlement and agreement to pay her $25,000 a year, in monthly installments. He made these payments until the lady died in 1945. She remained a resident of Missouri until her death.

In January of 1942, Mr. Francis moved from Missouri to Santa Barbara, California, and became a resident of California. He continued to be a resident of this state until he died in 1950.

In computing his personal income tax in California for the years 1943 and 1944, Mr. Francis deducted from his gross income payments made to his former wife during those years. These deductions were disallowed by California's Franchise Tax Commissioner, who assessed an additional tax against Mr. Francis of $912.45 for 1943, and $1,417.15 for 1944.

Mr. Francis paid the additional tax under protest, and made demand for refund. His demand was refused, and he brought this action for recovery of the amounts paid. When he died in 1950, Ada Davis Francis, executrix, was substituted as plaintiff. In 1949 the Legislature abolished the office of Franchise Tax Commissioner, created the Franchise Tax Board, and provided that actions like this do not abate but continue in the name of the Franchise Tax Board.

Judgment was against the state, from which judgment appeal has been perfected.

But one problem is presented, which may be summarized as follows: May a divorced husband, a resident of California, deduct from his gross income alimony paid to a nonresident former wife, when he computes his income tax in this state?

The Attorney General argues that in the case of nonresidents gross income for California income tax purposes includes only income from sources within this state; that the right of the former wife to receive $25,000 a year from her former husband was intangible personal property which had its situs at her domicile in Missouri; that income of nonresidents from intangible personal property is not income from sources within this state unless the property has acquired a business situs here; that the concluding sentence in Section 17317.5 of our Personal Income Tax Law, Revenue and Taxation Code, provides that in computing net income: "If the amount of any payment is * * * stated not to be includible in the husband's gross income, no deduction shall be allowed with respect to that payment under this section"; and that it was not the purpose of the Legislature of this State to permit alimony payments such as this to be deducted from gross income of a resident of California.

Respondent argues that Sections 17104 and 17317.5 of the law specifically authorize and permit such deductions to be made. Section 17104 provides: "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife. Such amounts received as are attributable to property so transferred shall not be includible in the gross, income of such husband."

Section 17317.5 provides: "In computing net income there shall be allowed as a deduction, in the case of a husband described in Section(s) 17104 * * * amounts includible under those sections in the gross income of his wife, payment of which is made within the husband's taxable year."

No cases have been found, or brought to the attention of this court, which bear directly upon the problem. From analysis and consideration of the Personal Income Tax Law as a whole, it appears to this Court that our Legislature did not intend to make any distinction between California husbands paying alimony to nonresident wives, and California husbands paying alimony to resident wives. It would be unjust state policy to penalize men who come here to live, and to deny them the right to deduct alimony paid to former wives who live in other states. It is logical to conclude that property brought to California, which is the source from which payments to nonresident wives are made, fixes the situs of the obligation in this state, with the right in the taxpayer to claim such alimony as a deduction from his gross income.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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107 Cal.App.2d 826

SILBERBERG v. FRANCHISE TAX BOARD.

Civ. 18505.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1951.

Hearing Denied Jan. 31, 1952.

Action by M. B. Silberberg, as executor of the will of Ernst Lubitsch, deceased, against the Franchise Tax Board seeking refund of tax payments on ground that plaintiff, as resident of California, when computing his state income tax, could deduct from his gross income alimony paid to a non-resident former wife. The Superior Court, Los Angeles County, F. Ray Bennett, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Drapeau, J., held that resident husband, in computing his State income tax, could deduct from his gross income alimony paid to nonresident former wife under property settlement incident to California divorce decree.

Affirmed.

Taxation 🔑1031

Resident husband, when computing his State income tax, could deduct from his gross income, alimony paid to nonresident former wife under property settlement incident to domestic divorce decree.

Edmund C. Brown, Atty. Gen., James E. Sabine and Edward Sumner, Deputy Attys. Gen., for appellant.

Mitchell, Silberberg & Knupp, and John L. Nourse, all of Los Angeles, for respondent.

DRAPEAU, Justice.

The legal question presented for decision in this case is the same as stated in Francis v. McColgan, Cal.App., 238 P.2d 70.

The facts in this case are not quite the same. The divorce was granted, and the property agreement was made in California. The wife thereafter left California and lived in another state until after the death of her former husband. He remained at all times a resident of this state. The Franchise Tax Commissioner assessed to him additional taxes for the years 1944 to 1947, inclusive, refusing to allow him to deduct alimony payments in computing net income for his income tax. The additional taxes were paid, claim for refund was made and not allowed, and this action was brought.

Such differences in facts as may here appear do not change the conclusions reached in the Francis case.

For the reasons therein stated, the judgment in this case is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

107 Cal.App.2d 718

SCHULTZ v. LOS ANGELES DONS, Inc.

Civ. 18368.

District Court of Appeal, Second District, Division 3, California.

Nov. 29, 1951.

Eberle Schultz brought action against The Los Angeles Dons, Inc., a corporation, to recover balance allegedly due on contract under which plaintiff had agreed to play professional football for the defendant for $8,000. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Vickers, J. pro tem., held that plaintiff was entitled to recover balance due under contract for season when defendant discharged plaintiff after plaintiff sustained injury during training season.

Judgment affirmed.

1. Contracts ⚷229(1)

Where football player and football club entered into a written contract under which player agreed to play professional football for football club for season for agreed amount of $8,000, and on July 14 player reported to training camp, and was examined by club's physician, who found player in good physical condition, and thereafter player was injured and was discharged on August 12 by club and received only $500, and player did substantially everything requested of him by club, player was entitled to recover balance due of $7,500 under the contract.

2. Evidence ⚷20(1)

It is common knowledge that a professional football player is under the complete control of his coach.

3. Contracts ⚷305(1)

Where professional football player orally gave football club, through its trainer and coach, all information in his possession in regard to his injury, and club took full advantage of such information by having player treated by its trainer and examined and treated by one of its doctors, and shortly thereafter by two other doctors who made written reports to club of their findings, club would be deemed to have waived requirement of employment contract that player give written notice of his injury within 10 days.

4. Appeal and Error ⚷931(3)

Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made.

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Betts, Ely & Loomis, Los Angeles, Ronald G. Cameron, Los Angeles, of counsel, for appellant.

N. E. Youngblood, Beverly Hills, for respondent.

VICKERS, Justice pro tem.

The plaintiff-respondent Schultz alleged in his complaint that on July 2, 1948, he and the defendant-appellant corporation entered into a written contract under which he agreed to play professional football for the appellant for the season of 1948 for which the defendant-appellant agreed to pay $8,000; that on July 14, 1948, he reported to the training camp of appellant; that on August 12, 1948, he was discharged without cause or justification by the appellant; that he had "done and performed any and all conditions and covenants on his part to be done and performed under said contract"; that on September 25, 1948, he notified the appellant that he was ready, able and willing to perform the services required under the contract; that the defendant failed and refused to permit such performance and that he was only paid $500 by respondent; and was thereby damaged in the sum of $7,500. By its answer the appellant admitted the execution of the contract and that respondent reported for training as alleged and was discharged; appellant denied that the termination was without cause or justification. Appellant's answer also admitted the receipt of the notification of September 25th and that there was no acceptance of respondent's services thereafter, but denied performance of the contract by respondent and that there was damage to respondent. By its answer the appellant also pleaded a number of affirmative defenses among which were fraud on the part of respondent in failing to disclose that his physical condition, due to prior injury, was such as to make it impossible for him to perform as required by the contract and that, if in good physical condition, respondent could have obtained employment with another professional football club and received compensation equal to that called for by the contract.

From the transcript it appears that there was little dispute in regard to the evidentiary facts except as to the cause and extent of the physical disability suffered by the respondent. Respondent had been a professional football player for approximately seven years. During the 1946 or 1947 football seasons, while playing with the Los Angeles Rams, he was partially incapacitated from a back injury. On June 28, 1948, he was examined by appellant's physician, who reported to it that he was in excellent physical condition and that there was no evidence of prior injury to his back or otherwise. On July 14, 1948 (12 days after the execution of the contract) he was examined by another physician on behalf of the appellant who certified to the appellant that respondent was in excellent condition and there were no symptoms of previous back injury. Between July 14th and July 18th respondent engaged in the regular training activities in Ventura, with the rest of the team and took part in two vigorous scrimmages. On July 18th respondent developed a pain in the back of his leg and numbness in his foot which greatly interfered with his attempts to run and he immediately reported his condition to the team trainer, William Kapela, and the team head coach, James Phelan. During the next few days the trainer gave respondent treatments to alleviate the condition but with little or no success. The trainer made full written reports of respondent's condition to the insurance carrier, it being one of his duties. Shortly after July 18th, under the coach's instructions, respondent was examined by three orthopaedic specialists who, after examination, reported to appellant that the respondent was suffering from a herniated disc in his lower back and sometime prior to August 12th informed appellant that it would be very dangerous for him to attempt to play football and that it was doubtful, if not certain, that his playing days were over. Between July 18th and August 12th the respondent reported for practice in proper attire but was not able to engage in the more strenuous activities and was not taken with the team on August 8th when it went to another city to engage in a practice game. Shortly prior to August 12th Mr. Benjamin F. Lindheimer, one of the successors of the club corporation and former chairman of the Board instructed Mr. Don Ameche, President of appellant, to discharge respondent. On August 12th respondent received from Coach Phelan a letter, the body of which read as follows:

"Under the terms of your contract you agreed to be in proper physical condition to play professional football for our club. Our doctors medical report indicates that you are not in proper physical condition.

"We wish therefore, to advise you that your contract is terminated effective immediately."

On August 20th respondent received from appellant a more formal notification of discharge. Prior to this, on August 12th, Coach Phelan suggested to the respondent that he see another orthopaedic specialist named Dr. Billig. He did so and Dr. Billig examined and treated him thereafter. Dr. Billig found him to be suffering from sciatic neuritis and under the doctor's treatment his condition rapidly improved. On August 23rd Dr. Billig released him to resume his activities as a football player and on September 23rd discharged him as fully recovered without fear of recurrence. On August 12th respondent had protested being discharged and thereafter on many occasions had conferences with Coach Phelan and with officers of appellant informing them of Dr. Billig's reports of his condition and attempted to have himself reinstated and allowed to perform his contract. Appellant refused both requests. Respondent attempted to secure employment with some of the other clubs of the same football league without success and was informed in September by Mr. Lindheimer that he could not play with "The Chicago Rockets" (one of such clubs) and, "to get back to Los Angeles." On September 25th respondent's attorney, by letter to appellant, declared the disability was sustained by respondent while acting in the service of appellant and that respondent was then ready, able and willing to perform under the contract. On October 25th the complaint was filed.

The trial court found that on July 14th, respondent was examined by appellant's physician and found by him to be in excellent physical condition; that such physician was at that time informed of respondent's previous back injury "to-wit, a slipped disc." The court further found that on August 12th, appellant notified respondent his contract was terminated; that respondent "has done and performed any and all conditions and covenants on his part to be done and performed under said contract, and in accordance with the terms and provisions thereof." The court also found that appellant did not terminate the contract for "good and sufficient reason or cause"; that prior to and at the time of the signing of the contract in question respondent did not make any false or fraudulent representation to appellant; that as a result of the termination respondent was damaged in the sum of $7,500; and that none of the allegations in the affirmative defenses were true.

[1, 2] Appellant's principal attack upon the judgment centers about the finding of full performance quoted above and relies upon the rule laid down in Re Estate of Warner, 158 Cal. 441, 111 P. 352. The rule so laid down is that a complaint based upon a contract must allege either performance or a valid excuse for non-performance; that the one is not the same as the other and if the plaintiff did not perform the contract but relies upon an excuse for non-performance he must set forth the excuse in his complaint; further, that evidence of excuse will not support a finding of performance. We have no quarrel with this rule. However, it cannot avail appellant in this case. Under the allegations of the complaint and the findings of the court it was established that the contract was executed; that respondent commenced performance; that he was discharged and prevented from performing by appellant; that such discharge was without good or sufficient cause; and that appellant failed to pay $7,500 of the contract price and that respondent was damaged in that sum. Each of such findings is supported by substantial evidence and by inferences reasonably to be drawn therefrom. They are therefore binding on appeal. Dillard v. McKnight, 34 Cal.2d 209, 223, 224, 209 P.2d 387, 11 A.L.R.2d 835. Such allegations and findings constitute a complete cause of action and fully support the judgment. Barber v. Cazalis, 30 Cal. 92, 97; Nohl v. County of Del Norte, 45 Cal.App. 306, 309, 187 P. 761; Long v. Thompson, 45 Cal.App.2d 161, 168, 113 P.2d 698. Appellant having discharged respondent without good cause and prevented him from performing, no further performance or offer to perform by respondent was required. Civ.Code, secs. 1440, 1511. He was entitled to treat the contract as at an end, insofar as performance was concerned, and sue for his lost profits. Sobelman v. Maier, 203 Cal. 1, 9, 262 P. 1087. The finding of full performance was therefore unnecessary and may well be considered as immaterial and disregarded. Moore v. Mosher, 88 Cal.App.2d 324, 198 P.2d 714. It is difficult to understand why such allegation and finding were made. It is clear that during the trial respondent at no time contended that he had done all the things referred to in the contract, such as engaging in exhibition and league games. However, it may be that the pleader and the court considered that respondent had fully performed in that he had done substantially everything requested of him by appellant and that that was all that was required of him under the contract. Our examination of the transcript has revealed no instance in which respondent failed or refused to comply with any request by appellant. It is implicit in a contract of this character that the player can perform only those services that the coach of his team permits or requests him to perform and it is a matter of common knowl-

edge that a player is under the complete control of his coach.

If we assume appellant made no requests for specific services from respondent after July 18th because of respondent's incapacity from injury, such injury and incapacity were not a ground under the contract for respondent's discharge. The court found that respondent's injury, causing his incapacity, was incurred while he was performing the services required of him. This finding is more fully considered hereafter. Such injury and incapacity was a risk which appellant specifically assumed under paragraph 7 of the contract. This paragraph reads in part as follows: "If this contract is terminated by Club by reason of Player's failure to render his services hereunder due to disability resulting directly from injury sustained in the performance of his services hereunder and written notice of such injury is given by the Player as provided in Regulation 6, Club agrees to pay Player at the rate stipulated in paragraph 2 [$8,000] * * *." Paragraph 7 further provides that in all other cases, if the contract is terminated during the training season, the player will receive only his expenses.

[3] Appellant further contends that it is relieved from liability because respondent admittedly failed to give the written notice required by paragraph 7 and regulation 6. With this we cannot agree. Regulation 6 reads as follows: "Written notice of any injury sustained by Player in rendering services under his contract, stating the time, place, cause and nature of the injury, shall be delivered to Club by Player within 10 days of the sustaining of the injury. In the absence of such notice, disability of Player to perform his services resulting from such injury shall be cause for termination of Player's contract by Club without liability for payment beyond the date of termination." The apparent purpose of the required notice was to make certain that appellant was promptly and fully informed of any such injury so that it could take the necessary steps to have its trainer and doctors treat the injury and protect its investment in respondent. It may also have had some relation to the insurance carried on respondent by appellant. The evidence clearly establishes that respondent promptly gave appellant, through its trainer and coach, all information in his possession in regard to the injury and that appellant took full advantage of it by having respondent treated by its trainer and examined and treated by one of its doctors on July 19th and shortly thereafter by two others, and that these doctors made written reports to appellant of their findings. By so doing appellant waived the requirement of written notice. In addition, the trainer sent reports about the injury to the insurance company. Appellant was therefore as fully protected as if the required information had been given in writing. A written notice from respondent would have been an idle act.

[4] Appellant also urges as a ground for reversal of the judgment that the court failed to make findings "concerning the cause of respondent's disability" and "concerning the requirement of written notice." Assuming that these are ultimate rather than evidentiary facts they were sufficiently covered by the findings made. The court found: "That each and all of the allegations upon which the affirmative defenses herein are based are untrue." By so doing the court found that it was not true, as alleged in the first affirmative defense, that at the time of entering into the contract respondent was not in a physical condition to render the services required or that a prior impairment of his physical condition then existed. Therefore the injury that caused respondent's disability must have been suffered after the execution of the contract. The only evidence offered or received of respondent's activities, after the contract date, whereby he could have been injured as found was that he had engaged in a strenuous conditioning program and during the four days of training, before his disability developed, had engaged in two scrimmages involving violent contacts with other players. Under such a state of the record the only finding that could reasonably have been made in that regard was that the injury causing respondent's dis-

ability was suffered during the performance of the required services. If we assume as appellant contends that a specific finding on that issue is necessary then we must infer that the court so found. "Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made. Reiniger v. Hassell, 216 Cal. 209, 211, 13 P.2d 737; Publishers Distributing Service v. Southern Cal. School Book Depository, 14 Cal.App.2d 448, 58 P.2d 401."

In addition to finding that the discharge was without cause the court also found that it was not true, as alleged in the third affirmative defense, that pursuant to paragraph 7 of the contract respondent had been fully compensated. As we have noted above it was under paragraph 7 that appellant contended that respondent's failure to give appellant written notice of his injury absolved appellant from liability to compensate respondent for anything except his training expenses and transportation. The court having found to the contrary it necessarily must have impliedly found that the failure of respondent to give the written notice did not bar his right of recovery and we must apply the rule of implied findings quoted above. If we were of the opinion that these two findings were not impliedly found, we would be impelled to make such findings under the power given this court under Code Civ.Proc., sec. 956a.

The judgment is affirmed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. Again I feel compelled to comment upon the prevalent lack of understanding on the part of counsel as to the function of findings and the importance of relating them to the material issues.

There were findings that plaintiff is a resident of Los Angeles County; that defendant is a California Corporation, and upon all the other allegations of the complaint which were admitted. There was also a finding that all the allegations of the affirmative defenses were untrue. By this blanket finding the court found that defendant did *not* discharge plaintiff because of physical disability; that the contract was *not* terminated during the training season; that defendant did *not* pay plaintiff's expenses and transportation as required by the contract; that the contract did *not* provide for the reference of disputes to the conference Commissioner as arbitrator; that plaintiff *did* refer the dispute between himself and defendant to the Commissioner; that the contract did *not* require plaintiff to give notice of his claim to the Commissioner within 90 days; that plaintiff *did* give notice to the Commissioner as required by the contract. In all these respects the findings are exactly contrary to the admitted facts and the undisputed evidence. Such ill-considered, contradictory and obviously false findings are an imposition upon a reviewing court.

But the errors and defects do not end with the findings upon immaterial or admitted facts or with those last mentioned. The one important question was whether plaintiff suffered disability resulting directly from injury sustained in the performance of his services. There was no finding upon that issue, although defendant earnestly insisted in writing that a finding should be made, as well as specific findings upon other issues. Defendant even went so far as to make an unsuccessful application to the district court of appeal for a writ of mandate to require the court to make additional findings.

It will be seen from the main opinion that the court has been required to make a painstaking and laborious analysis of the findings in order to determine whether there is a reasonable basis for regarding them as sufficient to support the conclusions of law and judgment. I agree that there was substantial evidence to support the finding that plaintiff was physically able to play football when he first engaged in practice, and in view of this finding, I believe a finding that he was subsequently injured in the performance of his services should be implied. But even if the finding were not implied a contrary finding would not have been logical, inasmuch as there was nothing to suggest injury except in practice. By this narrow margin I conclude that the inadequate, contradictory, false and confusing findings do not justify a reversal.

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107 Cal.App.2d 811

MAROSI v. J. W. ROBINSON CO. et al.

Civ. 18393.

District Court of Appeal, Second District,
Division 3, California.
Dec. 3, 1951.

Personal injury action by Stephen L. Marosi against J. W. Robinson Company, a California corporation, and Acmeline Manufacturing Company, a Michigan corporation. The jury returned a verdict in favor of the plaintiff against Acmeline Manufacturing Company. The Superior Court, of Los Angeles County, Phillip H. Richards, J., entered an order granting a new trial, and the plaintiff appealed. The District Court of Appeal, Vickers, J. pro tem., held that, where qualifications of manufacturer's expert witnesses were as high as those of plaintiff's witnesses, and the testimony of manufacturer's experts was in direct contradiction to that of plaintiff's witnesses as to negligent manufacturer of rose spray, granting a new trial for insufficiency of evidence to sustain jury's verdict for plaintiff suing manufacturer for damages resulting from explosion of rose sprayer which plaintiff was attempting to operate was not an abuse of discretion.

Order affirmed.

1. New Trial 🔑71

Where qualifications of manufacturer's expert witnesses were as high as those of plaintiff's witnesses, and the testimony of manufacturer's experts was in direct contradiction to that of plaintiff's witnesses as to negligent manufacturer of rose spray, granting a new trial for insufficiency of evidence to sustain jury's verdict for plaintiff suing manufacturer for damages resulting from explosion of rose sprayer which plaintiff was attempting to operate was not abuse of discretion.

2. Appeal and Error 🔑977(3)

Since granting of motion for new trial rests so completely within discretion of trial judge, his order will not be interfered with by reviewing court unless it appears that there has been a manifest and unmistakable abuse of discretion.

3. Appeal and Error 🔑854(6), 933(1)

On appeal from order granting motion for new trial, all presumptions are in favor of the order as against the verdict and it will be affirmed if it can be sustained on any ground although the reviewing court might have ruled differently in the first instance.

4. Appeal and Error 🔑1015(3)

If the evidence is uncontradicted a trial judge may nevertheless draw inferences from it opposed to those drawn by the jury, and it is only when, as a matter of law, there is no substantial evidence to support a judgment contrary to the verdict of the jury that an appellate court will reverse the order granting a new trial.

5. Appeal and Error 🔑717

While an opinion of judge of trial court will aid appellate court in ascertaining process by which judgment has been reached, it will not be considered in determining whether or not verdict of jury or findings of court are supported by the evidence.

6. Appeal and Error 🔑717

Order granting new trial for insufficiency of evidence to sustain jury's verdict for plaintiff cannot be impeached by the trial judge's opinion. Rules on Appeal, rule 5(a).

Goodstein, Moffitt & Weisman, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondent.

VICKERS, Justice pro tem.

Appeal by plaintiff from order granting a new trial.

Plaintiff-appellant filed his complaint against the defendant-respondent and the defendant J. W. Robinson Company for damages resulting from the explosion of a rose sprayer while appellant was attempting to operate it. The complaint alleged the manufacture of the sprayer by respondent, its sale to the defendant Robinson Company, the purchase of it from that company by appellant's aunt and appellant's injury. It also alleged that respondent so negligently manufactured the sprayer that it was dangerous and likely to explode and injure anyone near it and that this was known or by the exercise of reasonable care should have been known to respondent. By its answer respondent denied negligence and dangerous condition and alleged contributory negligence by appellant.

[1–4] At the close of the presentation of plaintiff's case the trial court granted a nonsuit as to the defendant Robinson and Company. At the close of the trial the jury returned a verdict for $11,721 in favor of plaintiff against the remaining defendant, the respondent herein. Thereafter upon defendant's motion therefor, the trial court made an order granting a new trial and filed its memorandum of opinion. In the memorandum and in the order entered in the minutes the court declared the motion was granted "solely on the ground of the insufficiency of the evidence to justify the verdict."

Appellant attacks the order on the grounds that it is contrary to the evidence and that, since it appears from the court's memorandum, that the court granted the motion solely because of an erroneous conception of the law of proximate cause, the order must be reversed. On neither ground can appellant prevail.

Appellant was injured while preparing to fill the sprayer with an insecticide solution at the direction of his aunt. She had used the sprayer shortly after purchasing it two and a half months before appellant's injury and had stored it without removing the pump and rinsing and drying the tank as directed by the instructions printed on the tank. She had also used it on the day in question and had then directed the appellant to fill and use it. He testified in part as follows: That he turned the handle of the plunger to release the air pressure and then removed the plunger from inside the brass cylinder within the tank; that a few minutes later he returned and as he bent over the sprayer he noticed the cylinder was at an angle and canted; that at that moment the cylinder exploded from the tank and struck him. This cylinder was approximately 14 inches in length and one and three-fourths inches in diameter. It fitted into a circular aperture in the top of the tank there being approximately 4 one-thousandths of an inch clearance between it and the edge of the aperture. It had a rubber gasket at the top so that when the cylinder and plunger were fully inserted, and the handle of the plunger was turned to the right, this gasket would be sealed against the seat of the tank preventing the escape of air.

Appellant's expert witnesses testified that the tank was poorly designed; that the plunger and cylinder should have been in one piece; that the amount of clearance between the cylinder and the seat of the tank was so slight that the cylinder could be canted and by forming a bind with the seat of the tank, prevent the air from escaping after the plunger had been removed; and that the cylinder might thereafter explode from the tank. The respondent introduced three expert witnesses whose qualifications appear to be at least as high as those of appellant's witnesses. Their testimony was in direct contradiction to that of appellant's witnesses on each of the above points. In addition, one of them testified that the sprayer was "constructed with good, established practice, and that with ordinary care and judgment it would be safe." Another one testified that "the sprayer is reasonably safe and manufactured in accordance with good engineering principles for the use to which it is intended." The sprayer was introduced into evidence and was examined by the trial judge.

Under such circumstances an appellate court cannot substitute its judgment for that of the trial court. The case of Stone v. Los Angeles County Flood Control Dist., 1947, 81 Cal.App.2d 902, 185 P.2d 396, which likewise was an appeal from an order granting a new trial, contains an excellent exposition of the law. At page 905 of 81 Cal.App.2d, at page 398 of 185 P.2d, the writer of the opinion, Associate Justice Emmet H. Wilson, declares:

"Since the granting of a motion for a new trial rests so completely within the discretion of the trial judge, his order will not be interfered with by the reviewing court unless it appears that there has been a manifest and unmistakable abuse of discretion. Jordan v. Schrieber, 74 Cal.App.2d 800, 805, 169 P.2d 394; Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited; Gallichotte v. California Mut. B. & L. Ass'n, 23 Cal.App.2d 570, 576, 74 P.2d 73, 535. On appeal from an order granting a new trial all presumptions are in favor of the order as against the verdict and it will be affirmed if it can be sustained on any ground although the reviewing court might have ruled differently in the first instance. Mazzotta v. Los Angeles Ry. Corp. supra.

"If the evidence is uncontradicted a trial judge may nevertheless draw inferences from it opposed to those drawn by the jury and it is only when, as a matter of law, there is no substantial evidence to support a judgment contrary to the verdict of the jury that an appellate court will reverse the order granting a new trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689; Williams v. Field Transportation Co., 28 Cal.2d 696, 698, 171 P.2d 722."

[5, 6] Appellant's contention that the order must be reversed because it is shown by the trial judge's memorandum of opinion that he granted the motion under a misconception of the law as to proximate cause has no merit. Neither can he draw any comfort from the 1943 amendment to rule 5(a) of the Rules on Appeal whereby "any written opinion of the superior court" was added to the papers or documents which the appellant could designate for inclusion in the record on appeal. In the first place, a fair reading of the memorandum discloses that the judge granted the motion because he was of the opinion that the evidence did not establish negligence on the part of the respondent. In the second place, even if the memorandum was susceptible of the construction placed on it by appellant that would not benefit him. Again we turn to Stone v. Los Angeles County Flood Control Dist., supra. At page 907 of 81 Cal.App.2d, at page 399 of 185 P.2d appears the following:

"While an opinion of the judge of the trial court will aid the appellate court in ascertaining the process by which a judgment has been reached it will not be considered in determining whether or not the verdict of the jury or the findings of the court are supported by the evidence. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 781, 163 P.2d 756; In re Estate of Felton, 176 Cal. 663, 667, 169 P. 392; Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347; DeCou v. Howell, 190 Cal. 741, 751, 214 P. 444. The order when made by the court concludes the case and it cannot be impeached by the judge's opinion. The question that concerns the reviewing court is whether or not the final decision, judgment or order is correct and not whether the reasons expressed in the opinion are in harmony with the result reached or whether they sustain the decision. Buckhantz v. R. G. Hamilton & Co., supra.

"Rule 5(a) makes the opinion a part of the record on appeal and thereby places it officially before the reviewing court for its consideration, but it does not modify the limitations found in the foregoing citations upon the effect to be accorded it. Redsted v. Weiss, 73 Cal.App.2d 889, 891, 167 P.2d 735; Southern Cal. Freight Lines v. San Diego Electric R. Co., 66 Cal.App.2d 672, 676, 152 P.2d 470; Williams v. Kinsey, 74 Cal.App.2d 583, 601, 169 P.2d 487."

The order is affirmed.

SHINN, P. J., and WOOD, J., concur.

107 Cal.App.2d 732, 736, 846

CAMPBELL v. CAMPBELL (3 Appeals).

Civ. 8046, 8089, 8121.

Sac. 6194, 6217, 6234.

District Court of Appeal, Third District,
California.

Nov. 29, 1951.

Hearings Denied Jan. 24, 1952.

Katherine C. Campbell filed a motion for alimony which had accrued under a California interlocutory divorce decree and Charles J. Campbell opposed the motion. The Superior Court, Yolo County, C. C. McDonald, J., granted the motion and two similar subsequent motions, and defendant appealed. The District Court of Appeal, Third District, Van Dyke, J., held, inter alia, that since the California interlocutory decree awarding permanent alimony had become final prior to the date of a Nevada divorce decree granted to the husband after substituted service, the Nevada decree could not affect the wife's rights which had been adjudicated and which were embraced within the California interlocutory decree.

Affirmed.

1. Divorce ⚷156

The function of an interlocutory decree includes the establishment of the right of a party to divorce, the hearing and final determination of rights of the parties as to property and a consideration in determination of the matter of the further support of the wife by the husband, and if no appeal is taken, or if decree is affirmed on appeal, the interlocutory decree becomes final with respect to these matters.

2. Divorce ⚷172

The interlocutory decree in a divorce action becomes final and is res judicata on all questions determined therein, including the property rights of the parties, except the final dissolution of the marriage, which is generally the only question held in abeyance until entry of final decree.

3. Divorce ⚷255

While an award of temporary alimony is terminated by the interlocutory decree, unless provisions for permanent alimony is made therein or question is reserved for later consideration, a final interlocutory decree awarding permanent alimony is res judicata upon the right of the spouse to whom award is made to receive the same in accordance with the decree.

4. Divorce ⚷243

Until judicially modified or vacated in accordance with methods applicable to judgments generally, an award of permanent alimony contained in interlocutory divorce decree is entitled to the same respect or finality as any other substantive right litigated and determined by such decree. Civ.Code, § 139.

5. Divorce ⚷331

Where California interlocutory divorce decree awarding wife permanent alimony had become final prior to Nevada divorce decree which was obtained by husband upon substituted service and which decree contained no provisions concerning alimony nor reference to the California decree, the Nevada decree did not affect the rights of the wife as decreed by the interlocutory decree. U.S.C.A.Const. art. 4, § 1.

6. Divorce ⚷331

Where California interlocutory divorce decree awarding wife permanent alimony had become final, Nevada court in which husband sought divorce was without power to affect in any way the adjudicated rights of the wife as embraced within the interlocutory decree. U.S.C.A.Const. art. 4, § 1.

On Second Appeal

7. Divorce ⚷277

Where divorced wife had obtained judgment ordering payment of accrued alimony due under interlocutory divorce decree, a second similar judgment covering alimony accrued after entry of first judgment did not offend against the rule that that there cannot be more than one judgment in an action.

8. Divorce ⚷277

Where second judgment ordered payment to wife of further accrued alimony due under interlocutory divorce decree, the judgment was in the nature of an order enforcing the rights given the wife by the interlocutory decree and accruing after the first judgment.

Chalmers, Cowing & Sans, Woodland, for appellant.

A. G. Bailey and John A. Young, Woodland, for respondent.

VAN DYKE, Justice.

On April 8, 1947, respondent herein as plaintiff commenced an action in the Superior Court of Yolo County wherein she sought separate maintenance from appellant. Appellant answered and filed a cross-complaint for divorce. On November 3, 1948, respondent herein filed an amended complaint wherein she also sought divorce. On March 28, 1949, the local court entered its interlocutory decree wherein it adjudged respondent was entitled to a divorce from appellant on the ground of extreme cruelty. Appellant was ordered to pay to respondent the sum of $400 per month as alimony for her support and maintenance, beginning April 1, 1949, and continuing until the death or remarriage of respondent. On May 27th appellant took an appeal from that portion of the interlocutory decree awarding alimony. The appeal was abandoned on June 23, 1949, and the decree then became final. In the meantime and on April 18th appellant went to Carson City, Nevada, and on June 16th filed in the First Judicial District of that State, in and for the County of Ormsby, his complaint for divorce upon the ground that the spouses had lived separate and apart without cohabitation for more than three years, this latter ground of divorce not being recognized in California, but available in Nevada. Substituted service of summons and complaint was made upon the defendant in that action. She did not appear. On July 21, 1949, appellant was granted a divorce by the Nevada court. That decree contained no provisions concerning alimony nor did it refer to the California decree which had been previously rendered. On August 21, 1950, respondent herein moved the local court for a supplementary judgment that she recover of appellant the sum of $2,000 accumulated unpaid alimony installments accruing in the months of April to August, inclusive. Appellant resisted the motion, relying upon the Nevada decree. The motion was granted. The local court concluded that the Nevada decree, based upon the ground of non-cohabitation, was valid, and dissolved the marriage between the parties as of the date of its entry. From the order and judgment that respondent, notwithstanding the dissolution of the marriage by force of the Nevada decree, recover the amounts ordered paid as alimony by the interlocutory decree of the local court, this appeal has been taken.

[1-4] The force and effect of an interlocutory decree of divorce rendered under California's dual divorce decree procedure was settled by our Supreme Court in the case of Wilson v. Superior Court, 31 Cal.2d 458, 189 P.2d 266. The court there declared that the function of an interlocutory decree includes the establishment of the right of a party to a divorce, the hearing and final determination of the rights of the parties as to property and a consideration and determination of the matter of the further support of the wife by the husband; that if no appeal be taken, and of course if appeal be taken then upon affirmance, the interlocutory decree becomes final with respect to these matters. Quoting from Parnham v. Parnham, 32 Cal.App.2d 93, 96, 89 P.2d 189, the court said that the interlocutory decree in a divorce action becomes final and is res judicata on all questions determined therein, including the property rights of the parties, except the final dissolution of the marriage which is generally the only question held in abeyance until the entry of the final decree. It was held that, while an award of temporary alimony is terminated by the interlocutory decree unless a provision for permanent alimony is made therein or the question is reserved for later consideration, this is not so of a final interlocutory decree awarding permanent alimony, which decree in and of itself is res judicata upon the right of the spouse to whom the award is made to receive the same in accordance with the decree. Said the court further [31 Cal.2d 458, 189 P.2d 270]: "It is true that in the case of an award of permanent alimony [that is an award made by the interlocutory decree], the court, by virtue of section 139 of the Civil Code, re-

tains continuing power to modify its order" but "until so judicially modified or vacated 'in accordance with the methods applicable to judgments generally' * * *, an award of permanent alimony contained in an interlocutory decree would appear entitled to the same respect or finality as any other substantive right litigated and determined by such decree." Distinguishing Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351, the court said as to the Wilson case: "Here the alimony obligation was imposed on petitioner while the marital status was in existence and upon rendition of the interlocutory decree. The question of alimony was then at issue and adjudicated." And the court finally declared that the lack of any provision in the final decree of divorce carrying forward the permanent alimony award did not preclude the enforcement of that award thereafter.

[5] When the judgment appealed from herein was rendered the interlocutory decree had long been final. It had never been modified. While for the purpose of this decision it may be assumed that the Nevada decree of absolute divorce was effectual as terminating the marriage it did not and could not affect the rights of the respondent herein as decreed to her by the interlocutory decree. Indeed, it did not even purport to do so by anything said therein. Surely if a final decree of the court in the California action terminating the marriage but silent as to alimony provisions would not have the effect of terminating those provisions as contained in the interlocutory decree, then the Nevada judgment could have here no greater effect, unless the full faith and credit clause of the Federal Constitution, art. 4, § 1, compels a different result.

[6] The decision in Wilson v. Superior Court, supra, was given under date of February 6, 1948. On June 7th following the United States Supreme Court decided the case of Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 1218, 92 L.Ed. 1561, 1 A.L.R.2d 1412. The case was one in which a New York separate maintenance decree was invoked by the wife who had secured it through motion for judgment against her former husband in conformity therewith, which motion was opposed by him upon the ground that after rendition of the New York maintenance decree he had obtained a divorce in Nevada upon constructive service and after establishing domicile therein. The wife had not appeared in the Nevada proceeding. With reference to the New York judgment the Supreme Court said that it was "a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations. * * * Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. * * * But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. * * We know of no source of power which would take the present case out of that category. The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an in personam jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand. * * * The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to

make it ineffective on the issue of alimony." The court made the foregoing declarations after having noted that the highest court in New York had held that a support order could survive divorce and that such conclusion was binding upon it except as it might conflict with the full faith and credit clause, which it did not. Likewise the highest court of this State has declared that an interlocutory decree finally adjudicating, subject only to modification by the court rendering it, the right of a wife to receive alimony will survive a final decree dissolving the marriage. It is thus clear that there was no power in the Nevada court in granting an absolute divorce ex parte to affect in any way the adjudicated rights of respondent here as embraced within the interlocutory decree of the local court.

The judgment appealed from is affirmed.

ADAMS, P. J., and PEEK, J., concur.

On Second Appeal

VAN DYKE, Justice.

[7, 8] This is a second appeal in the action of Campbell v. Campbell, the first appeal having been this day decided. After the rendition of the supplemental judgment concerned in the first appeal, the Yolo County court again on motion of respondent entered a second and supplementary judgment that respondent recover of appellant further accrued alimony. The grounds of the appeal are the same as were urged in the first appeal, with the additional ground that the second order or judgment appealed from constitutes a second judgment in the same action and offends against the rule that there cannot be more than one judgment in an action. The rule has no application. The order or judgment appealed from is in the nature of an order enforcing the rights given respondent by the interlocutory decree and accruing after the order first appealed from. The practice of returning to the trial court and moving for such orders as to accruing alimony from time to time has long been approved practice. Shields v. Shields, 55 Cal.App.2d 579, 130 P.2d 982.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

On Third Appeal

VAN DYKE, Justice.

This is a third appeal in the action of Campbell v. Campbell, the first two appeals having been this day decided. After the rendition of the supplemental judgments concerned in the first and second appeals the trial court again on motion of respondent entered a third and supplementary judgment and order that respondent recover from appellant accrued alimony becoming due after the rendition of the second judgment. The grounds of the appeal here urged are the same as those disposed of in the first and second appeals, and by reason of what has been heretofore said in deciding those appeals the judgment herein appealed from is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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107 Cal.App.2d 688

MARTIN et al. v. GOGGIN et al.

Civ. 4410.

District Court of Appeal, Fourth District, California.

Nov. 28, 1951.

Hearing Denied Jan. 24, 1952.

Frank L. Martin, and others, brought an action against George T. Goggin, as trustee in bankruptcy, and Charles F. Doyle and Gladys S. Doyle, and another, to foreclose a mechanic's lien. The Superior Court of Riverside County, John G. Gabbert, J., sustained a demurrer filed by the Doyles', and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that bankruptcy court by permitting action to be filed in state court suspended operation of provision of bankruptcy act that operation state statute of limitations affecting provable debts of a bankrupt shall be suspended during period from filing of bankruptcy petition until 30 days after entry of order denying a discharge, and turned matter of enforcing lien over to state court where it became subject to operation of state laws.

Judgment affirmed.

1. Limitation of Actions ⟹104½

A lien claimant is entitled to length of time allowed by statute during which he may lawfully commence an action to foreclose mechanic's lien, and running of statute of limitations is tolled during time he is under some statutory or other prohibition which prevents him from bringing action.

2. Bankruptcy ⟹314(4)

The purpose of amendment to Bankruptcy Act which provides that operation of State statute of limitations affecting provable debts of a bankrupt shall be suspended during period from filing of bankruptcy petition until 30 days after entry of an order denying a discharge, was to preserve property of bankrupt until various and relative values and rights of all parties concerned could be determined and passed upon by bankruptcy court. Bankr.Act, § 11, sub. f, 11 U.S.C.A. § 29, sub. f.

3. Bankruptcy ⟹285

Bankruptcy court had power under statute and by precedent to authorize action to be filed in State court against trustee in bankruptcy and others to foreclose a mechanic's lien. Bankr.Act, § 314, 11 U.S.C.A. § 714.

4. Limitation of Actions ⟹110

Bankruptcy court by permitting action to be filed in state court against trustee in bankruptcy and others to foreclose a mechanic's lien suspended operation of provision of Bankruptcy Act that operation of state statute of limitations affecting provable debts of a bankrupt shall be suspended during period from filing of bankruptcy petition until 30 days after entry of an order denying a discharge, and turned matter of enforcing lien over to state court where it became subject to operation of state laws. Bankr.Act, § 11, sub. f, 11 U.S.C.A. § 29, sub. f.

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Ralph C. Curren, Roy B. Woolsey, Los Angeles, for appellants.

Albert H. Ford, Riverside, for respondents.

BARNARD, Presiding Justice.

This is an action to foreclose a mechanic's lien. In September, 1947, Charles F. Doyle and Gladys S. Doyle deeded a parcel of real property in Riverside County to two partners. The plaintiffs furnished materials and labor used in constructing improvements on this real property and filed claims of mechanic's liens on August 5, 1948, and September 24, 1948.

On October 12, 1948, these partners, as a partnership and individually, instituted a proceeding for an arrangement in the United States District Court under Chapter 11 of the Bankruptcy Act, 11 U.S.C.A. §§ 701 to 799, and thereafter the defendant Goggin was appointed trustee of their estates. On April 24, 1950, these plaintiffs obtained an order from the United States District Court authorizing them to bring this action against the trustee, and such other persons as they deemed necessary. This action was commenced on July 28, 1950. At that time the bankruptcy proceeding was still pending, and no order denying a discharge had been entered and no right to a discharge had been waived or lost.

The complaint in this action named only the trustee, the Doyles, and a title company as trustee, as defendants. (Apparently, the Doyles held a trust deed with the title company as trustee.) In addition to the above facts the complaint alleged that the Doyles and the title company claimed to have some lien upon the property; that this lien, if any, was inferior to and subject to the lien of the plaintiffs; and that the time within which to foreclose the plaintiffs' lien, as provided by Sections 356 and 1190, Code of Civil Procedure, had been suspended by the provisions of Section 11, sub. f of the Bankruptcy Act. The prayer was for a judgment against the defendants for the amounts claimed due to the plaintiffs, and for a foreclosure of the plaintiffs' lien.

The trustee did not appear. The Doyles demurred on the ground that the action was barred by the provisions of Section 1190, Code of Civil Procedure. The court sustained this demurrer without leave to amend, and entered a judgment in favor of the Doyles in which it was decreed that the plaintiffs' cause of action is barred by the provisions of Section 1190 of the Code of Civil Procedure.

On this appeal from the judgment, the sole issue presented is whether or not the time within which this action could be commenced has been indefinitely extended by a 1938 amendment to Section 11, sub. f of the Bankruptcy Act, 11 U.S.C.A. § 29, sub. f. That amendment, § 29, sub. f, provides in part that the operation of any statute of limitations of any state, affecting the provable debts of a bankrupt, shall be suspended during the period from the filing of the bankruptcy petition until thirty days after the entry of an order denying a discharge, or the loss of a right to a discharge, or the dismissal of the bankruptcy proceeding, whichever first occurs. The appellants contend that Section 1190 of our code is such a statute of limitations, and that the provisions of section 29, sub. f are applicable and serve to toll the running of the time provided for in our statute, until such time as a right to a discharge is ended in the bankruptcy proceeding or that proceeding is dismissed. The respondents contend that the 1938 amendment to the Bankruptcy Act, § 29, sub. f applies only to pending cases *in personam* and is not applicable to lien foreclosures; that § 29, sub. f is not applicable to actions against trustees; that Section 1190 of our Code of Civil Procedure is controlling; and that the appellants waited 94 days before bringing the action, after the entry of the federal court order permitting them to do so.

[1] A lien claimant is entitled to the length of time allowed by the statute during which he may lawfully commence an action to foreclose his mechanic's lien, and the running of our statute is tolled during the time in which he is under some statutory or other prohibition which prevents him from bringing the action. Wells v. California Tomato Juice, Inc., 47 Cal.App.2d 634, 118 P.2d 916. No valid reason appears why such a resulting extension of the statutory time should continue after the prohibition is removed.

[2-4] The effect of the new chapter on arrangements, added to the Bankruptcy Act in 1938, 11 U.S.C.A. §§ 701 to 799, was to provide a procedure which would naturally extend bankruptcy proceedings for a much longer time but which might well enable the creditors to be eventually paid in full. The purpose of the amendment to Section 11, sub. f of the Bankruptcy Act, 11 U.S.C.A. § 29, sub. f was to preserve the property of the bankrupt until the various and relative values and rights of all parties concerned could be determined and passed upon by the bankruptcy court. Section 702 provides that the provisions of § 29, sub. f, which appear in Chapter 3, shall apply in such proceedings "insofar as they are not inconsistent with or in conflict with the provisions of this chapter". In addition to the general powers given to the bankruptcy court, in Chapter 1 of the Bankruptcy Act, to make such orders as may be necessary in order to carry out the powers specifically given, Section 714 of the chapter on arrangements, 11 U.S.C.A. § 714, gives the bankruptcy court power to decide whether or not any proceeding to enforce a lien upon the property of a debtor shall be allowed to be commenced or to be continued. Both by statute and by precedent, which has long been recognized, the bankruptcy court had the power and authority to make its order "authorizing the filing of this action" by the appellants for the purpose of foreclosing their lien on this property. In effect, the bankruptcy court thus released its control over this property for the purpose of permitting this suit to be filed. By its order permitting the filing of this suit the court necessarily suspended any operation of § 29, sub. f, and turned the matter of enforcing this lien over to the state court, where it became subject to the operation of the state laws. Assuming that § 29, sub. f was originally applicable to this matter, its operation and effect was ended by the order of the bankruptcy court permitting this action to be filed.

It would be unreasonable to hold that § 29, sub. f remains controlling, and provides an indefinite extension and suspension of the operation of state laws, after the bankruptcy court has determined that it no longer wants to retain control over the property involved. After the bankruptcy court has decided that it does not want to hold the property any longer, and has released it for the very purpose of permitting a creditor to proceed with his remedy under state law, the purpose of § 29, sub. f has been fully accomplished. It is inconceivable that § 29, sub. f was ever intended to have the effect of changing the operation of state laws after the bankruptcy court has released its hold on the property, and has ordered the entire lien matter returned to the state court. From that time, at least, the lien claimant is not only free to proceed under state law but is bound to comply therewith. In this case, after receiving permission to proceed under state law for the enforcement of their lien, the appellants allowed the full statutory time to elapse before bringing the action. The order authorizing the appellants to bring this action removed the matter of enforcing this lien from the effect of *all* of the provisions of the Bankruptcy Act, and not merely from all but the one here relied on.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

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108 Cal.App.2d 6

GREENE v. M. & S. LUMBER CO. et al.

Civ. 7996.

District Court of Appeal, Third District, California.

Dec. 4, 1951.

J. E. Greene sued the M. & S. Lumber Company and Stanley Eugene Walker for property damage resulting from a collision between plaintiff's truck and defendant lumber company's truck and trailer, driven by defendant Walker, at a highway intersection. Defendant lumber company filed a cross-complaint for damages to its equipment. From a judgment of the Superior Court, Solano County, Harlow V. Greenwood, J., for plaintiff and cross-defendant, defendants and cross-complainant appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained the trial court's findings that the truck and trailer were negligently operated at a speed exceeding the statutory limit, that such negligence was a proximate cause of the collision, and that plaintiff's negligence was not a proximate cause thereof.

Judgment affirmed.

1. Automobiles 🔑244(44, 59)

In action for property damage resulting from collision between plaintiff's truck and defendant's truck and trailer at highway intersection, evidence sustained trial court's findings that truck and trailer were negligently operated at speed exceeding statutory limit and that such negligence was a proximate cause of collision. Vehicle Code, § 515.

2. Evidence 🔑5(2)

It is common knowledge that term "limit line," used in statute requiring vehicle driver approaching highway intersection posted with stop sign to stop before entering nearest crosswalk or, if none, at limit line when marked, refers to broad white line preceded by word "stop" in large letters, usually printed on pavement at or beyond stop sign. Vehicle Code, § 577.

3. Automobiles 🔑171(11)

A truck driver, proceeding into highway intersection, without stopping at limit line painted on road on which he was traveling, after stopping at stop sign some distance back from such line, was negligent in violating clear statutory mandate. Vehicle Code, § 577.

4. Negligence 🔑56(3)

A violation of statute, to be negligence per se, so as to impose liability on violator for ensuing injury to another, must be shown to have been a proximate cause of injury.

5. Automobiles 🔑226(2)

A motorist's violation of traffic regulations does not charge him with contributory negligence, barring his recovery for injuries sustained in automobile collision, in absence of showing that such violation directly or proximately contributed to accident and resulting injuries.

6. Negligence ⚷117

Contributory negligence is affirmative defense, which is waived, unless pleaded.

7. Negligence ⚷122(1)

A party pleading contributory negligence as defense to action has burden of proving his allegations in respect thereto.

8. Appeal and Error ⚷1010(1)
Automobiles ⚷245(61)

Whether truck driver's negligence in proceeding into highway intersection, without stopping at limit line painted on road on which he was traveling, after stopping at stop sign some distance back from such line, was proximate cause of ensuing collision between truck and truck and trailer on intersecting through highway, was fact question for trial court, whose determination that such negligence was not proximate cause of collision is binding on District Court of Appeal on appeal from judgment for truck driver in his action against truck and trailer owner and operator for resulting property damage. Vehicle Code, § 577.

9. Insurance ⚷606(1)

The owner of truck damaged in collision with truck and trailer at highway intersection was not deprived of cause of action against owner and driver of truck and trailer by insurance company's payment of compensation under policy for total loss of truck.

◆

Robert C. Dunn, San Francisco, for appellants.

Wilbur U. Goodman and Burt D. Goodman, and Dunnell, Herbert & Dunnell, all of Fairfield, for respondent.

VAN DYKE, Justice.

On April 24, 1949, about 9 o'clock p. m. plaintiff-respondent Greene was driving a light pickup truck south on the Dixon cutoff highway near the intersection of that road with State highway No. 12 which runs westerly from Rio Vista in Solano County and is a through highway. Near the intersection a stop sign guarded the through road and respondent stopped at the point where this sign stood. He testified as follows: He looked left and right along highway 12 and saw no vehicle approaching; his view to the left was limited to approximately 300 feet, at which point approaching vehicles would become visible as they topped a rise and entered a downgrade to the intersection; he shifted into low gear and proceeded from the stop sign into the intersection, intending to turn left and proceed towards Rio Vista; as he entered upon the traveled portion of highway 12 he saw the truck and trailer of defendant-appellant M. & S. Lumber Co., driven by defendant-appellant Stanley Walker; the truck and trailer were coming down the incline approximately 300 feet away; he traveled an additional 20 or 30 feet where his rig was struck, resulting in property damage, for which he sued. The Lumber Company cross-complained for damages to its equipment. The trial court awarded respondent a judgment for $1,000, finding the driver of the truck and trailer to have negligently operated the same, and finding against the allegations of the cross-complaint and answer charging respondent with negligence and contributory negligence. There was testimony that appellants' equipment, weighing 34,000 pounds and equipped with hydraulic brakes on six axles, left skid marks 268 feet in length up to the point of impact and 180 feet in length from that point to where the truck and trailer came to rest. A short distance ahead of the stop sign, at which respondent stopped, there was painted on the Dixon cutoff road on which he traveled a broad white line and the word "Stop". The record does not definitely disclose the distance between the stop sign and the white line or between the white line and the traveled portion of highway 12, but the fair indication from the record, including the photographs admitted in evidence, is that these distances were not great. Appellant Walker testified he was driving his equipment at about 50 miles per hour when he approached the intersection with the Dixon cutoff road, then reduced to 45 miles per hour. When 200 feet from the intersection, and observing that respondent was entering the intersection, he applied all of his brakes at maximum. His equipment was 59 feet in length.

[1] Appellants first contend that as a matter of law they were not guilty of negligence. The contention cannot be sustained. From the facts the trial court could have found that the truck and trailer were proceeding at an unlawful rate of speed. Section 515 of the Vehicle Code provides that a motor truck and trailer equipped with pneumatic tires, as was the case here, shall not be operated upon a highway at a speed in excess of 40 miles per hour. The trial court could have determined that this speed limit was being greatly exceeded and that at the speed indicated the equipment could not have been stopped after it came into view of the intersection before it passed the same. The trial court's determination that the truck and trailer were being negligently operated and that this negligence was a proximate cause of the collision is sustained by the evidence.

[2, 3] Appellants next contend that the respondent was guilty of contributory negligence as a matter of law. Principally this contention is based upon a claim that by stopping at the stop sign he violated Section 577 of the Vehicle Code. The section provides that: "The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop sign * * *, shall stop before entering the nearest crosswalk or, if none, then at a limit line when marked, otherwise before entering such highway or intersection."

Although the term "limit line" is not defined in the Vehicle Code, nevertheless we think it common knowledge that it refers to the broad white line preceded by the word "Stop" in large letters, which device is usually painted on the pavement at or beyond the stop sign. This device appears at literally thousands of intersections along the State highway system and is a standard device described in the Manual of Safety Devices published by the Division of Highways of the Department of Public Works. The device is one that is common to many states. It is described in the Manual of Uniform Traffic Control Devices for Streets and Highways, published by the Public Roads Administration. It is to be noted that while the section quoted from does not, with respect to crosswalks or intersections, designate the exact place at which a stop is to be made, merely providing that the stop shall be made "before entering", yet with respect to limit lines the statutory language is definite and requires a stop to be made "at" the line when marked. It is easy to ascribe a sound reason why a considerable latitude should be allowed as to the stopping point when approaching a crosswalk or intersection, whereas the requirement is more strict as to a limit line. There are situations where it is material to the safety of the traveling public that a vehicle be brought approximately to a definite point and stopped there in order to assure a better view and a shorter time after starting to attain a position of safety; and further to assure observation of the vehicle about to enter the favored traffic lane by those approaching its projected path. In many situations it would make little difference whether the stop was made at the stop sign or anywhere between the stop sign and the intersection, but there are other situations in particular localities where maximum safety requires that the point where the stop shall be made be indicated. When, therefore, respondent stopped at the stop sign, which was some undetermined distance back from the limit line as painted on the Dixon cutoff road on that day, and having so stopped proceeded into the intersection without stopping at the limit line, he violated, at least technically, the clear mandate of the law, which mandate was laid down for his protection and for that of the other travelers who might be using the highway into which he desired to enter. Such conduct was negligent.

[4–7] But it still remains to decide whether or not this conduct, negligent though it was, was a proximate cause of the ensuing collision. "Before a violation of a statute can be negligence per se so as to impose liability it must be shown that the violation was a proximate cause of the injury." Wohlenberg v. Malcewicz, 56 Cal.

App.2d 508, 512, 133 P.2d 12. "The fact that * * * respondent may have violated one or more traffic regulations does not necessarily mean that he was chargeable with contributory negligence; to bar recovery on that ground it would be necessary to show that such violation directly or proximately contributed to the accident and resulting injuries." Ingram v. Wessendorf, 14 Cal.App.2d 16, 21, 57 P.2d 989, 992; see, also, Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497. Contributory negligence is an affirmative defense which is waived unless pleaded, and having pleaded the same the party so pleading has the burden of proving his allegations in respect thereto.

[8] There is nothing in the record from which we can tell with any sort of exactitude how far it was from the stop sign to the limit line or how far it was from the limit line to the traveled portion of highway 12. These are important matters, for if as is usually the practice where the terrain will permit, the stop sign and the limit line are for all practical purposes at the same point, then whether the respondent stopped at one or the other would have no causal connection with the accident. Respondent testified that he stopped at the stop sign at which point he could see to the top of the rise; that at the time of the trial there was a limit line further along the road but he couldn't remember seeing it there at the time of the accident; that his car traveled about 30 feet from the stop sign to the point of impact; that he estimated it was 6 or 8 feet from the stop sign to the "white stop on the pavement"; that his front wheels, when he stopped, were about even with the upright stop sign. Another witness, a patrol officer, testified that he had examined the area at the intersection; that he didn't know whether or not there was a line on the highway at the time of the accident, but that there was one there at the time of the trial and that it was "back where the post is"; that it had been changed since the accident. Recalled, respondent further testified that at the time of the accident the line was right up close to the main highway. When asked about how many feet from the highway, he said "It is about 6 feet but the old line was right up against the highway, the other was 6 feet back." We think it apparent from the whole record that the trial court, on the question of proximate cause here being discussed, was confronted with a factual situation, and could have inferred from all of the facts that the accident would have occurred even though the statute had been strictly observed; that the issue could not have been decided as a matter of law and that therefore the determination of the trial court is binding upon this court.

[9] Appellants moved the trial court for a new trial of the action, which motion was denied, and they now contend that the court erred in so ruling. It appeared by affidavit in support of the motion for new trial that an insurance company had paid respondent the sum of $1,255 in compensation for the "total loss" of the pickup truck involved in the accident. Appellants argue that since respondent had been paid in full by the insurance company he was no longer the owner of the cause of action against them. The point is without merit. See Lebet v. Cappobiancho, 38 Cal.App. Supp.2d 771, 102 P.2d 1109; Anheuser-Busch, Inc., v. Starley, 28 Cal.2d 347, 170 P.2d 448, 166 A.L.R. 198.

The judgment appealed from is affirmed.

PEEK, J., and ADAMS, P. J., concur.

107 Cal.App.2d 765

HOSFORD v. HENRY et al.

Civ. 7977.

Sac. 6163.

District Court of Appeal, Third District,
California.

Nov. 30, 1951.

Action by L. W. Hosford against Clyde W. Henry and others to obtain reformation of deed of trust securing promissory note given by defendant Clyde Henry to plaintiff and to foreclose deed of trust as reformed. The Superior Court, Del Norte County, Samuel F. Finley, J., decreed that deed of trust be reformed and foreclosed, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that despite determination by court that deed of trust did not express intent of parties, but that intention of parties at time of execution thereof was that same should embrace all operating properties of public utilities owned by defendant, court of equity was without authority to reform deed and thereby placed incumbrance upon operative properties of public utilities when no prior permission for incumbering of property of Commission had been obtained as required by statute, but that interlocutory decree of reformation should be entered with continuation until application could be made to Commission for consent.

Judgment affirmed in part, reversed in part, and cause remanded with directions.

1. Reformation of Instruments 🔑45(8)

In action to obtain reformation of deed of trust securing promissory note given by defendant to plaintiff and to foreclose deed of trust, wherein plaintiff contended that real intention of parties at time of execution of deed was to embrace all of property utilized by plaintiff in operating public utilities owned by him, and that deed in fact embraced only two small tracts of realty, evidence was sufficient to support finding that intention of parties at time of execution of deed of trust was that same was to embrace all property used in operating utilities involved, whether located on described real property or not.

2. Reformation of Instruments 🔑1

The purpose of reformation of an instrument is to effectuate common intention of both parties which was incorrectly reduced to writing.

3. Constitutional Law 🔑75
Receivers 🔑81, 82

Receivers are officers of court appointing them, but possess no judicial powers, nor does court have power to delegate to receiver, court's own fact-finding powers.

4. Reformation of Instruments 🔑43

In action to reform deed of trust securing promissory note given by defendant to plaintiff and to foreclose deed as reformed, wherein plaintiff contended that it was intention of parties that deed should embrace all of property utilized by defendant in operation of public utilities owned by him, but that deed in fact only embraced two small tracts of realty, and it appeared that nature of property utilized differed at time of trial from that at time of execution of deed, burden was upon plaintiff to prove right to have lien upon each item of property which he claimed ought to have been included in deed, and in absence of such evidence, particular items could not be included.

5. Evidence 🔑76

In action to reform deed of trust in such manner that it would include all of property utilized by defendant in operation of public utilities, failure of defendant to appear and testify raised no presumption that the testimony would have been in favor of plaintiff on issue concerning which of items presently used in operation of utilities were within deed of trust, since burden of bringing items within deed was on plaintiff and there was no duty on defendant in absence of subpoena to appear as witness for his adversary.

6. Receivers 🔑85

Where it was determined that deed of trust from defendant to plaintiff should be reformed to include all of property utilized by defendant in operation of public utilities at time of execution of deed and defendant consented to inventory by receiver of properties to be included, such consent was not waiver of any right to object when inventory was taken on ground that items had been wrongfully included therein.

7. Reformation of Instruments 🔑13(3)

Where it was determined that deed of trust given by defendant to plaintiff was intended by parties to embrace all of operative property of utilities owned by defendant, reformation of deed to include both personal and real property was proper even though personalty had not become affixed to realty in such manner as to constitute a fixture, since instruments denominated deeds of trust may include personal property and even though they may be executed and recorded as chattel mortgages as well as deeds of trust in order to comply with recording statutes.

8. Reformation of Instruments 🔑1

Courts in reforming instruments do so to express the actual understanding of parties and not to try to improve upon those understandings.

9. Mortgages 🔑131

A security instrument places lien upon property therein described and not upon property thereafter acquired, unless instrument so declares, or unless such property is so dealt with as to become by operation of law a part of property covered by lien.

10. Reformation of Instruments 🔑47

Where it was determined that it was intention of parties at time of execution of deed of trust that instrument placed lien upon all machinery and equipment used in operation of utilities owned by defendant, and complaint for reformation of deed to conform to such intention contained no allegation that it was intention to embrace after acquired properties of defendant and court made no finding upon such issue, it was error to reform instrument to include after acquired properties.

11. Public Service Commissions 🔑6.11

By virtue of statute prohibiting public utilities from creating liens on their property without having procured consent from Public Utilities Commission, court of equity was without power to reform deed of trust executed by owner of public utilities to conform to parties' intention that all operative property of utilities be embraced therein when consent to such deed had not been procured from Commission, but upon determination that reformation was necessary to conform to intention of parties, interlocutory decree for reformation should have been entered with continuation until application could be made to Commission for consent to such lien, in absence of which, no decree could be entered. Gen.Laws, Act 6386, §§ 51, 52.

12. New Trial 🔑155

Court was without power, more than sixty days after filing of notice of intention to move for a new trial, to enter order denying motion and reducing attorneys' fee below amount previously adjudged. Code Civ.Proc. § 662.

13. Mortgages 🔑581(5)
Reformation of Instruments 🔑50

Where amount involved at time of commencement of action for reformation of deed of trust securing promissory note given by defendant to plaintiff and to foreclose deed of trust was $36,000, and trial was extended and complicated, court did not abuse its discretion, in view of issues involved, in awarding attorneys' fee of $5,100.

14. Contempt 🔑80

Appeal from decree directing reformation of deed of trust and foreclosure of deed as reformed would not be dismissed on ground that appellant had been adjudged in contempt by trial court for violation of portion of judgment appealed from which restrained him from selling property involved, since policy of law is to decide appeals upon their merits.

15. Appeal and Error 🔑781(4)

Where it was determined that deed of trust given by defendant to plaintiff was intended by parties to embrace all of operative property of two utilities at time of execution of deed and defendant argued on appeal from decree reforming deed that certain after-acquired articles had been wrongfully included, motion to dismiss appeal on ground that question of wrongful inclusion was moot for reason that allegedly included articles had been destroyed by fire would not be granted, when affidavit in support of motion was merely upon information and did not purport to be from knowledge, and when affidavit in opposition was positive to effect that greater part of property had not been destroyed by fire.

16. Appeal and Error ⟹801(1)

The policy of the law is to decide appeals upon their merits.

◆

C. A. Degnan, Crescent City, Winston A. Langlois, Sacramento, for appellant.

Hauerken, St. Clair & Viadro, San Francisco, William W. Speer, Crescent City, for respondent.

VAN DYKE, Justice.

The action here under review was brought by plaintiff-respondent, Hosford, against defendant-appellant, Henry, to obtain reformation of a deed of trust securing a promissory note given by appellant to respondent and to foreclose the deed of trust as reformed. Appellant for some time had been engaged in the business of operating a public utility furnishing electric light and power and a public utility furnishing water to the town of Klamath and vicinity in Del Norte County. His enterprises had been franchised by the Public Utilities Commission. On March 13, 1948, he borrowed from respondent the sum of $36,000, executing to respondent a promissory note in that amount, together with the deed of trust in question. Prior thereto appellant had applied to the Public Utilities Commission for an order authorizing him to borrow said sum from respondent and to execute the note and deed of trust. To this application he appended copies of the proposed note and deed of trust and throughout the application referred to the copies for particulars concerning the terms thereof and for a description of the property to be encumbered. Therein there was described by metes and bounds two small parcels of real property and nothing more. Upon these parcels was situated the generating plant which produced the electricity for the electric utility business. Neither the wells which produced the water for the water utility business nor the pumps, pipe lines or other appurtenances of the water system were situated upon the real property so described. Much of the operating property of the electric utility, such as poles, service lines, transformers, meters and the like were also located without the boundaries of these parcels. Attached to the application there appeared a statement of the assets and liabilities of the Klamath Water Light & Power Company, under which designation appellant operated both utility businesses. This statement, among assets, listed "Machinery & Equipment $80,996.99, Land [the two small parcels] $1,471.00, Autos & Trucks $1,410.02, Inventory $1,265.88." The statement showed the net worth of the Klamath Water Light and Power Company to be approximately $69,000. Responsive to the application, the Commission granted permission for appellant to execute the note and the deed of trust, both instruments "to be in, or substantially in, the same form as the note and deed of trust on file in this application." It was ordered that appellant use the proceeds of the loan to pay certain outstanding indebtedness and to pay in part the cost of an electric service line proposed to be constructed jointly by appellant and the California-Oregon Power Company in order to bring electric current to Klamath from that company's lines.

In his complaint plaintiff-respondent alleged it was the intention of the parties when the loan was made and the instruments were executed that the deed of trust should cover all the property used in operating both utilities, whether located on the described real property or not. The plaintiff-respondent prayed that he have judgment for principal, interest, attorneys' fees as provided in the note and deed of trust and his costs, and that these sums be declared a lien upon all of the property described in the deed of trust and the additional property sought to be included therein by reformation; and that the lien be foreclosed. The court found the allegations as to what the parties intended the deed of trust to cover to be true. It decreed that the deed of trust be reformed and foreclosed.

It appeared that after the action was begun and by permission of the Commission and agreement of the parties to the action, the rights of way used in connection with the operation of the electric utility, together with the power poles, power lines and incidental equipment, were sold to California-Oregon Power Company for $30,000, $24,000 of which was paid to respondent, so that the amount adjudged to be due him was $12,000, plus over $2,000 accrued interest. The court by its judgment decreed that respondent recover attorneys' fees fixed at $5,100.

Appellant moved for a new trial. The trial court made an order denying the same and at the same time ordered that the attorneys' fees as adjudged be reduced to the sum of $4,200. These orders were made more than sixty days after the notice of intention to move for a new trial was filed.

It appeared in the evidence that before beginning action herein respondent requested the Commission to authorize appellant to include in the deed of trust the aforesaid property not described therein. Respondent further asked of the Commission, if appellant should decline so to do after being authorized, that the Commission authorize respondent to prosecute an action against appellant in a court of competent jurisdiction for reformation of the deed of trust and for foreclosure as reformed.

The Commission held a hearing upon respondent's application and thereafter rendered an opinion noting that the testimony was in conflict as to the intention of the parties with respect to the scope of the deed of trust. The Commission declared it had no authority to direct the appellant to reform the deed of trust as requested by the respondent; but that if a court of competent jurisdiction ordered a reformation of the deed of trust the Commission would then consider, upon the filing of an appropriate proceeding, what action it would take in regard thereto.

[1, 2] Appellant first contends that there is insufficient evidence to support the trial court's finding that the deed of trust should be reformed. Except as reformation here may be limited and controlled by the provisions of the Public Utilities Act, Gen.Laws, Act 6386, this contention cannot be sustained. Respondent testified that appellant offered to give as security for the loan "his entire operation in Klamath" including "the property, buildings, machinery and all transmission lines, poles, transformers, water department, wells, pumps, motors, and all transmission lines and all other assets he had in the County of Del Norte"; that he was "perfectly willing to put up all of his assets including the property, the plant and machinery, transmission lines, transformers, and everything else for security for the money." When later respondent advised appellant that his attorneys had recommended to him that he refuse to make the loan because appellant's credit was not satisfactory, appellant again described the security which he was prepared to give as "all of his property, buildings, transmission lines, transformers, poles, franchise for both water and electricity." He then exhibited to respondent the promissory note he proposed to use and the application he had filed with the Public Utilities Commission to obtain its order permitting him to borrow the money and give the security. The application was discussed in detail. The two men examined the Commission's order which recited that the deed of trust would be a lien on applicant's property situated "in Klamath and vicinity". Appellant stated to respondent that this order of the Commission "covered everything he had" and that there was no reservation as to machinery and that even some new poles were covered. Appellant urged that he needed the money that morning in order to complete certain deals. At the close of this conversation respondent gave appellant a check for $36,000 and received from appellant the executed promissory note and deed of trust. Respondent said he did not check the deed of trust because he would not have known whether it was right or wrong by reading it, but he took it for granted that it was correct and relied in part upon the fact that the Commission had acted in the matter, believing that anything done under its supervision would be correctly done. Respondent believed that the security instrument carried out the intentions of himself and appellant. As to appellant, who did not testify at the trial, being personally absent therefrom although represented by counsel, it is appar-

ent that the trial court could conclude from the testimony of respondent that either appellant also believed with respondent that the security instrument was adequate to do what the parties intended or else that, knowing it to be quite defective in the property therein described as security for the debt, he wilfully deceived and defrauded respondent into making the loan. The court could presume that appellant was not acting fraudulently and from the testimony of respondent could infer by reason of the statements appellant made to respondent at that time that appellant, even as respondent, mistakenly believed the security instrument carried out the intentions of the parties, which intentions were as claimed and testified to by respondent with respect to the amount of security that was to be placed behind the loan. The facts warranting reformation were therefore presented to the trial court.

"* * * The purpose of reformation is to effectuate the common intention of both parties which was incorrectly reduced to writing. To obtain the benefit of this statute, it is necessary that the parties shall have had a complete mutual understanding of all the essential terms of their bargain; if no agreement was reached, there would be no standard to which the writing could be reformed." Bailard v. Marden, 36 Cal. 2d 703, 708, 227 P.2d 10, 13.

"Except as stated in Sections 506 and 509–511, where both parties have an identical intention as to the terms to be imposed in a proposed written conveyance, assignment, contract or discharge, and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third parties will not be unfairly affected thereby." Restatement of the Law of Contracts, Sec. 504.

[3–6] After respondent had testified to the matters hereinabove referred to, it appeared, as might have been expected, that he could not describe all of the items of property that would come under the designation of operative property of the two utilities. It was then suggested by counsel for the appellants that an inventory be made which would describe the items of operative property which the court might find ought to have been described in the deed of trust. After considerable discussion the case was continued, the court having announced that it would reform the deed of trust and foreclose it so as to include therein all the operative property. The description of property to be included in the reformed instrument was to be ascertained after an inventory was taken. The court appointed a receiver, and ordered that this receiver prepare an inventory of all property, both real and personal, described in the complaint as having been intended to be included in the security instrument, the inventory to indicate all machinery, equipment and other personal property: a. Located "in the plant" on March 13, 1948, the actual date of the execution of the note and deed of trust; b. Located "in the plant" at the date of the receivership order; c. Removed from "the plant" between March 13, 1948 and January 16, 1950; and d. Removed from "the plant" subsequent to said January 16th. The receiver was directed to exclude from the inventory the electric distribution system previously sold to California-Oregon Power Company. When the trial was resumed the inventory as made up by the receiver was on hand. It was received in evidence but no one testified it was correct. At that time appellant, testifying therefrom, stated that numerous items were included in the inventory which were not part of the operative property of either utility when the deed of trust was executed, but had been brought to Klamath thereafter, that some of the items listed were worn out and had been disposed of, that some of the items had never been part of the operative property of either utility but were merely stored upon the utility premises or although located in other areas and never used were nevertheless included by the receiver in the inventory. The receiver did not testify as to what information he had acted on in inventorying the various items therein described. From this record it must be said with regard to many items contained in the inventory that there is nothing to conflict with the testimony of appellant that these items were not and never had been a part of the operating properties of the utilities and should therefore have been excluded. Receivers are officers of the court appointing them, but they possess no judicial powers. The court could not and in fact did not purport to delegate to the receiver the court's own fact-finding powers. The burden was upon respondent to prove his right to have a lien upon each item of property which he claimed ought to have been included in the deed of trust and in the absence of such evidence as to any particular item it could not be included. Respondent argues that appellant cannot be heard to complain of the insufficiency of evidence as to the items he says should not have been included in the deed of trust because it was appellant who would have best been able to testify on such matters and he chose not to be present, raising thus a presumption that his testimony would have been in favor of respondent. The rule that failure of a party to call an available witness raises a presumption that the testimony of such witness would have been adverse to the party failing to so call him has no application here. It was still the burden of respondent to prove his case and appellant was under no duty to appear as a witness for his adversary unless subpoenaed. Appellant did testify at the continued hearing on the matter of the inventory and his testimony as to the items covered by it stands without conflict. Even if disbelieved, as suggested by respondent, there is still no evidence that the receiver correctly inventoried the operative property. Respondent further argues that because appellant stipulated that the inventory might be taken he thereby waived any objection thereto. This argument is not sound. Respondent refers in support thereof to Lyle v. Lyle, 53 Cal.App.2d 552, 127 P.2d 1006. In that case the trial court in a domestic relations case delegated to an assistant the duty of investigating conditions surrounding children whose custody was involved and purported to base its order upon the report of such assistant. It was held that because the defendant in that action had by acquiescing in such conduct led the court into the error of delegating its fact-finding powers to such assistant he could not thereafter complain of the error which he had invited. No such situation obtains here. True, appellant's counsel, after the court had indicated its intention of reforming the deed of trust so as to include all items of operating property, suggested that an inventory be taken so that it could be determined what items would fall within the classification of operative property. There was no waiver of any right to object when the inventory was taken that items had been wrongfully included therein. There is nothing in the record to warrant applying the rule of invited error. The matter was made the subject of motion for new trial and the court refused to change its finding. Also appellant's objections relied on here were presented to the trial court before the findings were signed.

[7] Appellant contends further that a deed of trust cannot be reformed to make it include personal property which was not and did not become affixed to the realty so as to constitute a fixture. Herein we think appellant is being too technical. We have already said that the trial court was justified in finding it to have been the mutual intention of the parties that the security instrument should place behind the loan all of the operative property of both utilities. That security instrument, denominated a deed of trust, could have been so drawn as to include both real and personal property. It is not at all uncommon for instruments denominated deeds of trust to include personal property and to be executed and recorded as chattel mortgages as well as deeds of trust. This latter is done so as to comply with the requirements of the code as the way in which the chattel mortgages are to be executed and recorded, but this does not mean that a single security instrument cannot effectively include both real and personal property. See Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 173, 152 P. 542. We are not here concerned with the interests of third parties.

[8–10] Appellant contends that the trial court erred in declaring the deed of trust operative as to after-acquired personalty included in the inventory. He points out that there is no clause in the deed of trust as executed purporting to cover any after-acquired property, operative or otherwise. There is no specific allegation in the complaint and no specific finding that the parties intended the security instrument should contain a clause applicable to after-acquired operative property. Courts reform instruments to express the actual understandings of the parties. They do not try to improve those understandings. A security instrument places a lien upon the property therein described and not upon the property thereafter acquired unless the instrument so declares or unless such property is so dealt with as to become by operation of law a part of the property covered by the lien. The complaint alleged that the parties intended the security instrument to cover the two described parcels of land and all structures located thereon. With respect to the electric utility it was alleged that the deed of trust was intended to include all generating equipment used whether located on the described land or not. With respect to the water utility a similar allegation was made. The court found that the parties intended the security instrument to cover all machinery and equipment used in the operation of the utilities "not located on the above described land" at the time of the execution and delivery of said deed of trust but used at that time in connection with the operation "of said utility business." It is thus apparent that there is neither allegation nor finding addressed to the matter of after-acquired property and in the absence thereof it was error to include such property in the reformed security instrument and to declare a lien thereon.

"In general, personalty brought onto mortgaged premises by the mortgagor, if not physically or constructively attached thereto, does not come under the mortgage unless the instrument contains an appropriate after-acquired property clause." 175 A.L.R. 409.

"In the absence of any express agreement on the subject, the lien created by a mortgage is limited to the property which is described in the mortgage, and does not include other property of the same character which the mortgagor may afterwards acquire and place with the mortgaged property." 16 Cal.Jur. 311.

Section 51 of the Public Utilities Act, Deering's Gen.Laws, Act 6386, provides that: "No public utility shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its * * * property necessary or useful in the performance of its duties to the public, * * *, with out first having secured from the railroad commission [now Public Utilities Commission] an order authorizing it so to do."

It is also provided in Section 52: "The power of public utilities * * * to create liens on their property situated within this State is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the State, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe."

[11] Other regulatory provisions are contained in the act. Severe penalties are imposed upon utilities and their officers and operators for violation of these provisions. The act specifically declares that any encumbrance upon operative properties of utilities made without the prior permission of the Commission are void. We think it beyond the power of a court of equity to do by reformation what the parties are forbidden to do themselves and that, even though the trial court justifiably found that the security instrument must be reformed in order to coincide with the parties' intentions, nevertheless having so determined it could not itself decree a lien and enforce the same until and unless the Commission had consented that the lien be imposed. The court should have entered an interlocutory decree for reformation and then continued the case until application could be made to the Commission for its consent that the lien be imposed in accordance with the findings and decree of the trial court. Until and unless such consent has been obtained it is beyond the power of the trial court to place a lien upon the utility properties. On the other hand, we perceive no good reason why reformation cannot be

accomplished in cases involving encumbrance of operative utility properties where a court of competent jurisdiction has declared it ought in justice to be done and upon application the Commission is willing to consent to the decree in so far as it does impose a lien. If upon such application, notwithstanding the court's decree, the Commission shall refuse its permission then the parties must be left where their own mistake has placed them, or, if the ground of reformation be fraud, the defrauded party must be relegated to his action for damages suffered by reason of such fraud.

[12, 13] As we have stated, the trial court, more than sixty days after the filing of notice of intention to move for a new trial, entered an order denying the motion but reducing the attorneys' fee below the amount adjudged. This order was ineffective. The court had no power at that time to make that order. C.C.P. § 662; Fong Chuck v. Chin Po Foon, 29 Cal.2d 552, 554, 176 P.2d 705. Appellant complains that the court abused its discretion in awarding fees. He points to the fact that the judgment was for the sum of about $14,000 and says that, the whole record considered, the work performed did not justify so large a fee. But when the action was begun the amount due was $36,000, with interest, appellant having failed to pay any sum at all; the matters at issue both legally and factually were such as may well have required much time and labor; and the record reveals that appellant has unnecessarily increased the burdens of counsel. We cannot say there has been an abuse of discretion.

[14–16] Respondent has filed a motion to dismiss upon the grounds that: 1. Appellant was adjudged in contempt by the trial court for wilful violation of that part of the judgment appealed from which restrained him from selling, transferring or otherwise disposing of any property covered by the deed of trust as reformed, and, 2. That the main contention on the appeal being that certain property was erroneously subjected to the deed of trust and said property having been destroyed by fire, the appeal has become moot. These contentions are without merit. It does appear that appellant was adjudged guilty of having violated the restraint provisions of the judgment and also that he underwent punishment for such contempt. Respondent cites no authorities in support of this ground of their motion to dismiss and, indeed, frankly concedes that their research has revealed none. This Court likewise has found no such authorities. On reason we perceive no merit in the contention that such a violation with respect to the judgment appealed from affords ground for dismissal. With respect to the destruction of certain property by fire we find it unnecessary to consider the merits of the motion since the affidavit of respondent in support thereof is merely upon information and does not purport to be from knowledge, whereas the affidavit of appellant in opposition to the motion is positive to the effect that although some of such property was destroyed by fire the greater part thereof was not. The evidence on the motion, therefore, is to the effect that a substantial portion of the property involved is in existence. The policy of the law is to decide appeals upon their merits. Clement v. Board of Reclamation, 89 Cal.App.2d 115, 118, 200 P.2d 196.

The motion to dismiss is denied. The judgment appealed from is affirmed, except in so far as specific items of personal property have been placed under the security instrument without proof of correctness of the inventory returned by the receiver, and in so far as there has been included under the lien declared any after-acquired property not so dealt with as to become by law a part of the real property involved. As to such matters it is reversed. The cause is remanded to the trial court with instructions to take such further testimony as may be required to determine what items of personal property are to be included within the lien in accordance with the rulings here made, with leave to plaintiff to amend the complaint in respect of after-acquired property if it be claimed that the true contract of the parties embraced provisions that such property would come under the lien; and the trial court is further instructed, having determined these things, to enter an interlocutory decree for reformation in accordance with such determination and to then afford an opportunity to plaintiff to apply to the Public Utilities Commission for its consent. If the necessary consent is obtained then the court may proceed to foreclose the deed of trust as reformed. If such consent is refused then the court may proceed to foreclose the deed of trust as written. Each party shall pay his own costs on this appeal.

ADAMS, P. J., and PEEK, J., concur.

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108 Cal.App.2d 14

BARR LUMBER CO. v. SHAFFER et al.

Civ. 4200.

District Court of Appeal, Fourth District, California.

Dec. 4, 1951.

Hearing Denied Jan. 31, 1952.

Action by Barr Lumber Company against Earl A. Shaffer and others to foreclose a mechanic's or materialman's lien for materials furnished and used in constructing a house on land owned by named defendant and wife. The Superior Court of Orange County, Kenneth E. Morrison, J., having granted motions to strike and sustained demurrers to complaint without leave to amend, entered judgment in favor of demurring defendants and plaintiff appealed. The District Court of Appeal, Griffin, J., held that lien of trust deed, conveying unimproved realty to trustee as security for loan to owners, recorded before commencement of construction by owners of a house on the realty, was superior to subsequently recorded lien for materials furnished and used in constructing the house and that title to the property, including house, passed to purchasers at foreclosure sale under trust deed free and clear of lien for materials.

Judgment affirmed.

1. Mortgages 🔑131, 160

A mortgage of realty includes both the land and improvement subsequently made thereon, the lien upon such improvements being ordinarily construed as relating back to the date of the mortgage and entitled to priority as against a mortgage subsequent to the construction of the improvements. Civ.Code, § 2897.

2. Statutes 🔑223.2(25)

Civil Code, section 2897, fixing priority of liens according to time of their creation, must be construed in connection with Code Civil Procedure section 1186, giving mechanic's or materialman's lien priority over subsequent or unrecorded liens, mortgages, deeds of trust and other encumbrances. Code Civ.Proc. § 1186; Civ.Code, § 2897.

3. Mortgages 🔑171(1)

The lien of a mortgage or deed of trust recorded before the commencement of work or furnishing of materials, though consideration therefor did not pass until after work was commenced or materials furnished, is prior and superior to mechanics' lien claims, where the making of the advances by mortgagee or beneficiary under deed of trust is obligatory. Code Civ. Proc. §§ 1183, 1185, 1186; Const. art. 20, § 15.

4. Mortgages 🔑171(1), 372(2)

Lien of a trust deed, conveying unimproved realty to trustee as security for loan to owners, recorded before commencement of construction by owners of a house on the realty, was prior to mechanic's or materialman's lien on house for materials furnished and used in constructing the house, and title to the property, including house, passed to purchasers at subsequent foreclosure sale under trust deed free and clear of lien for materials. Code Civ.Proc. §§ 1183, 1185, 1186; Civ.Code, § 2897; Const. art. 20, § 15.

5. Appeal and Error 🔑1042(1)

Granting motion to strike amended complaint for failure to state a cause of action was not error, where, if motion had not been granted, demurrers to both counts of amended complaint would necessarily have had to be sustained without leave to amend.

6. Mortgages 🔑171(1), 372(2)

Where trust deed, conveying unimproved realty to trustee as security for a loan to owners, was recorded before commencement of construction by owners of a house on the realty, materialman had no equity in the property under subsequently recorded lien for materials furnished and used in constructing the house superior to rights of beneficiaries under trust deed or purchasers at public foreclosure sale under trust deed, regardless of the increase in value of the property as a result of construction of the house. Code Civ.Proc. §§ 1183, 1185, 1186; Civ.Code, § 2897; Const. art. 20, § 15.

◆

Forgy, Reinhaus & Forgy, Santa Ana, for appellant.

C. Arthur Nisson, Jr., Harvey, Rimel & Johnston and Wellington & Sprague, Santa Ana, for respondents.

O'Melveny & Myers, Louis W. Myers and Pierce Works, Los Angeles, amicus curiae for California Land Title Assn.

GRIFFIN, Justice.

Plaintiff and appellant Barr Lumber Company, a corporation, brought this action against defendants to foreclose a mechanic's or materialman's lien for $2,590.60, for materials furnished and used in constructing a house being built by defendants Earl and Ann Shaffer. Plaintiff alleged in its second amended complaint that the Shaffers were the owners of a parcel of land in Orange County containing about 4.89 acres; that about February 9, 1948, defendants William C. Labahn and wife, and defendants Charles a Rockwell and wife, loaned $12,000 to the Shaffers and that as security for said loan the Shaffers executed a note and trust deed dated February 9, 1948, and recorded May 14, 1948, in that amount covering the real property described; that under the deed of trust the real property was conveyed to defendant Reliance Title Company, a corporation, as trustee. The lenders were named as beneficiaries thereunder. It is further alleged that at the time the loan was made there was no dwelling house on the real property; that thereafter about September 1, 1948, defendant Mr. Shaffer, with the knowledge and consent of the remaining defendants, commenced building thereon; that between September 24, 1948, and October 29, 1948 (which period was prior to its completion), at the request of defendant Mr. Shaffer, plaintiff furnished him material to be used in the construction of the building, and that a mechanic's lien was duly recorded. It is then alleged that the construction of the dwelling house was commenced and completed after the real property was conveyed to the trustee, and that after its completion the value of the entire property was approximately $18,000; that on September 1, 1949, the trustee conveyed the property to defendants C. A. Nisson and wife (purchasers of the property) following a foreclosure sale of it under the trust deed for the sum of $10,700. By the amended complaint plaintiff seeks judgment against each defendant for $2,590 damages and costs. In a second cause of action it is alleged that it would be grossly unjust and inequitable for these defendants to retain this property without payment to plaintiff of the reasonable value of said materials used in the construction of the improvements, and plaintiff seeks the right to the establishment of a lien against the dwelling house in that sum and asks that it be adjudged a superior or prior lien to the trust deed, and that the building be sold and the proceeds be applied in payment of plaintiff's claim. Defendants Nisson filed a motion to strike the whole of the second amended complaint and also certain paragraphs thereof as containing irrelevant and redundant matter, and also filed a general demurrer claiming that the amended complaint stated no cause of action against these defendants, and asked that the demurrer be sustained without leave to amend. A similar demurrer and motion to strike was filed by the other defendant, Reliance Title Company, as trustee, as well as the defendants Rockwell and Labahn. The motions to strike were granted and the demurrers were sustained without leave to amend. Judgment was entered in favor of these demurring defendants. The court decreed that plaintiff take nothing by this action as against them. Plaintiff appealed from the judgment.

The principal question presented on this appeal is whether or not the charge or lien of a trust deed, mortgage or other encumbrance recorded prior to the commencement of the work of improvement is superior to the lien upon the improvement (as distinguished from the land) of a mechanic or materialman for work done or materials furnished in connection with such work.

It is appellant's theory of the law of mechanics' liens in California that laborers and materialmen are entitled to compensation; that to secure payment to those furnishing labor and materials such persons are granted an implied right to proceed against a structure for which labor and materials have been furnished; and that therefore a mechanic's lien may exist upon a building for which labor and materials have been furnished and that a lien upon the structure is not incompatible with the prior encumbrance upon the land itself. In support of the argument appellant cites art. XX, sec. 15, Constitution of California, which states: "Mechanics, material men, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

Appellant claims that this provision of the Constitution gives a direct lien upon the property to which persons have furnished labor or material, and that in providing for the enforcement of such liens under the Constitutional mandate, the legislature adopted about the same provisions in section 1183 of the Code of Civil Procedure; that this section provides only for a lien upon the property into which labor and materials have gone, and does not give a lien upon the land; that this interpretation is given force by the adoption of section 1185 of the Code of Civil Procedure, which provides for a lien upon the land in addition to a lien upon the building to the *extent of the contracting owners' interest,* citing McDowell v. Perry, 9 Cal.App.2d 555, at page 564, 51 P.2d 117. It is further argued that to distinguish between the ownership of improvements made on land and the ownership of the real property itself, the legislature enacted section 1192 of the Code of Civil Procedure which provides that a landowner may protect his interest in land as distinguished from the building by giving a notice of nonresponsibility. Secondly, it is argued that the mechanic's lien upon the building or structure is a primary thing and that the land is merely incident to it and that a prior recorded encumbrance, mortgage, or trust deed upon the land itself is junior to a mechanic's lien accruing from work or materials supplied to an improvement commenced subsequent to the date of recordation, citing such cases as Bottomly v. Rector, Wardens and Vestry of Grace Church, 2 Cal. 90; Houghton v. Blake, 5 Cal. 240; Holmes v. Richet, 56 Cal. 307; McGreary v. Osborne, 9 Cal. 119; Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 686, 81 P. 30; Linck v. Meikeljohn, 2 Cal. App. 506, 84 P. 309; Western Electric Company, Inc., v. Colley, 79 Cal.App. 770, 251 P. 331; English v. Olympic Auditorium, Inc., 217 Cal. 631, 20 P.2d 946, 87 A.L.R. 1281; and 22 Cal.Law Review 312.

As to the first contention respondents have no particular quarrel with appellant's theory as applied *to the interests of the owner,* particularly where the transaction resulted in an unjust enrichment to such owner. The English case and the Linck case sufficiently dispose of this question. As to the second point, respondents, as well as counsel for amicus curiae California Land Title Association, most earnestly disagree.

Respondents cite Basham v. Goodholm & Sparrow Inv. Co., 52 Okl. 536, 152 P. 416, 420, where the court held a mechanic's lien inferior to the lien of a recorded mortgage and then said: "* * * there are many states which permit materialmen and mechanics, who furnish material and labor to improve land upon which there is a prior recorded mortgage, to obtain a lien on the improvements so constructed superior to the mortgage lien, but such priority operates only upon the improvements, the mortgage holder still retaining his priority as to the land; but, as this rule contravenes the common law, it cannot be done in the absence of an expressed statute which plainly authorizes it. It will be noted that statutes that authorize it are clear and explicit, and leave nothing to conjecture."

Citing the Statute of Texas (Sayles Supp. Rev.St. Art. 3171 [Vernon's Ann.Civ.St. art. 5459]. See, also, Stats. of Iowa, subd. 4, Sec. 3317, McClain's Code.

In Kentucky Lumber & Mill Work Co. v. Kentucky Title Sav. Bank & T. Co., 184 Ky. 244, 211 S.W. 765, at page 769, 5 A.L.R. 391, the court said: "The contention of appellants that the Bank & Trust Company's mortgage does not attach to the house, because it was not in existence when the mortgage was executed, cannot be sustained. Where a lien is created upon land, and buildings are thereafter erected upon it, the lien attaches to the buildings, as they are constructed, and has priority over the liens of materialmen and laborers for constructing the buildings. (Citing cases.) In the absence of a statute to that effect, a prior lien cannot be restricted to the land itself, when a building is thereafter erected upon it * * *."

It is apparent that the constitutional and statutory provisions for mechanics' liens in the State of California did not, as in the states referred to, specifically provide that mechanics' liens shall be superior to a mortgage lien or deed of trust previously recorded. It was stated in McGreary v. Osborne, 9 Cal. 119, at page 122, that "The object of the act was to give the mechanic a lien upon *whatever interest the person had* who caused the superstructure to be made." (Italics ours.) To the same effect is Allis-Chalmers Co. v. Central Trust Co., 1 Cir., 190 F. 700, 704, 39 L.R.A.,N.S., 84, where it is said:

"One who contracts with the owner of land to furnish labor and materials, * * * is assumed to know, if a mortgage is recorded, that the consent of the mortgagor as owner can give a lien only to the extent of the mortgagor's interest. * * * He has no reasonable ground for an expectation or belief that a mortgagee who has advanced money upon the security of the land or on the improvements to be made thereon is willing to forego this security even if the money is advanced for the purpose of placing improvements upon the land.

* * * * * *

"Whoever undertakes construction work upon property subject to a recorded mortgage must be assumed to have relied upon the personal responsibility of the other party to the contract and upon such liens as the statute grants in definite terms, and not upon the expectation of displacing the priority of mortgage liens. * * *"

Counsel for amicus curiae points out that his research reveals that no courts of California have held a prior recorded encumbrance upon land to be junior in any respect to a mechanic's lien arising from work or materials supplied to an improvemen commenced subsequent to the date of recordation.

In Rose v. Munie, 1854, 4 Cal. 173, the Supreme Court said: "It is useless for us to adduce any argument in support of the proposition that a mortgage of land carries with it all buildings which are or may be attached to the freehold, and that the rights of the mortgagee cannot be defeated by mechanics' liens, or other incumbrances created without his consent."

American Building Material Service Co. v. Wallin, 116 Cal.App. 527, 529, 2 P.2d 1007, is a case factually similar. The court there held that a trust deed is a lien or encumbrance within the meaning of section 1186, supra, and that the general rule is that if recorded before any work is done or materials are commenced to be furnished, a deed of trust or mortgage is in the ordinary course of things prior to mechanics' liens.

[1] This general rule relating to mortgages is stated in 18 Cal.Jur. 110, sec. 417, where it is said: "A mortgage of real property includes not only the land, but improvements subsequently made thereon, the lien upon which is ordinarily construed to relate back to the date of the mortgage, and is entitled to priority as against a mortgage subsequent to the construction of the improvements * * *."

The only limited qualification there mentioned referred to the former mechanics' lien act which was then in effect. Stats. 1850, Chap. 87, p. 211, 213, sec. 9, which gave mechanics' liens preference over encumbrances attaching *subsequent* to the time work was commenced.

In Preston v. Sonora Lodge, 39 Cal. 116, 118, the court held that under the Statutes of 1867–1868, p. 589, sec. 3, prior encumbrances were superior as to permanent mining claim improvements, and stated as a general proposition of law buildings and structures placed upon mortgaged premises became part of such premises and are impressed with the lien of the mortgage, but did also state such lien was inferior as to structures subsequently built upon the property which were capable of removal and of *separate sale.*

The entire question then resolves itself to the question of the priority of a lien as between the holder of a prior recorded encumbrance and the lien of the materialman. The present governing statute, enacted in 1872, is section 1186 of the Code of Civil Procedure which, at the time this complaint was filed, read: "(Priority of liens.) The liens provided for in this chapter are preferred to any lien, mortgage, deed of trust, or other encumbrance, upon the premises and improvements to which the liens provided for in this chapter attach, which may have attached subsequent to the time when the building, improvement, structure, or work of improvement in connection with which the lien claimant has done his work or furnished his material, was commenced; also to any lien, mortgage, deed of trust, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, structure or work of improvement with which the lien claimant has done his work or furnished his material was commenced."

[2] That section does not provide that a mechanic's lien is superior to a prior recorded encumbrance but provides that mechanics' and materialmen's liens are only preferred as to (1) mortgages, trust deeds, and other encumbrances attaching subsequent to the time the improvement was commenced; and (2) unrecorded mortgages, trust deeds, and such other encumbrances of which the lien claimant had no notice. To be construed in connection with section 1186 of the Code of Civil Procedure is section 2897 of the Civil Code, which has been in effect for a like period. It recites: "Priority of liens. Other things being equal, different liens upon the same property have priority according to the time of their *creation* * * *." (Italics ours.)

In Ferger v. Gearhart, 44 Cal.App. 245, 186 P. 376, Article XX, Calif.Constitution, sec. 15 was held not to be self-executing, and that it was inoperative except as supplemented by the legislature through its power reasonably to regulate and to provide for the *exercise* of the right, the manner of its exercise, the time when it attached, and the time within which and the persons against whom it could be enforced. The legislature has exercised its plenary power in this respect continuously from 1850 down to the present time. Peckham v. Fox, 1 Cal.App. 307, 82 P. 91.

[3] In Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898, the rule is restated that where a mortgage or deed of trust has been recorded prior to the commencement of work or the furnishing of materials, but the consideration therefor has not passed until after work has commenced or materials have been furnished, the lien of the mortgage or deed of trust is prior and superior to the mechanics' lien claims where the making of the advances is obligatory on the part of the mortgagee or the beneficiary, citing cases.

Appellant claims that the right to a mechanic's and materialman's lien was raised to the dignity of a constitutional right by the Constitution of 1879, and argues that by reason of the decision in the English case and the interpretation placed upon it in 22 Cal.Law Review, p. 312, the previous opinions of the several courts have been altered to this extent and that "so far as mechanics are concerned" the building built upon the land "does not become a fixture until all mechanics' lien claimants are paid". It is true that there is language in the English case, 217 Cal. at page 643, 20 P.2d 946, as quoted. We find no legislative enactment supporting this statement, particularly, as applied to prior recorded encumbrances. There the court was considering a lease, by the terms of which the building did not become the property of the owner of the land until the termination of the lease. See, also, footnote No. 8, in 22 Cal.Law Review p. 313, commenting on this statement and suggesting that the proper view would be that the building does become part of the lessor's land, but subject to the lien of the mechanic, whose right cannot be defeated by any provisions to the contrary in the lease, citing Linck v. Meikeljohn, supra. It is true that this language was used in construing the relationship of the parties predicated upon the lease involved and on the theory, as mentioned in the opinion, that since the lease contemplated the construction of a building which would enhance the value of the fee to the benefit of the lessor, the lessee must be deemed a statutory agent of the lessor for the purpose of the construction. It is clear from that case and the decision therein that no previous trust deed was involved; that no mortgage lien existed on the property or building and that the mechanics' liens were allowed upon the theory that the lessee was the statutory agent of the lessor for the purpose of the construction. No such facts here exist.

In San Pedro Lumber Company v. Wilson, 4 Cal.App.2d 41, 40 P.2d 605 (hearing denied by the Supreme Court) which decision was written after the English case, this court held that a prior recorded mortgage or deed of trust creates a lien superior to the subsequent lien of a materialman, citing cases. In that case a mortgage and deed of trust were placed upon certain property and were duly recorded. Thereafter, the property was leased to a third party who went into possession and erected a house upon it. Plaintiff was not paid for the materials it furnished, and filed a materialman's lien. An action was commenced to foreclose the lien. The trial court there held that the liens of the mortgage and deed of trust were prior to the materialman's lien. Personal judgment was rendered against the third party for the amount of the claim. Plaintiff's lien was ordered foreclosed subject to the mortgage and deed of trust. There plaintiff relied upon the decision in English v. Olympic Auditorium, Inc., supra, to support its contention that the materialman's lien was superior to that of the mortgage. This court there held that the English case was readily distinguishable from the instant case in this, that in the English case no question of the priority of a lien of a prior mortgage or deed of trust was involved and for that reason it was not controlling. The lower court's judgment was affirmed.

In Linck v. Meikeljohn, supra, no question of a prior lien was involved. That case was distinguished in Brush v. E. R. Bohan & Co., 102 Cal.App. 457, 283 P. 126, where the reasoning which underlies both section 1186 of the Code of Civil Procedure and section 2897 of the Civil Code was discussed.

Appellant also cites Miller v. Waddingham, 91 Cal. 377, 381, 27 P. 750, 13 L.R.A. 680; Estate of Reid, 26 Cal.App.2d 362, 79 P.2d 451 and American Transit Mix Co. v. Weber, 106 Cal.App.2d 74, 234 P.2d 732, which latter case involved a vendor-vendee relationship. In that case no vendor's lien existed until the deed was given, which was at a time subsequent to the time when the materialman's lien attached. Allen v. Wilson, 178 Cal. 674, 174 P. 661; Oaks v. Kendall, 23 Cal.App.2d 715, 73 P.2d 1255.

It is amicus curiae's position in this action on appeal that the principles advocated by it with regard to the priority of earlier recorded mortgages and trust deeds over mechanics' liens have been the settled law of this state for one hundred years; that they have become a rule of property; that millions upon millions of dollars have been lent upon the security of California real property, bolstered by the knowledge of the public that recordation meant priority from that day forward as against any subsequent private lien or charge upon the land; that as regards mechanics' liens, section 1186, supra has so provided since 1872; that since the legislature has failed specifically to declare that such mechanics' liens are prior in point of time to a previously recorded trust deed or encumbrance, the courts should construe the statutes in accordance with the time honored construction that has been given to those statutes over this period of time.

As pointed out by counsel for amicus curiae, attorneys have doubtless advised their clients upon the law as announced in this long line of decisions, property rights have been acquired upon the faith of those decisions, and upon the interpretation of the statutes now before us. We conclude that if there were any good reason for a change in the rule with reference to trust deeds the legislature had abundant opportunity for an unequivocal declaration of such change. We find no statute that has been enacted with a view to the alteration of the declared doctrine.

In Sontag v. Stringer, 37 Cal.App.2d 663, 665, 99 P.2d 1098, 1099, this court said: "It has been repeatedly held that where a conclusion reached in a decision has been settled by long acquiescence on the part of the legislature and the courts, it will ordinarily not be disturbed, even if its soundness is doubted."

[4] It therefore appears that the trust deed here involved, having been recorded prior to the commencement of work, was prior to the lien here claimed and the necessary result would be that the title to the property passed to the appellants Nisson under the trust deed's foreclosure sale free and clear of the lien involved.

[5] Lastly, it is argued that a motion to strike is not the proper method of attacking a pleading claimed to be insufficient to state a cause of action, and the trial court erred in granting the motion to strike, particularly prior to sustaining the demurrers without leave to amend. We see no merit in this complaint because if the motion to strike had not been granted the demurrers as to both counts of the complaint would necessarily have had to be sustained without leave to amend. Neal v. Bank of America, 93 Cal.App.2d 678, 209 P.2d 825; Bowen v. Aubrey, 22 Cal. 566.

It is appellant's argument that the second cause of action was for equitable relief; that although it repleaded all the allegations of the first cause of action, it added certain allegations concerning the value of the property before and after the building was erected, to show unjust enrichment on the part of the owners of the land; that defendants were aware of the construction of said dwelling house and that the loan was not made for the purpose of financing the construction of a dwelling house; that all of these allegations were made for the purpose of stating a cause of action for equitable relief; and that accordingly the demurrer to that cause of action should not have been sustained without leave to amend, citing Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, at page 331, 44 P.2d 547; and Wuest v. Wuest, 53 Cal.App.2d 339, 127 P.2d 934.

[6] The facts pleaded in plaintiff's first cause of action clearly show that a trust deed was executed, delivered and recorded on the dates indicated; that shortly thereafter a house was built on the property. It further shows that so far as the Rockwells and the Labahns are concerned, they, in good faith, did advance the sum of $12,000 to the Shaffers for the apparent purpose of constructing a home upon the property. The allegations further show that as far as defendants Nisson were concerned they were innocent purchasers for value at the foreclosure sale under the trust deed. Therefore, it does not appear that the mechanic's lien claimant has an equity greater than the holders of the trust deed or the purchasers at the public foreclosure sale made pursuant to law. If the property had been improved in value to the extent alleged, the lien claimant might well have protected his interest by purchasing it at the same sale. The demurrers to the amended complaint were properly sustained without leave to amend.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

107 Cal.App.2d 794

NUNES v. DE FARIA et al.

Civ. 18673.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1951.

Hearing Denied Jan. 31, 1952.

Action by Joseph S. Nunes against Emma G. De Faria, and Edith Hay, to quiet title to certain realty and to cancel joint tenancy deed executed by plaintiff to himself and defendants. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that deed had been executed as result of false and fraudulent statement made by defendant De Faria at time of execution of deed.

Judgment affirmed.

1. Deeds 🔑211(3)

In action to quiet title and to cancel joint tenancy deed executed by plaintiff to himself and defendants who were daughters of his deceased wife by previous marriage, wherein plaintiff contended that deed had been executed as result of false and fraudulent statements by one defendant that execution of deed would not interfere with his possession or right of disposition of property, evidence sustained finding that joint tenancy deed had been executed as result of false and fraudulent statements made by such defendant.

2. Deeds 🔑196(2)

Where plaintiff sought to cancel joint tenancy deed executed by plaintiff to himself and defendants who were plaintiff's deceased wife's daughters by previous marriage, and execution of deed had been induced by fraudulent misrepresentation of one defendant that conveyance would not prevent plaintiff from selling property at any time he saw fit to do so, and defendants thereafter refused to allow sale unless they were permitted to share in sale price, trial court was justified in drawing inference that at time defendant had made statement she did not intend to permit plaintiff to sell property without her consent.

3. Deeds 🔑70(8)

Where plaintiff executed joint tenancy deed to himself and two defendants who were daughters of his deceased wife by previous marriage, and it appeared that such conveyance had been induced by false representation by one defendant that conveyance would not prevent plaintiff from selling property at any time he saw fit to do so, and that defendant had not intended to permit plaintiff to sell property without her consent at time of making such representations, there was sufficient basis for setting aside joint tenancy deed.

4. Reformation of Instruments 🔑17(1), 18

Equity will reform a voluntary conveyance when, as result of mistake of law or fact, larger estate or more land has been granted than was intended to be conveyed, and it is immaterial that grantee was cognizant of mistake, for grantee has given nothing for additional conveyance and cannot complain if mistake is corrected.

5. Deeds 🔑76

Where plaintiff was induced by false representation by his deceased wife's daughter by previous marriage to execute joint tenancy deed conveying property to himself and two of such daughters, misrepresentation was binding not only on daughter who made same, but also upon other daughter when she had reason to know of fraud or misrepresentation before giving or promising in good faith anything of value in transaction.

6. Appeal and Error 🔑1050(1)

In action by plaintiff grantor against two defendants, who were daughters of plaintiff's deceased wife by former marriage, to cancel deed conveying joint tenancy to plaintiff and such two daughters on ground that deed had been induced by false and fraudulent misrepresentations of one of such daughters, wherein it was determined that there had been misrepresentations warranting cancellation, admission in evidence of copy of will of deceased wife which named defendants as beneficiaries and testimony as to present opinions of one of defendants concerning property, if error, was not prejudicial error.

7. Cancellation of Instruments ⟹46

In action by plaintiff to cancel deed conveying joint tenancy to himself and two defendants who were daughters of plaintiff's deceased wife by former marriage, wherein it was contended that deed had been executed as result of false and fraudulent representations of one of such daughters, questions propounded to daughter who had made misrepresentations, whether or not she had contributed money for taxes or for any other purpose for property described in deed were proper, since such evidence was material in ascertaining whether she had given any consideration for deed.

◆

Joseph A. Brown, San Francisco, and Aaron Sapiro, Los Angeles, for appellants.

E. O. Leake and J. J. Leake, San Gabriel, for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff in an action to (a) quiet title to certain real property and (b) to cancel a joint tenancy deed executed by plaintiff to himself and defendants.

Facts: Plaintiff married Laura E. Nunes who had two daughters by a previous marriage, Mrs. Emma G. De Faria and Mrs. Edith Hay, defendants herein.

During their marriage plaintiff and his wife acquired a parcel of real property as joint tenants. On January 28, 1949, Mrs. Nunes died and plaintiff as the surviving joint tenant became the sole owner of the property.

Immediately after the death of his wife while plaintiff was suffering from shock and was mourning her loss, defendants expressed great love and affection for plaintiff. Defendant De Faria suggested that he execute a deed of the aforementioned real property to himself and the two defendants as joint tenants. Defendant De Faria stated to plaintiff that the execution of such deed would not in any wise interfere with his possession of the property or with any disposition thereof he might desire to make.

Relying on this statement plaintiff executed such a deed. However when he subsequently desired to sell the property both defendants told him that they would not consent to his selling it unless he gave them $11,000. Thereupon the present action was instituted.

[1] *Questions:* First: *Was there substantial evidence to sustain the trial court's findings that defendants made false and fraudulent statements and representations to plaintiff in order to induce him to execute the deed above mentioned?*

Yes. Plaintiff testified that he had a conversation with defendant De Faria during which she suggested that he execute a joint tenancy deed of the property to himself and the two defendants so that in the event of his death it would be unnecessary to have a probate of his estate; that during this conversation he said to her, "Well, supposing I want to sell this property?" to which she replied, "Well, that won't interfere with the selling of it one bit."

He further testified that he executed the deed in reliance upon her statement and that thereafter when he wanted to sell the property he called defendant De Faria in San Francisco and told her he wanted to sell, at which time she said, "Well, I don't know, you had better call Edith." (defendant Edith Hay). Immediately after this conversation with defendant De Faria he called Edith Hay and she said, "No, we are not signing." "She says, 'That is not half of it, we have to have $11,000 out of that place and we are not just letting you sell it like that.' She says, 'You go ahead and put it for sale and then we will sign and get our money.'" Plaintiff testified that he then said to Edith Hay, "You mean I am paying all the bills here, I paid off this property and paid all the bills, and you are telling me what to do and how to sell?" "She says, 'That is it, we are telling you.' She says, 'We want you to sell the furniture also.'"

In addition there was testimony that neither of defendants ever made any payments in connection with the property.

Clearly the foregoing evidence sustained the questioned findings of the trial court.

[2, 3] Second: *Was the misrepresentation merely one of law which did not support a cancellation of the conveyance?*

No. Defendant De Faria stated as a fact that the conveyance would not prevent plaintiff from selling the property at any time he saw fit to do so. Since he relied upon this fact, the trial court was justified in drawing the inference that at the time said defendant made the statement she did not intend to permit plaintiff to sell the property without her consent, and it was a sufficient basis for setting aside the deed.

[4] Even though we consider it as a misstatment of a question of law it would have justified the trial court in setting aside the deed. The law is accurately stated by Mr. Justice Vallée in Tyler v. Larson, 106 Cal.App.2d 317, 235 P.2d 39, 41, as follows: "It is old and well-established law that equity, at the instance of a grantor, his heirs, devisees, or representatives, will reform a voluntary conveyance, where, by mistake of *law* or fact, a larger estate or more land has been granted than was intended to be conveyed; and it is immaterial that the grantee is cognizant of the mistake. The grantee has given nothing for the conveyance; he is deprived of nothing; and he cannot complain if the mistake is corrected." (Italics added.)

Third: *Since the misrepresentation was made by defendant De Faria and not by defendant Hay, was such misrepresentation binding upon the latter defendant?*

[5] *Yes.* The correct rule is stated in Volume 2, Restatement of the Law, Contracts, (1932), section 477, at page 912 as follows: "Fraud or material misrepresentation by a third person renders a transaction voidable by a party induced thereby to enter into it, if the other party thereto (a) has reason to know of the fraud or misrepresentation before he has given or promised in good faith something of value in the transaction, or changed his position materially by reason of the transaction, or (b) is affected by the fraud or misrepresentations under the law of agency or trusts."

The section is followed by this pertinent comment: "As between the original parties to a transaction induced by the fraud or material representations of a third person, the injured party has power of avoidance, unless the other party is not only ignorant of the fraud or misrepresentation when he enters into the transaction, but has either parted with value or has changed his position materially in reliance upon the transaction. *A donee cannot conscientiously retain an advantage obtained from another because of a third person's misconduct, even if the donee neither knew nor had reason to know of it.*" (Italics added.)

Clearly in the present case subdivision (a) of the foregoing section is applicable since there is no evidence that defendant Hay has given or promised in good faith something of value or in any way changed her position as a result of the execution of the deed by plaintiff.

[6, 7] Fourth: *Did the trial court commit prejudicial error in receiving in evidence (a) a copy of a will which Mrs. De Faria prepared and had plaintiff copy shortly after his wife's death, which will named defendants as beneficiaries, (b) testimony of defendant De Faria relative to her present feelings and opinions about the property which was the subject of the suit, and (c) testimony as to whether Mrs. De Faria had contributed any money for taxes or any other purpose in connection with the property described in the deed?*

No. (a) and (b). Defendants' claim that the evidence admitted and described under (a) and (b), supra, was outside of the issues of the case and is immaterial.

Assuming without deciding that this is true such error was harmless and must be disregarded by this court in view of the fact that no prejudice appears to have resulted to either defendant from the admission thereof. (See Art. VI, sec. 4½, Constitution of the State of California; Mack v. White, 97 Cal.App.2d 497, 501 [9], 218 P.2d 76.)

(c) It was perfectly proper to question defendant De Faria as to whether or not she had contributed money for taxes or for any other purpose for the property described in the deed. Such evidence was material as to whether she had given any consideration for the deed; also as to whether there were any equities in her favor which should be recognized by the trial court in determining the judgment to be rendered.

In view of the foregoing conclusions it is unnecessary to discuss any of the other points raised by counsel.

Affirmed.

MOORE, P. J., concurs.

108 Cal.App.2d 111

WUEST v. WUEST.

Civ. 18310.

District Court of Appeal, Second District, Division 3, California.

Dec. 10, 1951.

Proceedings by Lois E. Wuest against William O. Wuest for an increase in the amount of support money awarded plaintiff by orders made subsequent to a decree of divorce which plaintiff obtained in 1943. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered an order refusing plaintiff's application for an increase in the amount of support money, and she appealed. The District Court of Appeal, Shinn, P. J., held that under the circumstances refusal to grant plaintiff's application was not an abuse of discretion.

Order affirmed.

1. Divorce ⚷286

It is not within appellate jurisdiction to try proceeding for increase in amount of support money awarded wife by divorce decree, de novo.

2. Divorce ⚷245(2)

Where divorced wife's right to support was established, she was entitled to be awarded from time to time such sums that were suitable to her needs and within defendant husband's ability to meet them.

3. Divorce ⚷245(3)

Where divorced wife owned five room house in which she lived, a vacant lot for which she paid $4,000, has $7,800 invested at 7% interest, did not rent any rooms in her home which was worth approximately $7,000, and owned a good automobile and had $500 cash, and was not in want, and defendant had assured income of some $800 a month and a potential income of sum $700 or more but all but $300 of that income was from property on which defendant had expended some $50,000 in improvements, which sum he had borrowed from separate funds of his present wife, refusal to grant divorced wife's application for an increase in amount of support money, was not an abuse of discretion.

William C. Rau, George A. Pickering, Los Angeles, for appellant.

Cook & Johnson, Van Nuys, for respondent.

SHINN, Presiding Justice.

Plaintiff wife has appealed from an order refusing her application for an increase in the amount of support money awarded her by orders made subsequent to a decree of divorce which she obtained in 1943. There have been previous appeals in the same action. Wuest v. Wuest, 53 Cal.App.2d 339, 127 P.2d 934, Id., 72 Cal.App.2d 101, 164 P.2d 32.

Some time after the second appeal plaintiff received in settlement of her community property interest about $23,000. She was awarded, in addition, $75 per month for her support; by order of August 21, 1946, the amount was reduced to $60 and by order of April 2, 1948, it was further reduced to $40 per month. The current proceeding was instituted by plaintiff for an increase in the allowance to $100 per month. Defendant's application, heard at the same time, for termination of the support payments was not acted upon and is not here in question.

[1] The case of the appellant is presented as if this court had jurisdiction of questions of fact and possessed the discretionary powers which belong to a trial court. Since it is not within appellate jurisdiction to try such matters *de novo* we shall give but a broad outline of the facts that were before the trial judge. From this it will satisfactorily appear that in denying plain-

tiff's application the court did not commit an abuse of discretion.

Defendant, who has remarried, owns valuable improved real estate from which he derives a substantial income. He is not physically able to pursue any occupation or employment and devotes his time to the management of his properties. With his present wife defendant has a joint bank account of $3,000 or $4,000. In a painstaking analysis of the evidence and by arguing the same in the light most favorable to plaintiff, her counsel arrives at a figure of $9,800 as defendant's annual income after the payment of taxes, upkeep of property and defendant's living expenses. This, it is shown, is substantially greater than defendant's net income in 1948 when the allowance was reduced to $40 per month. As defendant's counsel analyzes the testimony, their client has an assured income of some $800 per month and a potential income of several hundred dollars more. However, all but $300 of this income is from property upon which defendant has expended some $50,000 in improvements, which sum was borrowed from the separate funds of his present wife. She holds defendant's note for the amount, and while no time of payment is specified in it an oral agreement exists under which the net rentals from the improved property are applied on the indebtedness. The fact of this indebtedness was not disputed. Neither is it questioned that the improvement made with the funds of the present Mrs. Wuest increased the rental income to the present amounts from the previous $200 or $250 per month. The bona fides of the loan and the agreement for repayment are not questioned.

Plaintiff now owns a five room house in which she lives, and also a vacant lot for which she paid $4,000. She has $7,800 invested at seven per cent interest. She does not rent any rooms in her home which is worth approximately $7,000, she owns a good automobile, has $500 cash, and is not in want.

Pursuant to the direction of the court that the inquiry should be directed to the necessities of the plaintiff, the ability of the defendant to meet them and to any change in these conditions subsequent to the previous order, the parties were heard at length and the facts were explored in great detail.

[2, 3] It is scarcely necessary to say that since plaintiff's right to support has been established, she should be awarded from time to time such sums as are suitable to her needs and within the defendant's ability to meet them. Plaintiff has substantial resources at present. They have not been drawn upon to an appreciable extent, if at all. She should not be compelled to deplete them as long as defendant is able to supplement her income to an extent which will enable her to maintain her modest capital. The application of substantial amounts of income to the payment of a debt to his present wife is adding to defendant's resources. The order is a temporary one. The conditions by which the courts are guided in such matters are subject to change and changes in substantial respects are always taken into consideration. The necessities of plaintiff, as disclosed by the evidence, did not require the trial court to increase her allowance. As the parties are now situated, the denial of the application was not an invasion of plaintiff's right to support as we have defined it. Even if we were of the opinion that it would have been equally reasonable to grant some increase in the allowance we would not be justified in reversing the order upon that ground. The matter was thoroughly heard and considered and the order was well within the discretion of the trial court. We have only to decide whether there was a manifest abuse of discretion. Furniss v. Furniss, 75 Cal. App.2d 138, 170 P.2d 486; 1 Cal.Jur., p. 1012. We hold there was none. Neither was there error in rulings upon the admission of evidence.

The order is affirmed.

WOOD and VALLÉE, JJ., concur.

108 Cal.App.2d 53

In re SONORA DAILY.

PECKHAM v. CALIFORNIA NEWSPAPER PUBLISHERS ASS'N.

Civ. 8000.

District Court of Appeal, Third District, California.

Dec. 6, 1951.

Hearing Denied Jan. 31, 1952.

Proceeding by Orville Kenneth Peckham, publisher, opposed by California Newspaper Publishers Association, to have the "Sonora Daily" established as a newspaper of general circulation. The Superior Court, Tuolumne County, J. A. Smith, J., rendered judgment establishing the "Sonora Daily" as a newspaper of general circulation, and the contestant appealed. The District Court of Appeal, Peek, J., held that the word "printed" in statutes providing that newspapers of general circulation must be printed for one year at regular intervals in the state, county or city where publication, notice by publication or official advertising is to be given, and that for a newspaper to be "published" the mechanical work of producing it, that is the work of the type setting and the pressing type on paper, shall have been performed for all of such year, includes the use of a varityper and offset press as a means of reproducing a newspaper.

Judgment affirmed.

1. Newspapers ⚷1(3)

The general object of the statutes pertaining to publication is that of providing a means of displaying public notices, and one requirement laid down by the Legislature to attain that object is that the newspaper, in order to qualify as an organ for publication of such notices, have a fixed and permanent abode. Government Code, §§ 6000–6005.

2. Newspapers ⚷1(3)

The word "printed" in statutes providing that newspapers of general circulation must be "printed" for one year at regular intervals in the state, county or city where publication, notice by publication or official advertising is to be given, and that for a newspaper to be "published" the mechanical work of producing it, that is the work of the type setting and the pressing type on paper, shall have been performed for all of such year, includes the use of a varityper and offset press as a means of reproducing a newspaper. Government Code, §§ 6000, 6003.

See publication Words and Phrases, for other judicial constructions and definitions of "Printed".

◆

John A. Bohn, Vallejo, for appellants.

F. Edmund O'Connell, Sonora, for respondent.

PEEK, Justice.

This is a statutory proceeding instituted by the petitioner and respondent to have the "Sonora Daily" established as a newspaper of general circulation under the provisions of Sections 6000–6005 of the Government Code. Although the transcript shows a request by contestant's counsel to file a written protest to the petition we find none in the record. Apparently the cause proceeded to hearing upon the sole issue, which issue is the only question now before this court on appeal, of whether the "Sonora Daily" is precluded from qualifying as a newspaper of general circulation within the meaning of the above cited sections by reason of the particular methods used in the production of the paper.

The facts which, except in minor matters, are not in dispute, show petitioner and his wife have been the owners and publishers of the "Sonora Daily" for more than five years immediately preceding the institution of this proceeding; that during all of that period the mechanical work of producing and publishing the paper has been done at petitioner's location in the city of Sonora, County of Tuolumne; that the paper has been published daily except Sundays for more than one year immediately prior to the filing of said petition; that it is published for general circulation in Tuolumne county, carrying various news items and advertising and that it has a bona fide list of subscribers numbering approximately 1600. Particularly in regard to the manner of producing and publishing the paper the record shows that for approximately 9½ months of the preceding year the paper was composed on a typewriter. For the remaining 2½ months of that year's period the paper was composed on a machine called a "varityper", and the use of the typewriter was discontinued. The method of composition as disclosed by the record and briefs of the parties appears to be that the typewritten or varityper copy, together with advertisements which were either photographs or illustrations appearing in other publications or actual advertisements clipped from other publications, were laid out on a large board in the exact manner in which they were to appear in the finished newspaper. Also it appears that if a particular type was to be used, paper or cardboard letters of the kind desired would likewise be pasted in the desired spot on the board. This procedure resulted in what is termed as a "master sheet" and a like sheet is made up for each page. The sheets are then photographed and put through a particular procedure which is known as the "offset" process. The basic principle of the offset process is the transfer of the image to a rubber roller or blanket and from it to the paper. In many respects it is quite similar to the more commonly known mimeograph means of reproduction. From these facts the court found that the "Sonora Daily" was a newspaper of general circulation having a bona fide subscription list and that it had been printed and published in the city of Sonora, Tuolumne county, for more than one year preceding the date of the filing of the petition, and judgment was entered in accordance therewith.

The particular sections pertinent to this proceeding are 6000 of the Government Code, which provides as follows: "'Newspaper of general circulation' defined. A 'newspaper of general circulation' is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement."

And 6003 of that Code which provides: "'Printed' newspaper. [Mechanical work performed during whole of year-period.] For a newspaper to be 'printed,' the mechanical work of producing it, that is the work of typesetting and impressing type on paper, shall have been performed during the whole of the one year period. [Monthly average.] If a monthly average of at least 50 per cent of the work of typesetting and a monthly average of at least 50 per cent of the work of impressing type on paper is done in accordance with the other provisions of this article, the requirements embodied in 'printed' are met."

Appellant's attack upon the judgment of the trial court is two-fold; first, that the word "printed" as used by the Legislature in Sections 6000 and 6003 of the Government Code has a definite and fully understood meaning and is at least limited to reproduction by means of impressing type on paper; second, that the Legislature has, in Section 6003 of the Government Code, specifically defined "printed" to mean "the work of typesetting and impressing type on paper". In reply thereto respondent argues, in essence, that the Legislature has not so limited the meaning of the word "printed", but rather the word merely refers to the mechanical work of producing a newspaper by any reasonable means.

At the outset it should be noted that the word "printed" has a variety of meanings, depending on the context in which it is used. See 72 C.J.S., Printed, page 845.

It has been held that a typewritten notice is "printed" under a statute requiring the posting of printed notices. State v. City of Oakland, 69 Kan. 784, 77 P. 694, 696. On the other hand it has been held that mimeographing is not "printing" within the meaning of an appropriation bill appropriating a sum for the printing of session laws. Wiggins v. Kerby, 44 Ariz. 418, 38 P.2d 315, 319. Suffice it to say at this point that the word "print" may be used to describe a large number of distinctive mechanical processes. Perhaps the most suitable definition of the general sense of the verb is that found in Webster's dictionary, "to strike off an impression or impressions of, from type, or from stereotype, electrotype, or engraved plates, *or the like*." (Emphasis added).

While appellant calls attention to various statutes which make a distinction between printing and typewriting, Government Code, § 11091, printing and mimeographing, Political Code, § 3714, printing and other methods of reproduction, Government Code, § 29073, we cannot agree that the Legislature's use of the word "printed" in these other instances warrants the conclusion that the sense of the word excludes that means of reproduction by use of an offset press.

The problem then, relates not to the generally understood meaning of the word but rather to whatever more limited meaning the word may have taken on by virtue of its context here.

The case points up the importance of determining the purpose and object sought to be accomplished by the statute and the evil to be prevented as an aid to interpretation of the words of the statute. California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028; Rock Creek Water Dist. v. County of Calaveras, 29 Cal.2d 7, 172 P.2d 863. Whether the word "printed" has the meaning contended for by appellant may well depend, indeed should depend, on whether or not one of the objects of the legislation before us was to regulate and limit the mode of production of publications which seek to qualify as newspapers of general circulation. If the word "printed" as used and defined by the Legislature, does not, standing alone, clearly and unequivocally express the limited meaning ascribed to it by appellant, then we must consider the several code sections as a whole to determine whether such a legislative purpose is present as to give to the particular words that clear meaning.

The legislative history of the statutes in question is of some significance here. In re Estate of Ryan, 21 Cal.2d 498, 133 P.2d 626. Section 6000 of the Government Code is based on former Section 4460 of the Political Code. In 1903 Title V was added to Part IV of the Political Code, the new title pertaining to publications. Statutes 1903, page 478. Section 4459 thereof defined a newspaper of general circulation as follows: "A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed, and published, in the state, county, city, city and county, or town, where such publication, notice of publication, or official advertising, is given or made, for at least one year. A newspaper devoted to the interests, or published for the entertainment of a particular class, profession, trade, calling, race, or denomination, or any number thereof, is not a newspaper of general circulation."

Section 4459 contained the only definition of newspaper of general circulation, and there were no additional sections at that time defining the terms used therein. It may be readily seen that the Legislature used the word "printed" in its generally accepted meaning, and there is nothing to indicate that the statute was intended to specify a particular mode of reproduction.

In 1905 Section 4460 was added to the Political Code, Stats. 1905, p. 406–407, replacing the former Section 4459, and containing essentially the same language as the former Section 4459. No definitions of the terms used therein were added. In 1923, Section 4463 was added to the Political Code, Stats.1923, p. 512, the said section defining the terms "established", "printed", and "published" as used in Section 4460. The section provided that "* * * 'printed,' * * * shall mean, and be construed to mean, that the mechanical work of producing such a newspaper of general circulation, that is to say, the work of typesetting and impressing types on paper, shall have been performed during the whole of the period as designated and required by said section." The section also provided that "* * * in no case shall the words 'printed' and 'published' be construed as synonymous, but each shall be understood to relate to separate acts or functions, necessary to constitute a newspaper of general circulation."

The purpose behind the 1923 amendment is to some extent revealed in the cases of In re McDonald, 1921, 187 Cal. 158, 201 P. 110, and In re Monrovia Evening Post, 1926, 199 Cal. 263, 248 P. 1017. In the McDonald case the Supreme Court held that if the physical printing of a newspaper was done in a town other than that in which it was published and circulated such fact did not preclude its qualifying as a newspaper of general circulation within the meaning of Section 4460 of the Political Code; this because the word "printed" was used in that section in the broad sense of publish. In the Monrovia case, decided after the 1923 amendment, the Supreme Court held that the newspaper in question was not one of general circulation within the city of Monrovia because the mechanical operation of printing was performed in Pasadena. The court stated that Section 4663 of the Political Code specifically holds that a newspaper is "printed" in the place where the mechanical work of producing it is performed.

Thus it is seen that prior to 1927 there was no apparent effort on the part of the Legislature to limit or define the means of mechanical reproduction by which a newspaper might be printed. The phrase in Section 4663, "that is to say, the work of typesetting and impressing types on paper", appears more to be descriptive of the type of operations included within the term "mechanical work of producing" rather than to limit or narrow the general meaning of the word "printed" so as to include only one particular means of printing.

One other case, In re Hoyle, 84 Cal.App. 511, 258 P. 726, considers the requirement that a newspaper of general circulation be printed. There the appellate court held that the use of "boiler plate" was not "typesetting", that is, was not part of the mechanical process which is required to be performed in the place where the newspaper is printed and published, so that a newspaper was not prevented from qualifying as a newspaper of general circulation merely because it used, in the process of making up the newspaper, "boiler plate" which was prepared elsewhere.

Additionally, in 1927 Section 4463 of the Political Code was amended further to include the following language, Stats.1927, p. 485: "If a monthly average of at least fifty per cent of the work of typesetting and a monthly average of at least fifty per cent of the work of impressing types on paper be done in accordance with the other provisions of this title such shall be deemed to meet the requirements embodied in the word 'printed.'"

The object of the 1927 amendment seems clearly to be an attempt to meet the problem raised in the Hoyle case; that is, to permit a certain portion of the mechanical work of producing the newspaper to be done elsewhere without jeopardizing the status of the publication as a newspaper of general circulation. The terms "typesetting" and "impressing types on paper" are again a description of the extent to which this mechanical work may be done elsewhere, rather than a limitation on the mechanical methods that may be employed.

[1, 2] The general object of the statutes pertaining to publication may be stated as that of providing a means of displaying public notices, and one requirement laid down by the Legislature to attain that object is that the newspaper, in order to qualify as an organ for publication of such notices, have a fixed and permanent abode. In re Hoyle, supra. While the Legislature might consistent with the general object thus stated, have required in addition that newspapers be printed by a particular process, having determined that such process afforded a more suitable means of displaying public notices, such a requirement would presumably be stated clearly and unequivocally. The language relied upon by appellant, that is, the definition of "printed" is not so clear and unequivocal in that regard, nor is it inconsistent with the single purpose of requiring the newspaper to have a fixed and permanent abode. Furthermore, it should be noted that counsel have cited no cases nor has our research disclosed any, where either the courts of this state, or those of other

jurisdictions having similar statutes dealing with the same subject matter, have suggested a legislative purpose to restrict the mechanical means by which newspapers may be printed in order to qualify as newspapers of general circulation. See 60 C.J.S., Motions and Orders, § 20, pages 22–33.

We conclude that in Sections 6000 and 6003 of the Government Code the word "printed" is used in the broader sense heretofore discussed, and that it includes the means of reproduction used by respondent. While there may be substantial objections to the use of a varityper and offset-press as a means of producing a newspaper, whatever those objections may be, the problem is a matter of policy more properly addressed to the Legislature than to this court.

The judgment is affirmed.

SCHOTTKY, J. pro tem. and VAN DYKE, J., concur.

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108 Cal.App.2d 33

GIBBONS v. CITY OF SAN BERNARDINO et al.

Civ. 4197.

District Court of Appeal, Fourth District, California.

Dec. 5, 1951.

Rehearing Denied Jan. 2, 1952.

Hearing Denied Jan. 31, 1952.

Action by Rosemary Gravatt Gibbons against, among others, the City of San Bernardino, a municipal corporation of the State of California, Herz Paving Company, a copartnership composed of George A. Herz, Rosina F. Herz, Charles A. Foletta, and Everett H. Swing, for the wrongful death of plaintiff's son. Prior to trial, a covenant not to sue was executed by plaintiffs in favor of the city. The Superior Court of San Bernardino County, Martin J. Coughlin, J., gave judgment of non-suit in favor of the defendant Herz Paving Company, and the plaintiff appealed. The District Court of Appeal, Mussell, J., held that defendant paving company assumed no obligation for work performed by the city in portion of street remaining under city's control.

Judgment affirmed.

1. Municipal Corporations 🔑809(2)

Where paving company agreed, under contract with city, to perform certain construction work on sections of street, paving company was under duty to use reasonable care to see that the portion of the street under its control and upon which it worked was reasonably safe for traveling public, but company assumed no obligation for work done by city in portion of street over which city retained control.

2. Municipal Corporations 🔑809(2)

Where paving company agreed, under contract with city, to perform certain construction work on sections of street, paving company had common-law duty to warn traveling public of dangers incident to construction which it created in the course of its work, but there was no duty to protect the public against obstructions placed by the city in portion of street over which city retained control.

3. Municipal Corporations 🔑809(2)

Where paving company agreed to perform certain construction work on section of street, under contract with city providing that contractor should give adequate warning to public that street was under construction and of any dangerous conditions to be encountered as a result thereof, contract provision referred to work done by company and to excavations made and materials placed in street by company, and did not require company to give warning of obstructions or dangers created by city on portion of street under city's control and upon which no construction had been commenced.

4. Automobiles 🔑290

Where paving company agreed, under contract with city, to perform certain construction work on section of street, absence of manhole cover on portion of street under city's control and upon which no construction had been commenced was not a hazard created in the construction for which the paving company was employed, and therefore company was not liable for death of motorist resulting when automobile struck manhole.

◆

Wing, Wing & Brown, Banning, for appellant.

Wilson & Wilson, San Bernardino, for respondent.

MUSSELL, Justice.

Plaintiff Rosemary Gravatt Gibbons appeals from a judgment of non-suit in favor of defendant Herz Paving Company in an action for the wrongful death of plaintiff's twenty year old son, Charles Gravatt. The action was filed by the appellant and one Harry R. Berkheimer against the city of San Bernardino, its Mayor, Councilmen, and Street Superintendent, and Herz Paving Company, a copartnership. Prior to trial, a covenant not to sue was executed by the city and each of the plaintiffs, pursuant to which the record indicates that the sum of $12,000 was paid by the city to plaintiffs. The city, its officers and plaintiff Berkheimer did not appear at the trial. The Herz Paving Company will be referred to as the defendant.

Charles Gravatt was fatally injured when his automobile, traveling west, struck a raised manhole on Highland Avenue, a public street in the city of San Bernardino. The accident occurred on September 10, 1948, at about 7:30 P.M. on a section of the avenue, between "I" Street and Mt. Vernon Avenue, upon which defendant had agreed to perform certain construction work under a contract with the said city. Pursuant to the terms of the contract, defendant had removed the old curbs and gutters and had widened the avenue four and one-half feet on the north and south sides. This work had been completed prior to September 8, 1948, and no further construction work was done by the defendant until September 17th of that year. At the time of the accident there was a caution or warning sign at the east end of the construction zone and red warning lights were placed near it.

On or before September 10th the city of San Bernardino had raised the manhole involved so that its cover was approximately four inches higher than the surrounding surface of Highland Avenue. There is no evidence in the record indicating that the defendant participated in the raising of this manhole as a part of the work or that it was required to do so under the terms of the contract. A notation upon the plans "Raise manhole to grade (work to be done by the city)" clearly indicates that this work was not a part of the contract.

The contract contained provisions requiring the defendant to provide at least twenty-six feet of surfaced roadbed on Highland Avenue for use by the public at all times during the work, and to permit public traffic to pass through the construction operations at all times with as little inconvenience and delay as possible. The manhole was twenty-one feet south of the north line of Highland Avenue, in the portion of the paved roadbed which defendant was required to keep open for public travel and over which the city exercised control.

[1] Plaintiff first contends that the common law imposed upon defendant the duty to use reasonable care to see that the street was reasonably safe for the traveling public. The evidence clearly shows that defendant did not construct or maintain the dangerous condition which caused the accident. The manhole was in the portion of the street over which the city reserved control and authority. By the terms of the contract, defendant was prohibited from blockading the street or otherwise interfering with traffic in the area involved. Undoubtedly, defendant was under a duty to use reasonable care to see that the portion of the street under its control and upon which it had worked was reasonably safe, but the defendant assumed no obligation for the raising of the manhole or other work performed by the city at points in the street where defendant was not performing construction work.

[2, 3] It is next contended that the common law imposed upon the defendant the duty to warn of dangers incident to construction. Unquestionably, defendant had a duty to warn the traveling public of dangers, if any, which it created in the course of its work, but there was no duty to pro-

tect the public against obstructions placed in the street by the city. Plaintiff contends that the duty to warn was imposed upon defendant by the terms of the contract, and this contention is based principally upon the following provisions in the agreement: "The contractor shall furnish, erect, and maintain such fences, barriers, lights, and signs as are necessary to give adequate warning to the public at all times that the road or street is under construction and of any dangerous conditions to be encountered as a result thereof and he shall also erect and maintain such warning and directional signs as may be furnished by the City."

The evidence discloses that signs warning the public that Highland Avenue was under construction were maintained in place at the time of the accident and it is not contended that these signs were inadequate for that purpose. There is no evidence that the city furnished defendant with warning or directional signs. The additional requirement in the quoted provision of the contract is that defendant give adequate warning to the public of any dangerous condition to be encountered as a result of *such construction.* (Italics ours.) This clause refers to work done by the defendant and to excavations made and materials placed in the avenue by the Herz Paving Company. It does not require defendant to give warning of obstructions or dangers created by the city on a portion of the street under its control and upon which no construction had been commenced. In this connection, the evidence shows that at the time of the accident, the paved portion of Highland Avenue reserved for public travel had not been graded or disturbed otherwise than by the action of the city in raising the manhole and placing an asphaltic ramp around it. Defendant was prohibited by the contract from in any wise obstructing travel on this portion of the avenue.

[4] The evidence also indicates that at the time of the accident the cover to the manhole had been removed or was not in place. There is nothing in the record to show that this condition was created by the defendant or was known to it. The hazard which caused the accident may have been created by a passing automobile or by someone lifting or removing the manhole cover. In any event, it was not a hazard created in the construction for which the Herz Paving Company was employed.

Under the circumstances shown by the record, the trial court properly granted a nonsuit.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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108 Cal.App.2d 41

PETERSON v. MILLMAN et al.

Civ. 18627.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1951.

Rehearing Denied Dec. 26, 1951.

Action by Martha J. Peterson against Robert Ray Millman and Paul E. Grieder, individually and doing business as Calreal Company, and Calreal Company for money had and received. The Superior Court of Los Angeles County, Frank G. Swain, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that person to whom plaintiff had made down payment on purchase price of realty had in fact been agent for defendant.

Judgment affirmed.

1. Principal and Agent 🔑23(5)

In action of money had and received against real estate brokers to recover down payment on purchase price of property made to one who was allegedly agent of brokers, wherein it appeared that purported agent was officed with brokers, and that business transacted by him was on forms provided by defendant brokers and that such purported agent turned over 30 per cent of commission received by him in return for desk space, telephone service and other office expenses, evidence sustained finding that party to whom payment had been made was in fact agent for defendant brokers.

2. Appeal and Error ⚿931(1), 996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court, and, if there is any reasonable doubt as to sufficiency of evidence to sustain finding, such doubt should be resolved in favor of finding.

3. Principal and Agent ⚿105(4)

Where prospective purchasers of realty called office of realty brokers with relation to purchase of listed property, and brokers informed purchaser that they would send man to consummate purchase, purchaser acted as reasonably prudent person in dealing with man sent by brokers as agent of broker, and was not negligent when she made check for purchase price payable, as requested by agent, to agent rather than to brokerage firm.

4. Appeal and Error ⚿782

Order denying new trial was nonappealable, and purported appeal therefrom would be dismissed.

◆

Byron R. Bentley, Los Angeles, for appellants.

Charles A. Thomasset and Lee D. Mathews, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for money had and received, defendants appeal.

There is also a purported appeal from the order denying the motion for a new trial.

The evidence being viewed in the light most favorable to plaintiff (respondent) discloses these facts:

Defendants Grieder and Millman are real estate brokers as is also their codefendant John M. Ryan. The first two named defendants maintained a real estate office under the name of Calreal Company. Defendant Ryan worked out of the office. He turned over 30 per cent of commissions he earned to defendants in return for desk space, telephone service and insofar as the office was concerned complete overhead.

All business transacted by defendant Ryan was on forms provided by his codefendants upon which appeared the firm's name, Calreal Company, and all commissions were payable to Calreal Company.

On or about January 14, 1949, defendants Millman and Grieder placed an advertisement in the Southwest Wave as follows: "Units-Doubles-Flats. Call us for best investments. Calreal TW-4335." Sometime in January plaintiff read the advertisement and called the Calreal Company. She talked to defendant Grieder who asked her to come to the office on Sunday. She did not go and on Monday said defendant called plaintiff, stated that he was very busy, that he would be unable to show her any property and that he would send out one of his men.

The same afternoon defendant Ryan appeared at plaintiff's home. He showed her various properties and finally a parcel of improved realty which plaintiff agreed to buy. The purchase price was $18,000 of which $5,000 was to be a down payment. Plaintiff made a check payable to Calreal for such amount which was torn up since she lacked $50 in her bank account to cover it. She then wrote another check for $4,900 payable to Calreal Company which defendant Ryan induced her to cancel and make out one in his name, stating that he would hold the check in the real estate office until the property went through escrow.

However that afternoon defendant Ryan cashed the check telling plaintiff when the bank called her that he would be right over and explain why he wanted to cash the check at that time. This was on Thursday. Defendant Ryan failed to appear that or the next day and plaintiff called the Calreal office on three occasions, asked for defendant Ryan and was told by defendant Grieder that he was out showing real estate.

On Saturday plaintiff again talked with defendant Grieder and was informed that defendant Ryan had not come in. Then defendant Grieder asked plaintiff, "Are you still interested in that piece of property?" to which plaintiff replied that she had made a down payment on it. Defendant Grieder then stated, "That was cancelled," to which plaintiff replied that she had written a check to Mr. Ryan and that he had the money. Mr. Grieder then expressed surprise and said he would come to plaintiff's house, which he did bringing Mr. Millman with him. At plaintiff's home Mr. Grieder stated he was very much surprised, that Mr. Ryan was honest and dependable, that he thought something might have happened to delay him, and that he was sure all would be right and asked plaintiff not to do anything until the following day.

Plaintiff called Mr. Grieder on Monday and he told her he had not heard from Mr. Ryan, whereupon plaintiff told him she thought she had better do something about it.

Plaintiff did not see Mr. Ryan again until he was arrested, after he had spent the entire sum of money which he had obtained from her.

Questions: First: *Was there substantial evidence to sustain the trial court's finding that defendant Ryan was the agent for his codefendants?*

[1,2] *Yes.* Clearly from the evidence set forth above the trial court was justified in drawing the inference that defendant Ryan was the agent of his codefendants. Hence this finding is binding upon an appellate court. The applicable rule is succinctly stated by Mr. Justice Schauer in Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20, as follows: "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court * * *. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the findings."

Second: *Was plaintiff barred from recovering because of her own negligence in her dealings with Mr. Ryan?*

[3] *No.* According to the evidence set forth above the trial court was justified in finding plaintiff had acted as a reasonably prudent person in dealing with defendant Ryan as the agent of his codefendants.

[4] The judgment is affirmed. The order denying a new trial being nonappealable, the purported appeal therefrom is dismissed. (See cases cited in 6 West's California Digest, 1951, Appeal and Error, 🔑782, page 78.)

MOORE, P. J., concurs.

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108 Cal.App.2d 122

KLINKER v. KLINKER et al.

Civ. 18515.

District Court of Appeal, Second District,
Division 3, California.
Dec. 10, 1951.

Action by Lawrence Klinker against Myrtle Nell Klinker, also known as Nellie Myrtle Klinker, an incompetent person, and another, guardian of her estate, to quiet title to real property in plaintiff on the theory that the defendant Myrtle Nell Klinker, plaintiff's wife, had coerced plaintiff into taking title in joint tenancy rather than as his separate property. From a judgment of the Superior Court of Los Angeles County, Philip H. Richards, J., for the defendants, the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that the plaintiff's evidence supported the finding that Myrtle Nell Klinker had acquired her interest by the voluntary act of the plaintiff.

Affirmed.

1. Insane Persons 🔑98

In action by a husband to have title to real property quieted in himself on the ground that his wife had coerced him into taking title in joint tenancy, where wife had been adjudged mentally ill, it was the duty of trial court to closely scrutinize testimony of plaintiff and his witnesses.

2. Evidence 🔑313

Statements attributed to one who is dead are the weakest and most unsatisfactory kind of evidence.

3. Insane Persons 🔑98

In action by a husband to quiet title to real property in himself on ground that wife coerced him into taking title in joint tenancy rather than as his separate property, testimony as to the acts and conduct of the wife who had later been adjudged mentally ill fell within the rule that statements attributed to one who is dead are the weakest and most unsatisfactory kind of evidence.

4. Evidence ⚷590

In action by husband to have title to real property quieted in himself on the ground that his wife who later had been adjudged mentally ill, had coerced him into taking the property in joint tenancy by refusing to transfer her title in other property in which she had received an interest by mistake, in view of interest of plaintiff's witnesses and of inherent improbabilities in their testimony, court was not required to believe the testimony.

5. Deeds ⚷196(4)

In action by a husband to quiet title to real property in himself on the ground that his wife who later had been adjudged mentally ill, had coerced him into taking it in joint tenancy with her, where the deed to wife was regular on its face, burden was on husband to convince trier of fact that creation of the joint tenancy was not a result of his voluntary act.

6. Deeds ⚷211(5)

In action by husband to quiet title to real property in himself on ground that wife who later had been adjudged mentally ill, had coerced him into taking property in joint tenancy with her, evidence failed to impeach the wife's title and supported the finding that the wife had acquired a joint tenancy interest by the voluntary act of the husband.

◆

Wm. J. Clark, Los Angeles, for appellant.

Allan L. Leonard, Los Angeles, for respondents.

SHINN, Presiding Justice.

On April 15, 1940, plaintiff-appellant Lawrence Klinker and his wife, Myrtle (defendant here), took title as joint tenants to a parcel of real property described as lot 9 and the northerly 17.85 feet of lot 10, Block 39, of the City of Huntington Park (described hereafter as lot 9–10). Myrtle Klinker was adjudged mentally ill in December, 1941, and in 1948 defendant California Trust Company was appointed guardian of her estate. Plaintiff seeks to quiet title to lot 9–10 in himself, on the theory that Myrtle coerced him to take title in joint tenancy rather than as his separate property. The court found there was no duress, the acts of plaintiff were of his own free will, and further, that any claim of plaintiff for equitable relief was barred by laches. Plaintiff appeals.

Many alleged errors are argued in the briefs, but the only one we need consider is whether the evidence was sufficient to support the findings that plaintiff voluntarily allowed title to lot 9–10 to be conveyed to himself and his wife as joint tenants.

Related to this question there was evidence of the following facts: From 1922 until April, 1940, plaintiff, his father and his brother Joe, conducted a partnership engaged in buying lots, building and selling houses. This partnership was dissolved in 1940, the father giving his interest to the two sons. The major assets of the partnership at that date were two adjacent parcels of real property located in the city of Huntington Park. These were lot 9–10 (here involved), and lot 8, and the south seven feet of lot 7, in Block 39, of the City of Huntington Park. In 1922, title to lot 9–10 was taken in the names of Charles J. Klinker, Cordia Klinker, husband and wife, Lawrence Klinker and Joe Henry Klinker, as joint tenants. In 1923, title to lot 7–8 was taken in the names of C. J. Klinker, Cordia Klinker, Lawrence Klinker and Myrtle Klinker, his wife, and Joe Henry Klinker, as joint tenants. In 1940, when the partnership dissolved, title to both lots stood as originally vested. It was decided in 1940 that Joe should have parcel 7–8 and Lawrence parcel 9–10. To accomplish this, all five owners joined in a conveyance of parcel 7–8 to Joe and his wife, Nina, as joint tenants, and a conveyance of parcel 9–10 to Lawrence and his wife, Myrtle, as joint tenants.

In an effort to establish his claim of coercion and duress, plaintiff endeavored to prove that Myrtle had no title to an interest in lot 7–8, but nevertheless refused to sign a deed in favor of Joe unless she was given a joint tenancy interest in lot 9–10. Plaintiff offered the testimony of C. J. Klinker that he made a mistake in 1923 when he included Myrtle as a grantee when lot 7–8 was acquired. Plaintiff also testified that Myrtle threatened to divorce him, charge him with fraud, assault him and slander him if he did not take lot 9–10 in joint tenancy. The court found that Myrtle did have an interest in lot 7–8, and that plaintiff's action in taking title to lot 9–10 in joint tenancy was voluntary on his part and not the result of defendant's coercion. These findings are attacked as lacking support in the evidence.

[1–6] Due to her mental condition, Myrtle was incapable of giving testimony. It was the duty of the court to closely scrutinize the testimony of plaintiff and C. J. Klinker, by which it was sought to deprive the estate of Myrtle of an interest in the property. Statements attributed to one who is dead are the weakest and most unsatisfactory kind of evidence. Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657. Testimony as to the acts and conduct of the incompetent, Myrtle, fall within the rule. In view of the interest of plaintiff's witnesses and of what could properly have been considered to be inherent improbabilities in their testimony, the court was not required to believe it. In Blankman v. Vallejo, 15 Cal. 638, at page 645, the court said: "We do not understand that the credulity of a Court must necessarily correspond with the vigor and positiveness with which a witness swears. A Court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief." This is still the law. The deed was regular on its face and the burden was on plaintiff to convince the trier of fact that creation of the joint tenancy was not the result of his voluntary act. Plaintiff and his wife, as joint tenants, held title to lot 7–8 for 17 years, and to lot 9–10 for 8 years, before the wife's title was questioned. Acquiescence and inaction for these periods of time substantially refute the claims of mistake in including Myrtle as a grantee of lot 7–8, and of duress in the exchange of lot 7–8 for lot 9–10. In the absence of satisfactory evidence to impeach defendant's title, the court properly determined that Myrtle did have an interest in lot 7–8; that she reasonably requested that she receive an interest in lot 9–10 if she were to give up the interest in lot 7–8; and that plaintiff voluntarily agreed.

Inasmuch as the evidence supports the finding that Myrtle acquired a joint tenancy interest in lot 9–10 by a deed given voluntarily, it is unnecessary to consider the defense and finding of laches.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

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108 Cal.App.2d 44

In re GORCHAKOFF'S ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. GORCHAKOFF.

Civ. 18718.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1951.

Proceeding in the matter of the estate of Maurice Gorchakoff, deceased. The Superior Court of Los Angeles County, John Gee Clark, J., entered a decree of distribution holding valid a residuary trust created by the will of the deceased, and Benjamin Gorchakoff, contestant, opposed by the Security-First National Bank of Los Angeles, petitioner, appealed. The District Court of Appeal, McComb, J., held that will did not violate the rule against perpetuities.

Affirmed.

1. Wills ⚷470

Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto in another part of the will, and the parts of a will are to be construed in relation to each other and so as, if possible, to form one consistent whole. Probate Code, § 103.

2. Perpetuities ⚷4(17), 8(3)

Will giving remainder of estate to bank in trust with directions to pay out of principal the sum of $150 a month to testator's daughter for life, and providing that if daughter should predecease testator, leaving issue her surviving, sum of $150 a month should be paid in equal shares to such issue until youngest should reach age of 21 years, at which time payments should terminate, and that trust should terminate on death of survivor of daughter and of her issue living at date of testator's death, and trustee should distribute one-half of corpus of estate to issue of daughter by right of representation and remaining one-half thereof to named institutions or charities in certain per cents, did not violate the rule against perpetuities. Civ.Code, §§ 715, 716, 724.

3. Wills ⚷15

Where it was impossible at present to determine whether charitable bequest would be in excess of one-third of value of distributable assets of testator or property of the estate, in violation of statute, it should be distributed to trustee for purpose of trust, reserving matter of future distribution until termination of trust, so far as charitable bequest was concerned. Probate Code, § 41.

◆

Thomas Morris and Albert E. Coger, Los Angeles, for appellant.

Hugh Ward Lutz, Los Angeles, for respondent.

McCOMB, Justice.

This appeal is from a decree of distribution holding valid a residuary trust created by the will of decedent.

Maurice Gorchakoff died March 31, 1950, aged 71 years, leaving a will dated March 6, 1947. Surviving him were his two heirs at law, his daughter, Mrs. Beatrice G. Leader, and a son, Benjamin Gorchakoff. Mrs. Leader has had no issue while Benjamin Gorchakoff has two daughters, Gloria and Marlene and a son, Robert.

The estate was of the appraised value of $65,006.90. The will provided in part as follows:

"Fifth: I give, devise and bequeath all of the rest, residue and remainder of my estate, both real and personal and wheresoever situate, including all lapsed legacies, to Security-First National Bank of Los Angeles, a national banking association, in trust, to hold, manage and distribute, as hereinafter provided:

"(1) To collect the principal and interest of the trust estate, invest and reinvest the same; to pay, accumulate, use and manage the income, and to use, manage and invest the principal and income, as hereinafter provided:

"(2) All income shall be added to and become principal.

"(3) The Trustee shall pay out of the principal so accumulated the sum of $150.00 per month to my daughter, Beatrice G. Leader, for life. If my daughter shall predecease me, or shall die after the creation of this trust, leaving issue, her surviving, said sum of $150.00 per month shall be paid in equal shares to said issue until the youngest of such issue shall have reached the age of 21 years, at which time said payments shall terminate. If in the discretion of the Trustee the sum of $150.00 shall be insufficient to provide my said daughter or her said issue her surviving with reasonable care in case of illness or accident, the Trustee may pay to, apply or expend for the care of my said daughter or of her issue her surviving and entitled to take hereunder so much of the principal as the Trustee may deem advisable.

"(4) Notwithstanding any other provision herein, this trust shall terminate on the death of the survivor of my daughter and of her issue living at the date of my death, and the Trustee shall distribute one-half of the corpus of said estate to the issue of my daughter by right of representation, and the remaining one-half thereof to the following named institutions or charities in the following per cents, provided, however, that if my said daughter shall leave no issue her surviving the entire trust estate shall be distributed to the following named institution or charities in the following per cents:

"40% to Mount Sinai Hospital and Clinic of Los Angeles, California;

"40% to Los Angeles Sanatorium and Consumptive Relief Association of Los Angeles at Duarte, California;

"20% to Hebrew Free Loan Association of Los Angeles, California."

The probate court held the trust valid and reserved jurisdiction as to the amount to go to charity.

Questions: First: *Did the will violate the rule against perpetuities as set forth in sections 715, 716 and 724 of the Civil Code?*

[1] *No.* Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto in another part of the will, and the parts of a will are to be construed in relation to each other and so as, if possible, to form one consistent whole. (Sec. 103, Probate Code.)

Applying this rule the will read in part as follows, "Notwithstanding any other provision herein, this trust shall terminate on the death of the survivor of my daughter and of her issue living at the date of my death; * * *."

[2] The trust came into existence upon the death of decedent. Therefore under the provisions of the will above quoted it was to terminate in any event upon the death of a person in being at the time of the creation of the trust. Therefore it did not violate the rule against perpetuities.

The case is analogous to situations which obtained in Berry v. Levus, 56 Cal.App. 378, 381 et seq. 205 P. 471, and Estate of Hale, 75 Cal.App.2d 227, 234 [3], 170 P.2d 961.

Second: *Did the will violate section 41 of the Probate Code* ★ *in that it awarded to charity more than one-third of the estate?*

[3] *No.* The probate court expressly reserved jurisdiction to determine at a later date the amount to be awarded to charity. Therefore since at the present time it is impossible to determine whether or not such charitable bequest will be in excess of one-third of the value of the distributable assets of decedent or of the property of the estate, it should be distributed to the trustee for the purposes of the trust, reserving, as the probate court did, the matter of future distribution until the termination of the trust so far as the charitable bequest is concerned. (Estate of Campbell, 175 Cal. 345, 351, 352, 165 P. 931.)

Affirmed.

MOORE, P. J., concurs.

★ Section 41 of the Probate Code reads:

"No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected. * * *"

108 Cal.App.2d 50

PEOPLE v. WOODS.

Cr. 4710.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1951.

Leonard A. Woods was tried without a jury before the Superior Court of Los Angeles County, Thomas L. Ambrose, J., and was found guilty of violating § 11500 of the Health and Safety Code, relating to unlawful possession of heroin. The defendant requested leave to file an application for probation, which was granted, and made a motion for a new trial. The motion for new trial was denied, sentence was suspended and defendant was placed on probation for three years on condition that he serve the first 90 days of probation in the county jail, and he appealed from the order denying his motion for a new trial and purportedly from the judgment of conviction. The District Court of Appeal, McComb, J., held that there was substantial evidence to sustain the trial court's finding that the contraband and flour sifter, which were found in room opened with key found on defendant and which contained traces of heroin, belonged to defendant, and that defendant had knowledge of the presence of the heroin.

Order denying motion for new trial affirmed and purported appeal from judgment dismissed.

1. Poisons ⚿9

In prosecution for unlawful possession of heroin, evidence sustained finding that contraband and flour sifter, which were found in room opened with key found on defendant and which contained traces of heroin, belonged to defendant, and that defendant had knowledge of the presence of the heroin. Health and Safety Code, § 11500.

2. Poisons ⚿9

The mere possession of a narcotic constitutes substantial evidence to sustain a finding that the possessor of the narcotic knew its nature. Health and Safety Code, § 11500.

3. Criminal Law ⚿1023(10)

An order granting probation is not a judgment and no appeal lies therefrom.

4. Criminal Law ⚿1023(10)

Where proceedings were suspended and neither judgment nor sentence was pronounced, there was no judgment or sentence from which defendant could appeal, and the purported appeal was abortive and would be dismissed.

◆

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

Louis Thomas Hiller, Beverly Hills, for appellant.

McCOMB, Justice.

Defendant was found guilty after trial before the court without a jury of violating section 11500 of the Health and Safety Code (unlawful possession of heroin). Defendant requested leave to file an application for probation which was granted and made a motion for a new trial. The motion for a new trial was denied, sentence was suspended and defendant placed on probation for three years on condition that he serve the first 90 days of probation in the county jail.

Defendant has appealed (1) from the order denying his motion for a new trial and (2) purportedly from the judgment of conviction.

Facts: On February 26, 1951, at about 1:00 a. m. defendant was apprehended by two police officers at 3115 South Norton, Los Angeles. On his person were found a number of measuring spoons and some keys. One officer removed the keys from defendant's pocket and took him to a large residence at 2118 South Hobart where one of the keys opened the door.

The officers then asked defendant to take them to his room. Upon reaching the room defendant opened the door with a key which he had. In the apartment was found one of defendant's suits, and in the the dressing room in a waste basket was a capsule of contraband and on a shelf a flour sifter with heroin clinging to its sides. This flour sifter defendant said he had purchased about a week before.

[1] *Questions:* First: *Was there substantial evidence to sustain the trial court's finding that (a) the contraband and flour sifter containing traces of heroin belonged to defendant and (b) defendant had knowledge of the presence of the narcotic?*

Yes. (a) The trial judge drew a fair inference from the facts set forth above that the room in which the narcotic and sifter were found belonged to defendant. Clearly the fact that in his possession he had keys to the house in which his room was located and a key to the room where the narcotic and flour sifter were found supported the finding that it was defendant's room and that the flour sifter was his.

[2] (b) The law is settled that the mere possession of a narcotic constitutes substantial evidence to sustain a finding that the possessor of the narcotic knew its nature. (People v. Physioc, 86 Cal.App.2d 650, 652[2], 195 P.2d 439.)

Here the evidence disclosed that the room in which the narcotic and sifter were found was defendant's and therefore they were in his possession. Under the foregoing rule it was properly presumed that he knew the nature of the narcotic. This presumption sustains the trial court's finding to such effect.

[3] Second: *Is the purported appeal from the judgment properly before this court?*

No. An order granting probation is not a judgment and no appeal lies therefrom. (People v. D'Elia, 73 Cal.App.2d 764, 766 [3], 167 P.2d 253.)

[4] In the present case proceedings were suspended and neither judgment nor sentence was pronounced. Therefore there was no judgment or sentence from which defendant could appeal and the purported appeal was abortive and should be dismissed. (People v. Price, 95 Cal.App.2d 538, 540, 213 P.2d 105.)

The order denying the motion for a new trial is affirmed and the purported appeal from the judgment is dismissed.

MOORE, P. J., concurs.

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108 Cal.App.2d 64

CONSOLIDATED MORTGAGE CO. v. ROBERTS.

Civ. 4189.

District Court of Appeal, Fourth District, California.

Dec. 6, 1951.

Consolidated Mortgage Company, a California corporation, brought an unlawful detainer action against E. W. Roberts. The Superior Court of Orange County, Raymond Thompson, J., entered a judgment in favor of the plaintiff, and the defendant appealed. The District Court of Appeal, Mussell, J., held that whether parties intended that conversations between defendant and plaintiff's agent were to constitute an agreement to renew the lease, or whether they intended that no agreement should exist until their oral conversations were reduced to writing, and whether a contract to renew the lease was entered into, were questions for trier of fact.

Judgment affirmed.

1. Landlord and Tenant ⚷23

In unlawful detainer action wherein lessee alleged an oral agreement for renewal of lease for additional term, whether parties intended conversations had between them to constitute an agreement or whether they intended that no agreement should exist until oral conversations were reduced to writing, and whether contract for renewal was entered into, were questions for trier of fact.

2. Appeal and Error ⚷1011(1)

Where there is conflict in evidence, trier of fact's finding is binding and judgment thereon cannot be disturbed on appeal.

3. Estoppel ⚷119

Existence of an estoppel is question of fact.

4. Estoppel ⚷118

In unlawful detainer action wherein lessee alleged that because of conduct and statements of lessor's agent, he believed that tenancy would probably be renewed upon termination of lease and so made needed improvements and repairs on premises, evidence supported inference that agent had no intention that his statements and conduct should be acted upon, and that lessee had no right to believe that agent made such statements with such intent.

5. Estoppel ⚷119

Unless but one inference can be drawn from evidence, waiver and estoppel are questions for trier of fact.

6. Estoppel ⚷87

Where lessee after conversations with lessor's agent believed that tenancy would probably be renewed upon termination of lease and so made needed repairs and improvements on the premises, but the lessor had no knowledge that repairs and improvements were made until after they were completed, and lessor's agent had not intended that his statements and conduct should be so acted upon, lessor was not equitably estopped from removing lessee at expiration of term.

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Bodkin, Breslin & Luddy, Los Angeles, for appellant.

Wellington & Sprague, Santa Ana, and Joseph T. Enright, Los Angeles, for respondent.

MUSSELL, Justice.

Defendant appeals from a judgment for plaintiff in an unlawful detainer action involving a store room in Laguna Beach. Defendant occupied the premises from October 1, 1943 to September 30, 1948, as lessee under the terms of a written lease, which, by its terms and an extension thereof, expired on the last mentioned date. Defendant then refused to vacate, claiming that plaintiff had orally agreed to a renewal of the lease for an additional term. Plaintiff, on October 2, 1948, commenced the present action and obtained a judgment for possession of the property, a termination of the lease, and damages in the sum of $156.25.

The principal and controlling question here is whether the lease was extended or renewed by the conversations and correspondence between the parties and their agents. We conclude that it was not and that the findings and judgment are sufficiently supported by the evidence.

Defendant bases his claim of a right to occupy the store room after the termination of the written lease upon two conversations had with one J. C. McCormick, who for several years prior to May 10, 1948, was general manager and secretary-treasurer of plaintiff corporation. The first of these conversations was by telephone "in the early part of the summer of 1947", and defendant testified concerning it as follows:

"Q. Will you please relate that conversation? A. Yes. I called Mr. McCormick and I told him I had a party that was interested in buying the store and one of the things that was interesting them was the terms of the lease, and before they would pay the price I was asking, they would want assurance from him that the lease would be renewed for another term of five years. Shall I go on from there?

"Q. Yes, just give us the conversation. A. Mr. McCormick said he thought that would be all right, but the terms of a new lease would be up $25.00, or making it a hundred dollars, that he would have to take it up with one of the officers of the company, and that he would like to see and approve of the people that were contemplating going in."

The second conversation, according to defendant, occurred "maybe sixty days later" and was "kind of a running conversation." Defendant testified that McCormick made the following statement: "He said the president of the directors of the company had agreed to give me a new lease, and the terms of that would be that $25.00 he talked about, and he said they were cross with him and wanted to know if he was working for the tenant or working for them, and I told him at that time I would, as a means of appeasing their wrath, I would fix over the store, and that was the end of the conversation.

"Q. Did you have any further conversation with him regarding the lease to be effective after that particular term expired? A. No, except that he talked about other tenants' lights they were having to pay, and when he said he would get me the lease, I said it was a deal, and proceeded to fix the store up."

McCormick testified relative to the first conversation as follows: "I received a phone call from Mr. Roberts stating that he had a prospective buyer and wanted to know what our attitude would be as far as a new lease was concerned and, as I remember the conversation, I told him we would probably have no trouble with the new lease, but I wanted to meet his prospective buyers to see if we would pass on them or not."

As to the second conversation, Mr. McCormick testified: "As I remember, Mr. Roberts asked me about a renewal of his lease and, as I remember, my reply was I would have to take it up with the Directors, and it would probably be an increase in rent. I can't remember whether he made the suggestion that it would be $25.00 more or whether I made it, and we entered into a further discussion as to a little difficulty I was having with the Board of Directors as far as increasing rents materially was concerned, and I said I had been through all that with the tenants for the most part and I wasn't in favor, knowing the business conditions more or less, of increasing it beyond the capacity of tenants to pay, and I also mentioned I had some little difficulty with the Board. I think I stated—I said they wanted to know if I was working for them or for the tenants, because I had been through all the business conditions. I told him I would have to take it up with the Board of Directors as far as a new lease was concerned.

"Q. Was there anything said at that time by Mr. Roberts that he was going to do some improving on the store? A. He asked me if we had additional space, that he thought of going into additional businesses, or a new business in antiques, and at that time we had an additional space and I told him so.

"Q. And that is all that was said concerning any alterations at that time, is that correct? A. As far as I can remember, yes."

Evidence was introduced showing that defendant in 1948 had stated to one witness that he was going to get out of the store in September; that on three or four occasions in the fall of 1947 and again in the summer of 1948, defendant stated to his store manager that "He didn't know what he was going to do in regard to the store or the releasing of it. At one time he thought he might close it entirely and open in Palm Springs."

Evidence was received that Mr. Casteel, who succeeded Mr. McCormick as plaintiff's representative, met the defendant on August 6, 1948, at which time defendant stated that "he guessed" he would have to see him about a renewal of his lease; that Casteel then stated that on April 24, 1948, he had written a letter to defendant stating that he (Casteel) had been appointed general manager for plaintiff and that he was to be contacted regarding business matters; that not hearing from the defendant, he had rented the store on a five-year lease for $156.25 per month; that defendant then said "I guess that is it. I guess we will have to vacate;" that defendant then walked over to the store with Casteel, paid the August rent and stated to one of his employees "We are not going to get a new lease on the store. We will have to vacate on September 30."

By a letter dated September 8, 1948, defendant, through his attorneys, stated that he had been promised a new lease and that the terms and conditions "would be the same as the previous lease, with the exception that there might be an increase of not more than $25.00 a month." By letter dated September 20, 1948, demand was made by defendant for a lease for a term of five years at a rental of not more than $100 a month and by check dated October 1, 1948, defendant tendered the sum of $75 as rent for that month.

The trial court found, among other things, that the defendant and Mr. McCormick did not at any time discuss or agree upon the terms of a new lease or the exact amount of rental and neither understood or stated that a binding contract was entered into as a result of said conversation; that neither party intended or understood that the other should act or rely on said conversations and both understood that the same were negotiations only and that there would be no new lease until all of its terms and conditions were agreed upon and reduced to writing.

[1, 2] Whether the parties intended the conversations to constitute an agreement or whether they intended that no agreement should exist until their oral conversations were reduced to writing, and whether a contract was entered into, were questions of fact. Where, as here, there was a conflict in the evidence, the trial court's finding is binding upon us and the judgment cannot be disturbed.

The trial court further found that the defendant, believing the statements of Mr. McCormick and believing that said tenancy would probably be renewed upon the termination of the lease then in effect upon some terms and conditions not then fully discussed or understood, in the months of November and December, 1947, and January, 1948, had the premises repainted, repapered, a new carpet laid, new fixtures installed and had a balcony constructed; that the cost of said improvements, additions and renovations was $1,129.37, all of which was paid by defendant; that the plaintiff had no knowledge of said repairs and improvements being made until after they had been completed; that the said repairs were badly needed and necessary to keep the premises in good condition and repair and were, for the most part, necessary in order that the defendant could use the premises during the balance of the term of the lease.

[3] Defendant contends that these findings establish an equitable estoppel defense to plaintiff's action in unlawful detainer and require a reversal of the judgment. The existence of an estoppel is a question of fact. Parke v. Franciscus, 194 Cal. 284, 297, 228 P. 435.

[4–6] In the instant case a reasonable inference to be drawn from the evidence was that plaintiff's agent, Mr. McCormick, did not intend that his conduct should be acted upon. The trial court expressly found that plaintiff had no knowledge of the repairs and improvements being made until after they were completed. The evidence supports the inference that defendant had no right under the circumstances to believe that McCormick intended his statements to be acted upon by defendant. As was said in Krobitzsch v. Middleton, 72 Cal.App.2d 804, 815, 165 P.2d 729, 735: "'Unless but one inference can be drawn from the evidence, waiver and estoppel are questions for the jury or the trial court.'"

The defendant herein failed to prove the elements essential to the application of the equitable defense of estoppel. Bank of America v. Pacific Ready-Cut Homes, 122 Cal.App. 554, 561, 10 P.2d 478.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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107 Cal.App.2d 738

BOHN et al. v. ALBERTSON et al.

Civ. 14722.

District Court of Appeal, First District,
Division 1, California.
Nov. 30, 1951.
Rehearing Denied Dec. 29, 1951.
Hearing Denied Jan. 28, 1952.

Action by John A. Bohn and Willard E. Bohn, copartners, doing business under the firm name and style of Frank's Tract Development Co., a copartnership, against Robert Albertson, and others to enjoin defendants permanently from entering or fishing on tract of land of which plaintiffs were the lessees. Defendants cross-complained against plaintiffs and certain other cross-defendants to restrain all cross-defendants from interfering with right of cross-complainants of using waters for navigation and fishing and for damages for such interference. The Superior Court, County of Contra Costa, Homer W. Patterson, J., entered a judgment granting plaintiffs a permanent injunction and defendants appealed. The District Court of Appeal, Bray, J., held that the waters which covered plaintiffs' land were navigable, that the title was subject to right in public of navigation and fishing, but that title to land underlying the waters was not lost and the owners had right to reclaim and that plaintiffs, until land was reclaimed, had no right to prevent public from fishing on, or navigating those waters, provided public could do so without trespassing on plaintiffs' land.

Judgment reversed.

1. Public Lands 🔑61(8)

Where swamp and overflowed lands were conveyed by State to predecessors of plaintiffs' lessors, right of navigation and fishing thereon was reserved if there were navigable waters on land, although not expressed in Constitution or in conveyance. St.1867–1868, p. 511; 43 U.S.C.A. §§ 981 to 986.

2. Navigable Waters 🔑1(1)

Rule that navigability is to be determined by condition of waters at date of admission of California to Union is limited to title to lands under water and riparian rights, and navigability for purpose of commerce may arise later.

3. Navigable Waters 🔑36(2)

An owner does not lose title to his land where there is a sudden covering of the same with navigable waters.

4. Navigable Waters 🔑1(7)

In action by lessees of tract of overflowed land to enjoin defendants from entering or fishing on premises, evidence that, while not available for heavy commercial traffic, waters were being used by innumerable pleasure and fishing boats and for transportation of peat established that water in its natural and ordinary condition afforded channel for useful commerce and that waters were navigable.

5. Fish 🔑3

Navigable Waters 🔑16

Where waters on plaintiff lessees' overflowed lands were navigable, although title to lands remained in owners and they had right to reclaim, public, until land was reclaimed, had right of navigation and fishery.

6. Navigable Waters 🔑36(2)

If a portion of the land of riparian owner is suddenly engulfed, and former boundary can be determined or land reclaimed within a reasonable time, he does not lose his title to it.

7. Fish 🔑3

A right to fish in a stream is in the people even though the stream be nonnavigable.

8. Fish 🔑3

Navigable Waters 🔑16, 38

Where plaintiff lessees' lands were suddenly flooded by river, title was subject to right in public of navigation and fishing because rights of public in river were transferred to waters of tract but title underlying waters was not lost and owners had right to reclaim but plaintiff lessees, until land was reclaimed, had no right to prevent public from fishing on, or navigating the waters, provided public could do so without trespassing on plaintiffs' land.

◆

Robert L. Mann, Morris M. Grupp, San Francisco, Joseph A. Brown, San Francisco, of counsel, for appellants.

Carlson, Collins, Gordon & Bold, Richmond, Cal., for respondents.

BRAY, Justice.

From a judgment granting plaintiffs a permanent injunction, defendants appeal.

Facts

Plaintiffs are the lessees of the owners of most of the Frank's Tract in Contra Costa County. These owners are the successors in interests of the original patentees of swamp and overflowed land. In February, 1938, the San Joaquin River broke the levee and flooded the entire tract, including lands leased by defendants. It has remained flooded ever since. From 1938 until the making of the lease in 1947 the defendants and the general public in large numbers have gone on the tract in rowboats, skiffs and pleasure boats and have fished there. Subsequent to the making of the lease, plaintiffs have attempted to bar the public therefrom, charging a fee or license for the privilege of fishing on the tract. Plaintiffs brought this action to quiet their title to the land and the waters thereon. Defendants answered, claiming for themselves and the general public the right of navigation and fishing on and in said waters.

Questions Presented

1. In California does a landowner lose title to his land by avulsion?

2. Where, by avulsion, waters inundate land and remain navigable, has the public the right of navigation and fishing in those waters?

3. What are navigable waters?

4. Did the court make a finding on navigability as a fact, and if so, does the evidence support it?

Record and Findings

Plaintiffs filed a complaint seeking an injunction to enjoin defendants permanently from entering or fishing upon the premises therein described, referred to generally as "Frank's Tract." Defendants answered severally and each cross-complained against plaintiffs and certain other cross-defendants for an injunction restraining all cross-defendants from interfering with the right of cross-complainant, his agents, employees and customers to use the waters of Frank's Tract for navigation and fishing and for damages for such interference. Certain of the court's findings pertinent here follow. (More detailed findings appear later.) The tract constituted swamp and overflowed land granted to the State of California by the United States government pursuant to the Arkansas Act, passed by Congress September 28, 1850, U.S.Revised Stats. 2479 to 2484, 43 U.S.C.A. §§ 981 to 986; United States patents were issued to the State for said land on September 13, 1870 and February 8, 1873; said land was granted by the State by valid California patents issued pursuant to an Act of March 28, 1868, entitled "An Act to Provide for the Management and Sale of Lands Belonging to the State", St.1867–1868, p. 511; the cross-defendants, other than plaintiffs, derived title to said land by mesne conveyances from the original patentees of the State and are the owners of said land; the land is situated in Contra Costa County, within the Delta Region, near the San Joaquin River and adjacent sloughs. About the time the California patents were issued it had been fully reclaimed by the construction of levees and surface drainage. From that time until February, 1938, the land was developed for agricultural purposes; homes and buildings were constructed thereon; the land was not upland, frontage or tide land. (The findings concerning the flooding of the land and its effect will be discussed later.) Plaintiffs, in 1947, entered into a lease of said land with the other cross-defendants for 25 years for the purpose of developing it for recreational uses such as boating, hunting, fishing, bathing and other aquatic sports, and have been in possession ever since, attempting to assert their right to its exclusive possession by excluding defendants and the general public therefrom, and licensing users of said land for recreational purposes. Prior to the date of the lease, the owners have permitted defendants and others to use said land and water for recreational purposes and to gain access thereto through breaks in the levees, which use was not under a claim of right, color of title, or adversely to the rights of cross-defendant owners. Defendants have no right to the use of said land and water. The premises have not been reclaimed or used for agricultural purposes since the 1938 break in the levee. Neither the owners nor plaintiffs are violating any obligation or public trust in connection with further rights to reclaim said lands, and their use thereof is not contrary to the public policy of the State. As conclusions of law the court found that plaintiffs are entitled to exclusive use of the land and waters thereon and that neither defendants nor the general public have any right or interest therein. The judgment followed the findings and conclusions and in addition ordered that defendants take nothing by their cross-complaint. Apparently no appeal is taken from the denial of the prayer of the cross-complaint, so the cross-defendants (other than plaintiffs) do not appear on this appeal, and no further consideration will be given to such denial.

Original Title

[1] There can be no question but that the basic character of the land was determined to be swamp and overflowed lands by the "Arkansas Swamp Land Act" of 1850, and the official surveys, People ex rel. Pierce v. Morrill, 26 Cal. 336; Edwards v. Rolley, 96 Cal. 408, 31 P. 267; Newcomb v. City of Newport Beach, 7 Cal.2d 393, 60 P. 2d 825; Foss v. Johnstone, 158 Cal. 119, 110 P. 294, and that when the State conveyed the land to the predecessors in interest of the present owners such conveyances were without express limitation and without express reservation to the State or its inhabitants of the rights of navigation and fishery. Plaintiffs assume that because there was no express right of navigation and fishing in the patents of their lessors' predecessors, such right was not reserved to the State. Such assumption, however, is erroneous if there were navigable waters on the land at the time of the patents. That such right was reserved, although not expressed in the Constitution or in conveyances of swamp and overflowed lands, has been definitely decided in this State. See Forestier v. Johnson, 164 Cal. 24, 127 P. 156; People v. California Fish Co., 166 Cal. 576, 138 P. 79; People ex rel. Robarts v. Russ, 132 Cal. 102, 64 P. 111.

Thus, had there been navigable waters on the lands of Frank's Tract at the time of the patents, the landowners' rights therein would have been subject to the navigation and fishing rights of the public. Apparently there were no navigable waters thereon at that time. But if there are now (assuming that because there were no navigable waters originally plaintiffs' lessors' title was free from restrictions), in determining plaintiffs' rights in those waters, the character of the deposit of the waters thereon and the question of their navigability must be considered.

To determine whether the waters are navigable it is necessary to consider what are the recognized tests of navigability, and then, to examine the findings and the evidence in the light of those tests.

What Are Navigable Waters?

In United States v. Utah, 283 U.S. 64, 76, 51 S.Ct. 438, 441, 75 L.Ed. 844, the court said: "The test of navigability has frequently been stated by this Court. In The Daniel Ball, 10 Wall. 557, 563, 19 L.Ed. 999 [1001], the Court said: 'Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' In The Montello (United States v. The Montello) 20 Wall. 430, 441, 442, 22 L.Ed. 391 [394], it was pointed out that 'the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation,' and that 'it would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.' The principles thus laid down have recently been restated in United States v. Holt State Bank, 270 U.S. 49, 56, 46 S.Ct. 197, 199, 70 L.Ed. 465 [469], where the Court said: '* * * navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.'"

Navigability "is largely a question of fact, to be determined from the character of the stream, its situation and availability as a highway of commerce, and the other surrounding circumstances affecting the question." Mintzer v. North American Dredging Co., D.C., 242 F. 553, 559.

[2] It has been held that navigability is to be determined by the condition at the date of the admission of California to the Union. United States v. Utah, supra, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844; New-

comb v. City of Newport Beach, supra, 7 Cal.2d 393, 60 P.2d 825. However, this rule is limited to the title to the lands under the water and riparian rights. Navigability for the purpose of commerce may arise later. United States v. Appalachian Electric Power Co., 311 U.S. 377, 408, 61 S.Ct. 291, 85 L.Ed. 243. Thus, if the evidence showed the creation of a new channel of the river, the fact that there was no such channel in 1850 would not prevent the assertion by proper public authority of the right to use that channel for navigation and fishing.

[3] In State ex rel. Cates v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746, Ann.Cas.1914B, 1043, the court was considering the question of navigability on a lake formed as the result of an earthquake, which submerged the land. The lake has an average depth of about seven feet, except along the shore line and at a certain dam and bar. Along the shore line the water is only a few inches deep for several yards out into the lake, and at the dam and bar it is from a few inches to two feet in depth. The lake has both an inlet and outlet. The outlet flows continually but is not of sufficient depth to form a navigable connection with the Mississippi River into which it flows. A government levee prevents the waters of the Mississippi at ordinary tides from flowing in. Before this levee was built the river would overflow into the lake once or twice a year, raising its waters many feet, remaining there until the following late spring or summer. Many people fished in the lake daily, using many small boats, canoes and batteaux. The fish had free access to and from the Mississippi before the building of the levee. In holding the lake to be navigable, the court said 127 Tenn. 575, 158 S.W. page 748, Ann.Cas.1914B, page 1045: " 'Navigable rivers are not merely rivers in which the tide flows and reflows, but rivers capable of being navigated; that is, navigable in the common sense of the term.' " See also Ann.Cas.1914B, page 1068. " 'If the river be a public navigable stream, in the legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. But if it be not navigable in the legal meaning of the term—as is the case in England as to all streams above the flow of the tide—the ownership of the bed of the stream is in the riparian proprietors, but the public have an easement therein, for the purposes of transportation and commercial intercourse.' " 127 Tenn. 575, 158 S.W. page 750, Ann.Cas.1914B, page 1046. "Considered in this view, the presence of stumps and trees in the water, although they may prevent present navigation, cannot affect its capacity nor change its classification from that of a navigable body of water in the legal sense to that of one navigable only in the ordinary sense." 127 Tenn. 575, 158 S.W. page 750, Ann.Cas.1914B, page 1047. The case then goes on to discuss the situation as to grants made by the State of North Carolina to one Doherty before the lake was formed, and says 127 Tenn. 575, 158 S.W. page 752, Ann.Cas.1914B, page 1049: "As these lands were grantable by North Carolina, and were subject to private ownership before the formation of the lake, we are of opinion that the mere fact that they have since become submerged by a body of navigable water does not deprive the owners of their title to the land as long as they can be reasonably identified." The case further holds that the exclusive right of fishing is in the private owners, although they may not detain the fish nor prevent their free movement through the waters of the lake. However, in California we do not have this exclusive private right of fishery in navigable waters. The case is important in demonstrating that an owner does not lose title to his land where there is a sudden covering of the same with navigable waters.

In Lamprey v. State, 52 Minn. 181, 53 N.W. 1139, 1143, 18 L.R.A. 670, at pages 678, 679, the court said: "But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. *Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for* *mere pecuniary profit.* Many, if not most, of the meandered lakes of this state, are not adapted to, and probably never will be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, *will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot perhaps, be now even anticipated.* * * * If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, *so long as these lakes are capable of use for boating even for pleausre, they are navigable, within the reason and spirit of the common-law rule.*" (Emphasis added.)

United States v. Appalachian Electric Power Co., supra, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243, states that the navigability under consideration is "navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents." 311 U.S. at page 409, 61 S.Ct. at page 300. Again, "Nor is it necessary for navigability that the use should be continuous." 311 U.S. at page 409, 61 S.Ct. at page 300. "Small traffic compared to the available commerce of the region is sufficient." 311 U.S. at page 409, 61 S.Ct. at page 300. "It is well recognized too that the navigability may be of a substantial part only of the waterway in question." 311 U.S. at page 410, 61 S.Ct. at page 300. See also United States v. Utah, supra, 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844, to the effect that impediments such as logs, debris, and shifting sandbars do not necessarily make waters nonnavigable.

In Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532, 12 L.R.A.,N.S., 275, the situation was much different than in the case at bar. There the waters were completely enclosed within the plaintiff's land. In holding that they were not navigable the court recognized the rule which would have applied were they navigable, stating 151 Cal. at page 261, 90 P. at page 535: "*While it is true, therefore, that one may take fish and shoot birds upon navigable waters, and while it is true also that one may go with boats thereon,* the converse of these propositions is far from being true." (Emphasis added.) The language of the court to the effect that the fact that one might go with a boat on the waters, catch fish thereon, or that the waters ebb and flow, does not necessarily prove navigability, must be considered in view of the peculiar facts of that case.

Likewise, in Mintzer v. North American Dredging Co., supra, 242 F. 553, page 560, where the court said that the mere fact that the tide ebbs and flows in a stream does not necessarily tend to any extent to demonstrate its navigable character, the slough in question was one which was not navigable or capable of being navigable. Many of the cases hold that the fact that the tide ebbs and flows is of significance in determining navigability.

Navigable Water—Evidence and Findings

The court did not expressly find whether the waters are or are not navigable. Its findings as to the character and the use of the waters follow.

"That on or about the month of February, 1938, a break occurred in one of the levees adjacent to said land, causing water to flow into and over said land and inundating portions thereof at varying depths up to six (6) feet; that ever since that date large portions of said land have been and now are covered by water within the boundaries of the levees. * * *

"That the water covering a large portion of said land is affected by tidal action due to several breaks in the levees surrounding said land, and said water is deep enough to accommodate skiffs, row boats, and in some portions thereof, larger pleasure craft; that said water covers abandoned farm equipment, stumps of trees, peat bogs, and the uncontrolled use of said land and the water thereon is hazardous and dangerous and requires supervision and control; that it is necessary that said levees be maintained for the protection of adjacent homes and property. * * *

"* * * that the land and water thereon are properly the subject of private ownership, and said land is annually assessed and taxed by the County of Contra Costa; that while said water will accommodate pleasure craft as hereinbefore found, said water is not public water of the United States, nor the State of California, and neither the defendants nor the general public have any right to the use of said water for any purpose.

"* * * that the use of said land by the owners thereof, plaintiffs herein, or their predecessors in interest, is not contrary to the public policy of the State of California."

Findings on navigability of the waters are necessary. "* * * it is plainly apparent that an express finding of fact as to the effect of these dams, placed in the sloughs tributary to Salt river, upon the navigability of that river, is a material and vital question in the case, and for that reason a direct and specific finding should be made upon it." People v. Russ, supra, 132 Cal. 102, 106, 64 P. 111, 113.

If the findings are to the effect that the waters are navigable, then, within the rule of the cases herein cited, the right of the public to fish therein is unquestioned. On the other hand, if these findings are to be interpreted to mean that the waters are nonnavigable, then we are compelled to hold that they are completely contrary to the evidence and contradictory to those parts of the findings which state "said water will accommodate pleasure craft"—"said water is deep enough to accommodate skiffs, row boats, and in some portions thereof, larger pleasure craft * * *."

The testimony most strongly in favor of nonnavigability follows: Plaintiff John A. Bohn testified that for the most part the levees are substantial and are holding. Row boats and small craft do go through holes in the levees. There is a large hole in the levee on the northwest corner of the tract and one on the easterly side. Some of the small holes were cut fairly recently by individuals. Defendant Robert Albertson testified that in places there are stumps or trees extending from the water. There is no channel through the tract, but "[w]ater wash that leads out to those breaks * * * just * * * overflow of the whole island." Ralph L. Foy, a witness for plaintiffs, testified that his company in 1941 cut one of the breaks in the levee so as to make a shorter way for his peat barges to go from Antioch to the tract. When the tide is out, the average depth of water is about three and a half feet and about seven and a half feet when completely in. Boats drawing over three and a half feet would strike objects on the island itself. There are cross levees, too. Most of the deep places are where peat has been removed. When the tide is flooding and the river is backing up from the bay the water runs into the island from the breaks and on the ebb it runs from the island out into the river. "There is no direct current through the island itself from one break to another" nor are there any well defined channels. There are no currents except right next to the breaks themselves. Joe Thompson testified that the peat barges draw two and a half feet when empty and four and a half feet when loaded. They have to come out on high tide. There are obstructions, even farm machinery. The barges get stuck. He went over the tract with the Army engineers and found no water anywhere over seven to eight feet deep and "that was on almost a four foot tide." There are holes which are deeper than that but that is where the peat has broken loose and come to the surface as constantly goes on.

No one testified that the water, except in a few areas, is ever less than three feet deep. The evidence shows, too, that hundreds of pleasure boats have used the water and many have gone in one way and out the other. In the light of the tests shown in the authorities herein reviewed, it is clear that in spite of obstructions such as tree trunks, farm machinery and low spots, the waters are navigable.

[4] The evidence conclusively shows that the water in its present "natural and ordinary condition affords a channel for useful commerce." United States v. Utah, supra, 283 U.S. 64, 76, 51 S.Ct. 438, 441. While not as yet available for heavy commercial traffic, it is being used by innumerable pleasure and fishing boats, and for the transportation of peat. The situation at Frank's Tract is definitely within the rule of Lamprey v. State, supra, 52 Minn. 181, 53 N.W. 1139, 18 L.R.A. 670. It is somewhat similar to that in Forestier v. Johnson, supra, 164 Cal. 24, 127 P. 156, where Fly's Bay was held navigable although at low tide the land was nearly all bare, except for a certain channel of which the court said: "It does not appear that there has ever been any occasion for running boats out of the main channels, except for the purpose of hunting." 164 Cal. at page 28, 127 P. at page 158.

The waters being navigable, brings us to the effect of that fact on the title.

Avulsion

While the parties have discussed at some length, and cited authorities on the legal effect of erosion, or the gradual eating away of the soil, and of the gradual changing of the channel of a river, the principles involved in such situations are not pertinent here. The action of the waters here constituted not an encroachment or erosion or gradual change of the river's channel, but an inundation or avulsion, "not a gradual or imperceptible encroachment on the land, but * * * [a] sudden or violent action of the elements, perceptible while in progress." Schwartzstein v. B. B. Bathing Park, 203 App.Div. 700, 197 N.Y.S. 490, 492. There it was held that the owner of land which became inundated by the sudden action of the sea did not lose title to the submerged lands. The court quoted from Hargreaves' Law Tracts. "'If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or, though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety, and accordingly it was held by Cooke and Foster, M. (7 Jac. C. B.), though the inundation continue forty years.' 'But, if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues.'"

"29 Cyc. 349 thus defines it [avulsion]: 'Avulsion is the sudden and rapid change of the channel of a stream which is a boundary, whereby it abandons its old and seeks a new bed.' Thus we have two distinct ideas; that of bodily tearing a piece of land away from one owner, and adding it to the land of another, so that it can be identified; and that of a sudden and violent change in the channel of a river, regardless of what becomes of the land washed away. * * * 'Where the change in the channel of a river is made suddenly and violently, and is visible, and the effect certain, it is said to be by avulsion.'" Wood v. McAlpine, 85 Kan. 657, 118 P. 1060, 1062, 1063.

[5] The real question here is not of the title to the land, but whether by the flooding, the right of navigation and fishing arose in the public. The solution of this question, in turn, depends upon whether the waters on the tract are navigable. If they were not, no rights of the public would attach. Bolsa Land Co. v. Burdick, supra, 151 Cal. 254, 90 P. 532. As the waters are navigable, then, although the title to the lands thereunder still remains in the owners and they have the right to reclaim, the public, until the land is reclaimed, has the right of navigation and fishery.

[6] "If a portion of the land of the riparian owner is suddenly engulfed, and the former boundary can be determined or the land reclaimed within a reasonable time, he does not lose his title to it." Farnham, Waters and Water Rights, vol. 1, p. 331, § 74; see also Simpson v. Moorhead, 65 N.J.Eq. 623, 56 A. 887.

In the Simpson case, supra, 65 N.J.Eq. 623, 56 A. 887, there was a somewhat similar situation to the one in the case at bar. The plaintiffs owned certain high land in front of which were mud flats. They reclaimed these flats and thereby, under New Jersey law, acquired title thereto. Breaches in the banks of the reclaimed land occurred from time to time permitting the land to be subject to the overflow of the tide. The owners did not repair these breaks. Defendants contended that by thus permitting the land to be overflowed plaintiffs lost their title. To this claim the court said: "The theory that mere submergence takes away private title is quite too uncertain to be made the means of changing the ownership of lands. * * *

"It seems to me to be unquestionable that, if the lands be once reclaimed, the title to such lands remains in the several reclaiming owners, whether the tidewater afterwards overflows them or not." 56 A. at pages 889, 890; see also Commissioners of Lincoln Park v. Fahrney, 250 Ill. 256, 95 N.E. 194.

"In general, the rights of the public to the incidents of navigation are boating, bathing, fishing, hunting, and recreation. * * *

"* * * the right of navigation includes the incidental use of the bottom. This is true where the use of the bottom is connected with navigation, such as walking as a trout fisherman does in a navigable stream, boating, standing on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, walking on the ice if the river is frozen, etc." Munninghoff v. Wisconsin Conservation Commission, 255 Wis. 252, 38 N.W.2d 712, 715, 716.

In City of New York v. Feltman, 230 App.Div. 299, 243 N.Y.S. 625, appellants had acquired title to Parcel 35 by reclamation. Thereafter the ocean encroached on and submerged it (whether gradually or by avulsion does not appear). The court said: "The proprietorship of the appellants, Feltman, was lost, subject to a return to that proprietorship by the exclusion of the water, either by natural or artificial means." 243 N.Y.S. at page 628. Before appellants attempted again to reclaim, the city as owner of the upland reclaimed it. Although the court upheld the city's action and it cannot be determined whether the encroachment was actually by avulsion, the case is authority for the proposition that mere submergence does not cause the land owner to lose land without right of reclamation.

City of New York v. Realty Associates, 256 N.Y. 217, 176 N.E. 171, was an action to condemn certain shore lands for a public beach. The city conceded that the title to the lands originally was in defendant, but contended that it lost that title to the state by the land becoming submerged and not reclaimed. The State had granted to the city any title it might have. The court said 176 N.E. at page 172: "It concedes, however, that the title could have been regained by reclaiming and filling the land under water or even by natural restoration, but insists that, in the absence of either process, title remains with the city as grantee of the sovereign state. Assuming that land lost by erosion returns to the ownership of the state, we think that the same conclusion does not follow the effects of avulsion. In some treatises and even in judicial opinions in other states and in England occur confusing statements which might lead to an inference that in cases of avulsion their writers believed that private title was temporarily lost and was restored only when the waters receded or the land was artificially replaced. In this state the subject may not have been authoritatively settled by any actual decision which required adjudication of this question, but the expressions of opinion by distinguished judges reveal general concurrence in the view that the private owner is not divested even temporarily of his title. * * * We accept this doctrine, and now pronounce it law. The logical deduction from these judicial utterances is that the right to regain the land rests solely on the principle that the title to it remains in the riparian owner. It is not suspended by a physical catastrophe." See also 65 C.J.S. Navigable Waters, § 86, page 186; see discussion in People v. California Fish Co., supra, 166 Cal. 576, 597, 138 P. 79, concerning the revocation by the state of the original dedication of the lands for purpose of navigation and fishery.

It might be pointed out that the rule in Texas is different from that of most of the states. There, where the bed of a river is changed through avulsion, the owner of the land where the river has made a new bed loses his entire title to the state. State v. R. E. Janes Gravel Co., Tex.Civ.App., 175 S.W.2d 739.

Right To Fish

In Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, the Medina River was not navigable in fact but was made so in law by statute passed in 1837. In 1912, as part of an irrigation project, the river was dammed in two places so as to form two lakes. The smaller of these, Diversion Lake, covered about 150 acres. Plaintiff in 1926 became the owner of two strips of land each about 1500 feet in width and four miles in length, fronting on what were originally the two banks of the river. It did not, however, own the bed of the river. Plaintiff fenced its land and stocked it with fish and improved it for the use of its members for fishing, hunting, boating and bathing. Defendants, as Texas citizens, claimed the right to fish and boat in the lake. They had access to it by a public road which crossed the upper end of the lake. In holding that the public had the right to fish, the court said: "In general it is held that all members of the public have a common right of fishing in navigable streams * * '* * * to * * * those waters that are navigable in fact.'" 86 S.W.2d at page 444. The court referred to the rule that "The right to fish in public water does not carry with it a right to cross or trespass upon privately owned land in order to reach the water." 86 S.W.2d at page 445. While the decision was based on the fact that the plaintiffs did not own the bed of the river, the court held that the public had the right to fish not only in that portion of the lake in which lay the river bed but on the whole of the navigable lake, saying that the waters of the lake, notwithstanding that most of its bed was privately owned, were still public waters. "When the irrigation company, plaintiff in error's predecessor in title, constructed the dam across the river, it caused by its voluntary act the flood waters of the river, public waters, to spread over the land which it had acquired, submerging and in effect destroying a portion of the river bed, and giving to the public waters a new bed. This artificial change in the river and its bed did not affect the public nature of the waters and did not take away the right of the public to use them for fishing." 86 S.W.2d at page 446.

Thus, in our case, the involuntary flooding of plaintiffs' land made a change in the river to the extent of spreading its waters over plaintiffs' land. That fact, as long as the waters remain navigable and are reached by the public without trespassing on plaintiffs' land, does not affect the public nature of the waters.

In Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816, Ann.Cas. 1915C, 1148, the question was the right of the public to hunt in a widening of a river, the title to the land thereunder being, by Wisconsin law, in private persons. The court points out that while the states differ with relation to the ownership of the title to land under navigable waters, nevertheless in most states, regardless of title ownership, there is a sovereign right in the people to have all navigable waters forever free for navigation, and "that the right of navigation carries with it the right of fishing, which is incident to the right to navigate." 156 Wis. 261, 145 N.W. page 819, Ann.Cas. 1915C, page 1150. The court said further: "Navigable waters are public waters, and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation." 156 Wis. 261, 145 N.W. page 820, Ann.Cas. 1915C, page 1151.

In Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273, 42 L.R.A. 305, the court points out how under the common law of England, as a general rule, beds of tidal rivers belonged to the Crown, but that beds of fresh water rivers belonged to the abutting landowners. Then our original thirteen states followed that rule, although in some of the states the tidal river rule was extended to certain navigable fresh water rivers. Subsequently when the national government was organized and the Northwestern Territory ceded to the United States by Virginia and the newly formed states acquired lands from the United States, there became quite a conflict in the rules between states, the courts of some holding that the title to the river beds was in the state and others holding it was in private persons. But, because of the sovereign rights of the people, "notwithstanding the plaintiff has title to the bed of the river, nevertheless it holds the same in trust for the use of the public" 76 N.W. at page 276. "The question recurs whether the public right of fishery is included in, or an incident of, such public right of navigation. In other words, has the plaintiff, as riparian owner, the exclusive right to take fish from the river? The plaintiff certainly has no property in the particles of water flowing in the stream, any more than it has in the air that floats over its land. Its rights in that respect are confined to their use and in preserving their purity while passing. Lawson v. Mowry, 52 Wis. [219] 234, 235, 9 N.W. 280. So, the fish in the stream were not the property of the plaintiff at common law, any more than the birds that flew over its land. State v. Roberts, 59 N.H. 256; Ang. Water Courses (7th Ed.) § 65a, and cases there cited; State v. Welch, 66 N.H. 178, 28 A. 21. As indicated, the public right of fishery in tidal rivers was maintained, at common law, in England, before the use of steam,—when vessels could only be carried up the river by the flow of the sea, and down the river by the ebb of the sea,—and consequently when the ebb and flow of the tide practically measured the navigability of the stream. For the same reason, the public should have the right to fish in all the public navigable waters of the state, including all public navigable rivers and streams of the state." 76 N.W. at pages 276–277.

In Wright v. Seymour, 69 Cal. 122, 10 P. 323, the court in holding that a patent which describes the land as running to a stake on the bank of the Russian River "thence, meandering down the Russian river" did not carry title to the bed of the river, points out that the common law doctrine of title has been modified in some of the states and that "the right of navigation in all such navigable waters is the paramount public right of every citizen." 69 Cal. at page 127, 10 P. at page 326.

[7] In California the right to the fish in a stream is in the people even though the stream be nonnavigable. In People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, the defendant operated a sawmill on the banks of the Truckee River, which is a nonnavigable fresh water stream, stocked with fish. Defendant in operating its mill allowed sawdust, etc., to pollute its waters. In sustaining an order refusing to vacate an injunction restraining defendant from continuing such pollution the court said:

"The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (Ex parte Maier, 103 Cal. 476, 483, 37 P. 402 [42 Am.St.Rep. 129]), as in England it was in the king; * * *. But defendant urges that the facts do not show the infringement of any public right; that the right, if any, shown to be interfered with, is solely that of fishery, or the privilege to take fish; that this is a public right only so far as it pertains to navigable waters, while, as to all other waters, it is exclusively in the riparian proprietor; that, as the Truckee river is not a navigable stream, the destruction of the fish therein is not an injury to the public for which the people can complain, there being no allegation that the riparian proprietors thereon have been injured. In the first place, the common right to take fish extends not alone to navigable waters, but exists as to all waters the lands underlying which are not in private ownership,—

in other words, to all lakes, ponds, or streams, navigable or otherwise, upon the public lands of this state or the United States not protected by reservation; and, since there is no averment that the lands along the Truckee river are held in private proprietorship, we think the presumption must be that the title remains in the government. But, in the next place, if this is not the presumption the case would not be different. The dominion of the state, for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery. * * *

"For the purposes of the right involved in this action, then, the Truckee river, so far as it flows within this state, is a part of the waters to which the jurisdiction of the state in the protection of its fish supply extends. This court will take judicial cognizance of the fact that the river has its source in Lake Tahoe, a large navigable body of water lying partly in this state, and that it flows thence into the state of Nevada, and empties into Pyramid lake, also navigable; and the court may also take notice of a fact so common and notorious that between these two bodies of water the river affords, and has from time immemorial, a natural and free highway for the passage of the fish inhabiting these lakes. Even, therefore, if, as contended by defendant, the lands through which the stream flows are to be presumed, in the absence of contrary averment, to be owned in private proprietorship, it can make no difference as to the right here asserted. While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken." 116 Cal. at pages 399, 400–401, 48 P. at page 374.

While the court there held that the riparian owner of land on a nonnavigable stream has the sole right to fish in the waters on his land, it upheld the rule that the people are the owners of fish in the streams and waters of this State, and stated that even in nonnavigable waters the riparian owner had no right to prevent fish from passing up and down stream.

The evidence in this case shows that Frank's Tract has become a well-defined water course and a part of the San Joaquin River whose waters are not to be classified as mere flood waters, but as navigable waters. See Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024; Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L.R.A.,N.S., 391.

In City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 52 P.2d 585, the court referred to the right of the state to regulate, protect and preserve the easement of the public in navigable streams for the purpose of navigation. In Taylor v. Underhill, 40 Cal. 471, it was stated that no "right to obstruct navigation passes to a purchaser under the laws for the sale of swamp and overflowed land." 40 Cal. at page 473. "The title to, and property in, the fish within the waters of the state are vested in the state of California and held by it in trust for the people of the state." People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 404, 38 A.L.R. 1186; People v. Stafford Packing Co., 193 Cal. 719, 227 P. 485. In People v. Miles, 143 Cal. 636, 77 P. 666, defendants were convicted of using a set-net in the Sacramento Slough in violation of law. This slough emptied into the Sacramento River and was about three or four miles in length, about

80 feet wide and 12 feet deep. Except in midsummer this slough drains the back country lands into the river, but in August the water of the slough has no perceptible current. Fish may and do pass freely up and down the slough from the river. The ownership of the lands bordering on the slough did not appear. However, the court held upon the authority of People v. Truckee Lumber Co., supra, 116 Cal. 397, 48 P. 374, that to the extent that the waters are common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed public waters and subject to all of the laws of the state regulating the right of fishing and that "Whether or not the water of this slough, at the particular time defendants had their net set across it, was subject to movement by current or tide, is immaterial." 143 Cal. at page 642, 77 P. at page 669.

" 'The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. * * * When, by reason of natural changes, the stream abandons the bed over which, through the instrumentality of its waters, the public has the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road and its right and privilege to pass over the old one revert to the abutting owners, and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist * * *.' " Thies v. Platte Valley Public Power & Irr. Dist., 137 Neb. 344, 289 N.W. 386, 387–388.

In Hume v. Rogue River Packing Co., 51 Or. 237, 83 P. 391, 92 P. 1065, 96 P. 865, 31 L.R.A.,N.S., 396, plaintiff claimed by grant, custom, usage and prescription the exclusive right to take salmon on 18 miles of the Rogue River, a navigable stream. His grant was of all tidelands for four or five miles along the river. The court denied his claims. As to the claim of title by grant, it held that if he had ever had any title to the bed of the river he lost it through the *gradual* shifting of the river submerging his tide land. (In the respect that the submergence was gradual the case differs from ours. However, the case is important in its discussion of the right of fishery in navigable waters.) " 'There is an exception to the rule that the fishery follows the soil in case the soil lies under water in which the public has a right of fishing.' * * * Even where a mere right of fishery in public water has been conferred by the sovereign, it will not be regarded as exclusive, in the absence of anything to indicate an intention to make it exclusive, although the title to the soil is also in the grantor." 92 P. at page 1068.

Similarly to the plaintiffs in our case, the plaintiff there contended that the deeds from the state to the tide lands expressly gave him the right of fishery because there were no restrictions therein. At the time, the Oregon law provided that grants should not be construed as granting exclusive rights to oysters and other shell fish. Plaintiff contended that because of no restrictions in his *deed* and particularly because the only restriction in the express *law* was as to shell fish, there could be no restriction as to his right of fishery. However, the court said, 92 P. at page 1069: " 'A grant of an exclusive right of fishery in a public water is in derogation of common right, and must be expressly mentioned to vest in the grantee. No such right will pass by implication.' 2 Farnham [on Waters, § 1379], supra. No language being found in plaintiff's deeds from the state which by unavoidable construction imports an intention to grant an exclusive right to fish for salmon in the water opposite and adjacent thereto, it follows that he does not have that right by virtue of his tide land deeds."

Tax Sales and Deeds—Findings

[8] To sum up, the waters of Frank's Tract are navigable until reclamation is made. The title is subject to the right in the public of navigation and fishing, because, by the sudden flooding of the tract by the San Joaquin River the rights of the

public in the river are transferred to the waters of the tract. The title to the lands underlying the waters is not lost, and the owners have the right to reclaim. Plaintiffs, until the land is reclaimed, have no right to prevent the public from fishing on, or navigating these waters, provided the public can do so without trespassing on plaintiffs' land.

In view of our determination that regardless of the prior title of plaintiffs' lessors to the land, the rights of the public as herein set forth have attached to the waters, it is unnecessary to discuss the contention of defendants that the tax sales and deeds had the effect of restricting the title to that extent. Nor is it necessary to discuss the questions raised by defendants concerning the findings.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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HELPERIN v. GUZZARDI.

Civ. 18544.

District Court of Appeal, Second District,
Division 3, California.

Dec. 10, 1951.

Rehearing Denied Dec. 28, 1951.

Hearing Denied Feb. 7, 1952.

Action by Alice F. Helperin against Walter Guzzardi, to recover damages alleged to have been suffered by the failure and refusal of defendant to sell and convey real property to the plaintiff. The Superior Court of Los Angeles County, Frederick F. Houser, J., rendered judgment for the defendant, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that, where defendant subscribed his name to agreement of sale and handed agreement to real estate broker to be retained by broker as defendant's agent until defendant's wife, who held title with defendant in joint tenancy, should consent to and sign the agreement, and wife refused to sign agreement, and broker placed agreement in an escrow opened with a bank where it would be available for signature of wife, no binding contract for sale of property was entered into between defendant and plaintiff, who gave her check for a portion of purchase price to broker and signed offer to purchase the property, and hence plaintiff could not recover damages for defendant's refusal to sell the property to plaintiff.

Judgment affirmed.

1. Appeal and Error 🔑933(1)

On appeal from order granting plaintiff's motion for a new trial, the evidence should be stated in the light most favorable to the plaintiff.

2. Contracts 🔑42

Deposit of a writing with a third party, for use only upon occurrence of a specified condition, is not a delivery if the condition does not occur. Civ.Code, §§ 1054, 1057, 1626.

3. Contracts 🔑42

When agreement is signed and handed over with the understanding that it will not be used or become operative until it is signed by another who is expected to join therein, it does not become a contract until the additional signature is obtained.

4. Contracts 🔑42

An instrument placed in the hands of a third party is not delivered as long as the signer retains control of it.

5. Brokers 🔑100

Where defendant subscribed his name to agreement of sale and handed agreement to real estate broker to be retained by broker as defendant's agent until defendant's wife, who held title with defendant in joint tenancy, should consent to and sign the agreement, and wife refused to sign agreement, and broker placed agreement in an escrow opened with a bank where it would be available for signature of wife, no binding contract for sale of property was entered into between defendant and plaintiff, who gave her check for a portion of purchase price to broker and signed offer to purchase the property, and hence plaintiff could not recover damages for defendant's refusal to sell the property to plaintiff.

◆

Lyman A. Garber, Beverly Hills, for appellant.

Leo K. Gold, Beverly Hills, for respondent.

SHINN, Presiding Justice.

Plaintiff, Alice F. Helperin, brought the present action against Walter Guzzardi to recover damages alleged to have been suffered by the failure and refusal of defendant to sell and convey to her real property in Beverly Hills upon which was located an apartment house. Plaintiff first sued for specific performance, but dismissed that action and instituted the present one. It was first tried before Honorable D. Oliver Germino, assigned by the Chairman of the Judicial Council to the superior court of Los Angeles County. That trial resulted in a judgment for the defendant upon findings that although defendant subscribed his name to an agreement of sale, it was handed to a broker to be retained by him, as Guzzardi's agent, until Mrs. Guzzardi, who held title with her husband in joint tenancy, should consent to and sign the agreement, which she failed and refused to do. The court concluded that no contract was entered into between the parties for the sale and purchase of the property.

[1] Judge Germino's assignment having expired, plaintiff's motion for a new trial was granted by another judge. Guzzardi appealed. The order was affirmed, 95 Cal.App.2d 31, 212 P.2d 9 in an opinion which properly stated the evidence in the light most favorable to the plaintiff whose motion had been granted. The action was retried before still another judge of the superior court. In all material respects his findings were the same as those of Judge Germino. The following facts, among others, were found. Plaintiff gave her check for $1,500 to one George Prindle, a real estate broker, and signed an offer to purchase the property for a price of $42,500, $15,000 to be paid in cash, the balance in the form of encumbrances on the property, and a second trust deed to be given by the buyer. Three copies of the agreement were taken by the broker to Walter Guzzardi, who signed the same; the property belonged to Guzzardi and his wife, Carolyn, as joint tenants, and Mrs. Guzzardi refused to sign the agreement; one copy of the agreement signed by Guzzardi was handed to Prindle to be held by him until such time as Mrs. Guzzardi should agree to join in the execution thereof; she did not sign or agree to sign the same; it was understood between Guzzardi and Prindle that the agreement would not constitute a binding contract or be made use of unless and until it was signed by Mrs. Guzzardi. Mr. Prindle respected the directions given him. He did not deliver it to plaintiff but placed it in an escrow opened with a bank where it would be available for the signature of Mrs. Guzzardi.

The record on appeal contains a settled statement of the evidence. The findings above referred to have support in the testimony of Mr. Guzzardi. Mrs. Guzzardi also testified that she refused to sign the agreement at the time her husband signed it, and that she told Mr. Prindle she did not want to sell the property and would not sign any papers. Inasmuch as the testimony of Mr. Guzzardi was complete and explicit with respect to the instructions given to Prindle and the understanding that acceptance of the offer was conditioned as related in the findings, it is unnecessary to engage in any further discussion of the evidence. The fact that Mr. Prindle's testimony on this point was the exact opposite of that given by Mr. Guzzardi proves only that one of them was untruthful. Since the court believed Mr. Guzzardi, the case for our consideration is the same as if Mr. Prindle had not testified at all.

[2, 3] The findings support the judgment. A contract in writing, signed by the parties, takes effect only upon delivery. (Civ.Code, secs. 1054, 1626.) Deposit of a writing with a third party, for use only upon occurrence of a specified condition, is not a delivery if the condition does not occur. Dyson v. Bradshaw, 23 Cal. 528;

Rest.Contracts, sec. 101; Civ.Code, sec. 1054, 1057; cf. Hotaling v. Hotaling, 193 Cal. 368, 381, 224 P. 455, 56 A.L.R. 734. When an agreement is signed and handed over with the understanding that it will not be used or become operative until it is signed by another who is expected to join therein, it does not become a contract until the additional signature is obtained. Kurtz v. Forquer, 94 Cal. 91, 94, 29 P. 413; Winter v. Kitto, 100 Cal.App. 302, 306, 279 P. 1024; Anthony Macaroni Co. v. Nunziato, 5 Cal.App.2d 588, 43 P.2d 315; 17 C.J.S., Contracts, § 62, p. 412. The agreement may or may not name the expected signer as a party in order to come within the rule. Here no one was named in the body of the deposit receipt as the "seller" although that word appeared under Guzzardi's signature. Nevertheless the acceptance would have been incomplete without the signature of Mrs. Guzzardi and it was so understood by the broker.

[4, 5] Futhermore there was no delivery such as to result in the formation of a contract. The writing provided that the seller was to pay Prindle a broker's commission. If it had been a completed contract Prindle would have been the agent of both buyer and seller. By the oral agreement, Prindle became the special agent of Guzzardi with respect to possession of the writing and received it in that capacity. It was returnable upon demand when it became certain Mrs. Guzzardi would not sign it. The possession of Prindle was subject to the right of Guzzardi to recall the writing. An instrument placed in the hands of a third party is not delivered as long as the signer retains control of it. Williams v. Kidd, 170 Cal. 631, 637, 151 P. 1; Hudemann v. Dodson, 215 Cal. 3, 6, 7 P.2d 997. Whether it is a deed or other instrument, the intention of the depositor to part with or retain control is the deciding factor. It is a question of fact. Upon the facts found and for the several reasons stated defendant was entitled to judgment.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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108 Cal.App.2d 131

GATES v. LEVERS.

Civ. 7955.

District Court of Appeal, Third District, California.

Dec. 10, 1951.

Hearing Denied Feb. 7, 1952.

Action by Victor Gates against J. W. Levers, doing business under the firm name and style of Levers Bros. Trailer Co., for money paid for a house trailer under a conditional sales contract, based on the alleged misrepresentation, fraud, and rescission of the defendant. The Superior Court, Sacramento County, Percy G. West, J., gave judgment for the plaintiff and the defendant appealed. The District Court of Appeal, Adams, P. J., held that the records of the Motor Vehicle Department do not necessarily and conclusively establish the true ownership of a vehicle.

Judgment affirmed.

1. Automobiles ⚿=20

The records of the Motor Vehicle Department do not necessarily and conclusively establish the true ownership of a vehicle.

2. Sales ⚿=481

In action by buyer against seller for money paid for house trailer under conditional sales contract, evidence sustained trial court's conclusion that buyer was owner of the trailer notwithstanding registration certificate was in name of buyer's sister. Vehicle Code, §§ 186, 223, 402.

3. Sales ⚿=481

In action by buyer against seller for money paid for house trailer under conditional sales contract, evidence sustained finding of rescission on part of seller.

◆

Wallace Shepard and James D. Meredith, Sacramento, for appellant.

Emerson W. Read, Sacramento, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action to recover from defendant money he had paid for a house trailer under a conditional sales contract, basing his action on misrepresentation and fraud, followed by rescission. Defendant demurred to the complaint, and said demurrer being overruled filed his answer denying misrepresentations. The action was tried by the court sitting without a jury, and at the conclusion of plaintiff's evidence defendant made a motion for a nonsuit. The court suggested that it would take the motion under submission and would hear defendant's evidence. Defendant, however, declined to offer any evidence and rested on his motion. The court thereupon made findings in favor of plaintiff and entered a judgment against defendant, from which judgment defendant has appealed.

Appellant's main contention for a reversal is that respondent was not the owner of the trailer, as records of the Motor Vehicle Department showed Marcelene Fisher, plaintiff's sister, as the registered owner, and Security Acceptance Corporation, Sacramento, as the legal owner, and he urges that this record is conclusive as against any claim by plaintiff to the house trailer, with the result that his rejected offer to restore was legally insufficient to establish rescission.

Plaintiff testified that he put the trailer in his sister's name and signed her name to the application for registration as he wanted the trailer to be in her name; he stated that he had personally entered into the contract for purchase of the trailer on July 19, 1948, and had made a down payment and monthly payments until about August, 1949, when he suffered a stroke of paralysis and was unable thereafter to sign checks. His sister, then took over and made the payments thereafter, and plaintiff transferred his residence from Sacramento and went to live with his sister in San Francisco. He also testified that of the original down payment of $1500 his sister put up $600 which he still owed her, and that she had made seven or eight installment payments since he became ill. However, plaintiff, who bought the trailer as a place of residence, had lived in and had possession of it, and his sister never had possession.

Marcelene Fisher testified that she was with her brother in North Sacramento about the time that the contract was made and was in defendant's trailer yard just prior to the making of said contract and had then looked at the trailer. She testified as to matters pertaining to the representations by the seller and as to the conditions which resulted from the alleged failure of the trailer to meet them. But she asserted no interest in the trailer and appeared to be satisfied to have her brother succeed in the action to her exclusion.

Neither in the defendant's demurrer nor in his answer did appellant raise any issue of plaintiff's title or interest in the trailer, and the record shows that when plaintiff complained to defendant that the trailer had been misrepresented, defendant, in meeting and corresponding with him, recognized him as the owner of the trailer.

[1] We do not agree with appellant's contention that the records of the Motor Vehicle Department necessarily and conclusively establish the true ownership. Henry v. General Forming, Ltd., 33 Cal.2d 223, 226, 200 P.2d 785; Logan v. Serpa, 91 Cal.App.2d 818, 822, 206 P.2d 70; Willard H. George, Ltd. v. Barnett, 65 Cal.App.2d Supp. 828, 150 P.2d 591; Lynn v. Herman, 72 Cal.App.2d 614, 616, 165 P.2d 54. In Logan v. Serpa, supra [91 Cal.App.2d 818, 206 P.2d 72] the court said: "It has been held that a certificate of registration does not necessarily or conclusively establish true ownership and that a different ownership may be shown under certain circumstances which would bring the true owner within the provisions of sec. 402 of the Vehicle Code. McCalla v. Grosse, 42 Cal.App.2d 546, 109 P.2d 358." In Willard H. George, Ltd. v. Barnett, supra, which was cited with approval in Henry v. General Forming, Ltd., supra, an appeal was taken from a judgment in favor of a third party claimant after a levy of execution. The property levied upon was bought from a dealer on a conditional sales contract, but was registered in the name of the claimant's mother. The court said, 65 Cal.App.2d Supp. at page 830, 150 P.2d at page 592, that it appeared that the conditional sales contract was signed by defendant in claimant's presence, and that with claimant's knowledge and consent the car was registered in the name of defendant as owner

and Universal Credit Company as legal owner, but that this was done as a matter of convenience and that claimant made all payments upon the purchase price of the car, regarded it as hers and had no intention of making a gift of it to defendant; and the trial court having accepted these facts as true, the appellate court stated that it was bound by that decision—that the rights of the third party claimant which lawfully attached upon the purchase of the car were not forfeited or taken away because of the subsequent registration of the car in the name of another; and it added, 65 Cal.App. 2d Supp. at page 831, 150 P.2d at page 593: "The Vehicle Code contains no provision similar to that found in the Torrens Title Law affecting real property whereby the certificate of registration is made conclusive on the title to the registered property." In Lynn v. Herman, supra [72 Cal.App.2d 614, 165 P.2d 55], hearing in the Supreme Court denied, the court said: "Clearly section 186 of the Vehicle Code cannot be given the construction urged by plaintiff. It deals with the vesting of title in a new owner and provides that title shall not pass until the formalities of registration have been undertaken. It does not purport to provide that the title evidenced by the registration certificate shall be conclusive, unimpeachable, and free from all forms of attack. That the legislature did not intend to give any such effect to a registration certificate is shown by section 223 of the Vehicle Code, * * * which, in subdivision 'a,' provides for the revocation of a registration certificate, 'when the department is satisfied that such registration or that such certificate, card, plate or permit was fraudulently obtained or erroneously issued.' "

[2, 3] From the evidence in the case we are satisfied that the trial court properly concluded that plaintiff was the owner of the trailer despite the registration certificate; and that rescission in fact was made out by the evidence. For this reason other contentions made by appellant require no consideration and the judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

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108 Cal.App.2d 25

HOWARD et al. v. GENERAL PETROLEUM CORP. et al.

Civ. 18468.

District Court of Appeal, Second District, Division 3, California.

Dec. 5, 1951.

Action by Grace C. Howard and others against the General Petroleum Corp., a corporation, to recover royalties on production from a well on a lot sold to defendant, based on alleged representation of the defendant that the well was not producing and that it it was the intention of the defendant to abandon it. From a judgment of nonsuit of the Superior Court of Los Angeles County, F. Ray Bennett, J., pro tem., the plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that in view of the evidence the trial court should have determined the fraud issue, the attempted abandonment of the lease, whether it was still in existence, and the question of laches and made findings thereon.

Judgment reversed with directions.

1. Trial 🔑159

Where the evidence of plaintiffs when given full credit and effect, would have entitled them to some relief, it was error to grant a nonsuit.

2. Trial 🔑143, 388(1)

Where evidence of plaintiffs, when given full credit would have entitled them to some relief and the evidence of defendants presented the transactions in a different light and the entire case was before the court, the evidence of defendants should have been considered and the court should have made findings and conclusions in accordance with statutory procedure.

3. Trial 🔑159

Purpose of a "nonsuit" is to save time, effort and expense of presenting a defense when plaintiff has failed to make out a case.

See publication Words and Phrases, for other judicial constructions and definitions of "Nonsuit".

4. Appeal and Error 🔑1061(3)

While after the evidence of all the parties is in, the trial court must make findings upon the material factual issues, if the court fails therein and grants a nonsuit, plaintiff is not prejudiced if his case would be defective even if the factual issues were decided in his favor. Code Civ.Proc. § 632.

5. Trial ⚷159

Where issues of fact are presented upon complete evidence, granting of a nonsuit is improper unless justified by some rule of law under which it is unnecessary to decide issues of fact.

6. Trial ⚷165

On motion of defendant for a nonsuit, the evidence is viewed in a light most favorable to the plaintiffs.

7. Mines and Minerals ⚷79(7)

In action to recover royalties on production of an oil well sold to defendant because of alleged fraudulent representation of defendant that the well was not producing in paying quantities and that it was the intention of defendant to abandon it, evidence established that when plaintiffs sold the lot to defendant they did not sell or transfer their royalty right under a community lease and that they still retained that right.

8. Mines and Minerals ⚷79(7)

In action to recover amount of royalties on production of an oil well sold to defendant because of alleged fraudulent representation that the well was not producing oil or gas in paying quantities and that it was intention of defendant to abandon it, evidence was sufficient to establish prima facie that there was no voluntary abandonment by plaintiffs of their rights under a community lease on the property through their agreement with defendant.

9. Limitation of Actions ⚷199(1)
Mines and Minerals ⚷79(7)

In action to recover royalties on production of an oil well sold to defendant based on alleged fraudulent representation that the well was not producing and that it was the intention of the defendant to abandon it, where it appeared prima facie that plaintiffs still had their royalty rights under a community lease on the property, a nonsuit was not warranted on the theory that plaintiffs had sold their royalty rights or had abandoned them, or that the action was barred by the statute of limitations.

10. Trial ⚷384

In action to recover royalties on production of an oil well sold to defendant based on alleged fraudulent representation that the well was not producing and that it was the intention of the defendant to abandon it, where defendant filed a motion for nonsuit, the trial court should have determined the fraud issue, the attempted abandonment, whether the community lease of plaintiffs on the property was still in existence and the question of laches pleaded by all the defendants and made findings thereon.

John N. Metcalf and Elon Gilbert Galusha, Los Angeles, for appellants.

D. W. Woods, J. M. Jessen and Martin J. Weil, all of Los Angeles, for respondent, Gen. Petroleum Corp.

Cree & Brooks, Long Beach, for respondents, Jack Herley, et al.

SHINN, Presiding Justice.

[1, 2] This is an appeal from a judgment of nonsuit rendered after the action for the recovery of oil royalties had been fully tried and all the evidence of the defendants, as well as that of the plaintiffs was before the court. We are satisfied that the judgment should be reversed with instructions to the trial court to make findings and conclusions of law and to render judgment thereon. The evidence of plaintiffs, when given full credit and effect, would have entitled them to some relief. It was therefore error to grant a nonsuit. The evidence of the defendants, however, presented the transactions in a different light. The entire case was before the court, the evidence of the defendants should have been considered and the court should have made findings and conclusions in accordance with statutory procedure.

Plaintiffs were the owners of lot 18 in block 19, of Athens in the City of Los Angeles, in December 1932, when they sold it to General Petroleum Corporation, having derived title as surviving wife and children of William J. Howard. On February 11, 1925, the administrator of the estate of Mr. Howard as lessor of lot 18, and Edith Griswold and Nellie B. Radcliffe as lessors of lot 19 adjoining, entered into a community oil and gas lease with Walter H. Fisher, as lessee. The term of the lease of lot 18 was 20 years, with the privilege in the lessor or assigns to extend the term beyond 20 years, and of lot 19, 20 years and so long thereafter as oil and gas should be produced from said lot 19 in paying quantities. The owners of lot 18 did not elect to extend the term of the lease and it expired as to that lot on February 11, 1945. Royalty was to be paid to the lessors at the rate of one-eighth of production, one-half to the owner of lot 18, and one-half to the owners of lot 19, whether production be from one lot or the other.

Fisher Petroleum Corporation, as assignee of Fisher, brought in a well in 1925 on lot 19, and paid royalties to all lessors until the 1st of April, 1926. On March 27, 1926, Fisher Petroleum Corporation assigned the lease to defendant, General Petroleum Corporation, then known as General Petroleum Corporation of California. This defendant operated the well and paid royalties to December 1, 1932. On October 26, 1932, General Petroleum bought lot 19 and conveyed it to R. P. Cooney, December 1, 1932. On January 11, 1933, General Petroleum recorded a deed of plaintiffs to lot 18, dated December 1, 1932, paying therefor $1,000 and other consideration. Plaintiffs have retained the consideration paid to them and have not rescinded or attempted to rescind the sale. General Petroleum conveyed lot 18 to Mr. Cooney January 10, 1933, and on the same day recorded an instrument by which it purported to surrender the lease and all of its rights thereunder. On January 24th, Mr. Cooney entered into an oil and gas lease of lot 19 with defendants Jack Herley and Paul L. Kelley, who reconditioned the well and have operated it since that time, paying royalties to the lessor but none to the plaintiffs herein. This action was brought on September 15, 1948, to recover damages in the amount of royalties on the production from the well on lot 19 since December 1, 1932.

The complaint alleged that General Petroleum represented to plaintiffs that the well was not producing oil or gas in paying quantities, and that it was the intention of General Petroleum to abandon the same; that plaintiffs believed the representations and in reliance thereon sold their lot to General Petroleum; that the representation was false and made with fraudulent intent; that plaintiffs were and ever since have been residents of the State of Michigan, and inexperienced in business; they made no inquiry as to whether the well had been abandoned and refrained from inquiry because they believed the alleged representation of General Petroleum; that on May 1, 1948, they were informed by one Guy N. Stafford that the well had not been abandoned; they appointed Stafford as their attorney in fact and as such he instituted the present action. It was alleged, further, that plaintiffs have not disposed of their right to receive royalty from the well on lot 19. Defendants answered, denying the allegations of fraud on the part of General Petroleum and pleading numerous defenses, among which were those of the statute of limitations and laches. It was alleged that in the purchase of lot 18 General Petroleum acquired all rights of the grantors to receive royalty under the lease; also that when General Petroleum acquired both lots the leasehold interest was merged with the fee. The answers pleaded General Petroleum's surrender and abandonment of the lease by the instrument recorded January 10, 1933.

The action was duly brought to trial; plaintiffs introduced their evidence, consisting of certain documents and the depositions of two of the plaintiffs. When plaintiffs had rested their case, defendants made a motion for a nonsuit. The settled statement on appeal reads in part as follows: "The Court then suggested that the defendants put on their evidence, for consideration by the Court in event the motion for non-suit was denied, in order that the cause might be decided without further appearance by the parties. The defendants accepted the suggestion and thereupon the defendant General Petroleum Corporation, introduced the following documentary and oral evidence." (Five written exhibits.) As shown by the settled statement defendants also introduced the testimony of several witnesses, one of whom was at the time of the transaction in question, secretary of General Petroleum, another, a vice president and general manager of production, and a third, manager of the land department. The testimony of these witnesses was to the effect that in 1932 the corporation was operating 18 wells in the Athens field, that all of them were in very bad condition and were operated at a loss in 1931 and 1932; that it was determined to abandon all said wells and to discontinue operations in the Athens field; that it proceeded to abandon all the wells except four, one of them the well on lot 19; that it was determined that it would be less expensive to sell the four wells with all equipment, than to abandon them by pulling certain of the casing, flooding the wells, dismantling the derricks and removing the machinery. The four wells and equipment were sold to Mr. Cooney for $6,500. Mr. Cooney at the time was engaged in salvaging oil well equipment and selling it. General Petroleum has had no interest in the well or the property since the same were sold to Mr. Cooney. Following a narrative of the testimony, the settled statement reads: "Defendant General Petroleum Corporation offered no further evidence and rested. The defendants Jack Herley and Associates offered no additional evidence and rested.

"The Court then announced that if the motion for non-suit was denied, the argument should be upon briefs, plaintiffs' brief filed within ten days after Notice of denial of said motion for non-suit, the defendants' briefs within ten days thereafter, and plaintiffs' closing brief within five days thereafter, to which the parties agreed." Thereafter, the court granted the motions for nonsuit and entered judgment dismissing the action.

[3-5] It is a most unusual procedure in a nonjury case for the court to grant a nonsuit after the complete evidence of the parties has been received. The purpose of a nonsuit is to save the time, effort and expense of presenting a defense when the plaintiff has failed to make out a case. After the evidence of all parties is in, the court is required to make findings upon the material factual issues. Code Civ.Proc. § 632. However, if the court fails in this duty and grants a nonsuit, the plaintiff is not prejudiced if his case would be defective even if the factual issues were decided in his favor. Where issues of fact are presented upon complete evidence, the granting of a nonsuit is improper unless justified by some rule of law under which it is unnecessary to decide the issues of fact. Karallis v. Shenas, 41 Cal.App.2d 694, 107 P.2d 395. Although it was error for the court, after hearing all the evidence, to fail to decide the factual issues, the question here is whether independently of those issues there was a fatal weakness in plaintiffs' case.

[6, 7] Plaintiffs contend that when they sold lot 18 to General Petroleum they did not sell or transfer their royalty right under the community lease and that they still retain that right, citing Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 129 P.2d 383. General Petroleum claims it purchased the leasehold interest of plaintiffs as well as the fee title and thus acquired their royalty right. Plaintiffs introduced their deed in evidence. It was merely a conveyance of lot 18 and did not purport to transfer their royalty interest. There was nothing in their evidence which indicated an intention to sell any royalty rights under the lease although it is evident that they believed the well was to be abandoned and operations under the lease discontinued. Viewing this evidence in the light most favorable to plaintiffs, it appears to us to be insufficient to prove that plaintiffs parted with their royalty right. And if they did not, the right to receive royalty endured unless it was terminated by some means other than by transfer to General Petroleum.

In some respects the respondents rely upon defenses based entirely upon their own evidence. We have found the situation to be confusing and we are led to wonder whether the trial court, having all the evidence before it, was successful in distinguishing between the evidence of plaintiffs, which alone was to be considered, and the evidence of the defendants. In determining whether the judgment should be reversed we have only the plaintiffs' evidence to consider. But in discussing what was the duty of the court, with respect to a complete disposition of the issues, and in explanation of our proposed judgment remanding the case for the limited purpose of making findings and conclusions and a new judgment, it will be necessary also to refer to the evidence that was introduced by the defendants.

If plaintiffs did not sell their royalty right they necessarily admit the validity of the transaction, since they are satisfied with the price they received for the fee title. In that view of the transaction, the fraud issue was irrelevant, inasmuch as plaintiffs would have lost no rights through that transaction which they now assert.

[8] Our holding that the evidence of plaintiffs did not prove they had sold their royalty brings us to the question whether it appeared from their evidence that they had abandoned their rights under the lease through their agreement with General Petroleum. It does not appear from the evidence of plaintiffs that they understood the nature of royalty rights under a community lease and intended to abandon them. Although it is clear that they believed General Petroleum was operating the well at a loss at the time they sold lot 18, they nevertheless alleged, and their evidence tended to prove, that they acted under the belief that it was to be abandoned. If there appeared to be an abandonment by mutual consent, there was still a question whether it was voluntary. The evidence of plaintiffs was sufficient to show, prima facie, that there was no voluntary abandonment.

[9] The next question is whether, from plaintiffs' evidence alone, the court could properly have determined that the action was barred by the statute of limitations. There are two phases of this question. If plaintiffs still retain their royalty rights, they are suing for royalties based upon production since December 1, 1932, or for damages in an equal amount. This action was brought September 15, 1948. Royalties accruing after September 15, 1944, would be within the four-year statute. The term of the lease expired February 11, 1945. Claims for any amounts that may have fallen due to plaintiffs during this interval would not be barred. However, as to royalties accruing prior to September 15, 1944, plaintiffs claim the statute of limitations was tolled by their ignorance of their rights consequent upon the alleged fraud of General Petroleum. In view of our holding that the court, from plaintiffs' evidence, should have concluded that the royalty rights had not been disposed of, it would have been error to hold that claims to royalties accruing since September 15, 1944, were barred, and in view of the excuses offered by plaintiffs for their delay in bringing suit, the court could not properly have held that the claims to royalties accruing prior to September 15, 1944, were barred, without passing upon the fraud issue and the legal sufficiency of the excuses offered for the delay. Inasmuch as it appeared, prima facie, that plaintiffs still have royalty rights, and it would have been error to hold their claims barred in their entirety, we express no opinion as to whether the evidence of the plaintiffs, if believed, would be sufficient to tell the statute of limitations with respect to claims to royalties accruing prior to September 15, 1944.

A separate defense is urged by defendants based upon the recording by General Petroleum January 10, 1933, of an instrument purporting to surrender the lease. This fact appeared only in the evidence of the defendants.

We conclude therefore that the nonsuit was not warranted upon the theory that plaintiffs had sold their royalty rights or had abandoned them, or that the action was barred by the statute of limitations. If we were merely reversing the judgment, our opinion would end at this point. But inasmuch as the judgment is to be reversed with directions to make findings and conclusions upon the evidence already submitted, we think we should state our reasons for disposing of the appeal in that manner.

[10] The evidence of the defendants tended to show that General Petroleum acted in good faith in abandoning its

operations in the Athens field and in concluding that its operations there could not be carried on profitably. Although the well on lot 19 was sold and not abandoned, and information as to that fact was not conveyed to the plaintiffs, the question whether General Petroleum acted in good faith or with fraudulent intent was an issue which was presented by the evidence of the defendants. Their evidence also developed that when General Petroleum decided to purchase lot 18, the manager of its land department addressed a letter to plaintiff, Grace C. Howard, mother of the other plaintiffs, offering to assume taxes and bond liens in a large amount, and to pay $1,000 cash for title to the lot and for the release of all further obligations under the lease, to which letter Mrs. Howard replied, accepting the offer, "for the property and lease of lot 18, block 19 Athens." Defendants also introduced an agreement entered into at the time of the sale by which plaintiffs released General Petroleum from all further obligations under the lease. Since the motions for nonsuit should have been denied, the court should have given consideration to the evidence of the defendants. It would have been necessary in order to properly dispose of the case to make a finding as to whether plaintiffs sold their royalty interest to General Petroleum. The evidence which required a finding upon that issue was such that if the court found there was not an outright sale of the royalty, it would have been required to make a finding as to whether there was a mutual abandonment of the lease. If there was a finding that the lease was abandoned, it would have been necessary to determine whether it was voluntarily abandoned by the plaintiffs. For all the reasons stated, it was necessary that the court determine the fraud issue. There was also to be considered the attempted abandonment of the lease by General Petroleum at the time it sold lot 18 to Mr. Cooney. If it had been found that the lease was still in existence it should have been decided whether the attempted cancellation was effective. All defendants pleaded laches. That issue should have been determined.

We have not given separate consideration to the case of the defendants, other than General Petroleum. While it is not clear upon what theory plaintiffs seek to hold the lessees of Mr. Cooney, by virtue of their claimed rights under the General Petroleum lease, we assume that these lessees would be proper parties to an accounting of the royalties they have paid, even though they were not shown to be under any liability for having paid them to someone other than plaintiffs.

The judgment is reversed, with directions to the trial court to make findings and conclusions of law and to render judgment thereon.

WOOD and VALLÉE, JJ., concur.

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107 Cal.App.2d 831

In re KREHER'S ESTATE.

CALIFORNIA TRUST CO. v. CULBERTSON et al.

BROWN v. CALIFORNIA TRUST CO. et al.

Civ. 18554, 18555.

District Court of Appeal, Second District, Division 3, California.

Dec. 4, 1951.

Proceeding in the matter of the estate of Charles E. Kreher, deceased. John Jacob Kreher filed Charles E. Kreher's holographic will for probate, and it was admitted to probate and letters testamentary issued to John Jacob Kreher. Polly Culbertson, and others, brought an action contesting the will after probate, but John Jacob Kreher died before trial and the California Trust Company, a corporation, was appointed executor of his estate. Ben H. Brown, public administrator, was appointed administrator with will annexed of Charles E. Kreher's estate, and he brought action against the California Trust Company to set aside joint tenancy agreements executed by Charles E. Kreher.

The actions were consolidated for trial. The Superior Court of Los Angeles County, John J. Ford, J., entered a judgment that the joint tenancy agreements were valid, and the public administrator appealed, and in the will contest, entered an order granting a new trial, and the contestants appealed and were opposed by the California Trust Company, the public administrator, and Donn B. Tatum, special administrator. The actions were consolidated on appeal. The District Court of Appeal, Vallée, J., held that evidence was sufficient to sustain judgment that joint tenancy agreements were valid, and that evidence warranted conclusion of trial judge that verdict in favor of contestants in will contest was unsupported by evidence.

Judgment affirmed, order granting new trial affirmed.

1. Appeal and Error 🔑989

Where findings are attacked for insufficiency of evidence, District Court of Appeals can determine only whether there is any substantial evidence to support them, and has no power to judge effect or value of evidence, to weigh evidence, to consider credibility of witnesses, or to resolve conflicts in evidence or in reasonable inferences that may be drawn therefrom.

2. Jury 🔑13(1)
Wills 🔑316(1)

While it is a matter of statutory right to have issue of undue influence in a will contest determined by a jury, there is no right to trial by jury where gist of the action is one for enforcement of a right cognizable only in equity. Probate Code, §§ 371, 382.

3. Trial 🔑374(2)

Where a jury trial is not a matter of right but is nonetheless permitted, verdict rendered is advisory only, and the court may accept or reject it and irrespective of the verdict, must make findings to complete the record.

4. Trial 🔑374(2)

Where issues presented in action to set aside joint tenancy agreement were equitable, jury's verdict was advisory only and court could reject the verdict within its discretion.

5. Appeal and Error 🔑1014

Where trial court has rejected an advisory verdict and court's findings are supported by substantial evidence, judgment may not be disturbed on appeal.

6. Gifts 🔑47(3), 49(2)

Mere proof of a confidential relation is not of itself sufficient to establish undue influence by party to whom property was transferred, or to cast burden of negativing undue influence upon such party, but proof of such relation must be coupled with proof that one in whom confidence was reposed actively participated in the transaction and that by the transaction he obtained a gift from or advantage over the other.

7. Joint Tenancy 🔑3

Rules applicable to proof of undue influence in a will contest apply to the creation of joint tenancies where question of undue influence is involved.

8. Joint Tenancy 🔑3

In order to set aside joint tenancy agreement on ground of undue influence, it must be established that the influence amounted to coercion destroying free agency of allegedly influenced party, and that influence was used directly to procure the joint tenancy, and establishing of general influence, however strong and controlling, or an opportunity to influence coupled with an interest, is not itself sufficient.

9. Appeal and Error 🔑931(1)

On appeal on ground of insufficiency of evidence to support findings, evidence must be viewed in light most favorable to party prevailing in trial court.

10. Joint Tenancy 🔑3

In action by public administrator of one brother's estate against executor of second brother's will to set aside joint tenancy agreements executed by first brother, to recover personal property and a penalty on ground of undue influence, evidence was sufficient to sustain court's findings that joint tenancy agreements were freely and voluntarily made by the first brother without undue influence and were valid. Probate Code, § 612.

11. Evidence 🔑573

In contest of holographic will, testimony of qualified handwriting experts that in their opinions questioned part of will was written by testator, uncontradicted by other expert testimony, was sufficient to warrant trial court in concluding that jury's finding that will was not entirely written by testator was unsupported by evidence.

12. Wills 🔑166(2)

Proof that a confidential relation existed between brothers and that one brother had an opportunity to guide the other brother in his testamentary act was in itself insufficient to support jury's finding of undue influence, in absence of proof that the influence destroyed free agency of testator.

13. Wills 🔑337

Setting aside of jury's verdict, in contest of holographic will, that there was undue influence, and granting of new trial, was not abuse of discretion under the evidence.

14. Appeal and Error 🔑874(5)

An order denying a motion for judgment notwithstanding verdict may be reviewed on appeal when new trial is granted to party moving for such judgment and adverse party appeals from order granting new trial. Code Civ.Proc. § 629.

15. Judgment 🔑199(3.10)

Motion for judgment notwithstanding verdict may be granted only when it can be said as a matter of law that there is no evidence of sufficient substantiality to support verdict.

16. Judgment 🔑199(3.5)

While a trial judge might be justified in granting a new trial, he might not be justified in granting motion for judgment notwithstanding verdict on the same evidence.

17. Wills 🔑324(4)

In contest of holographic will, evidence on issue of whether will was written entirely in testator's handwriting, and whether it was procured by undue influence, was sufficient to take case to jury.

18. Wills 🔑337

In contest of holographic will, though evidence on issue of whether or not will was entirely in testator's handwriting and whether or not it was procured by undue influence, was sufficient to take those issues to jury, the granting of a new trial on ground that evidence was insufficient to support verdict rendered for contestants rather than granting of directed verdict for proponents was not error.

◆

Guthrie, Darling & Shattuck, Los Angeles, for appellants and contestants.

Newlin, Holley, Tackabury & Johnston, Los Angeles, for Ben H. Brown, as Administrator with will annexed of Estate of Charles E. Kreher, Deceased, appellant.

Lindstrom & Bartlett, William C. Bartlett and A. Harris Robison, all of Los Angeles, for California Trust Co., as executor of will of John Jacob Kreher, deceased, respondent.

Harold W. Kennedy, County Counsel, R. Eldon Dick, Deputy County Counsel, Los Angeles, for Ben H. Brown c. t. a. of estate of Charles E. Kreher, deceased, for respondent in will contest, Civil No. 18554.

VALLÉE, Justice.

These actions—one to set aside joint tenancy agreements, to recover personal property and a penalty under Probate Code section 612, the other a will contest after probate—were consolidated for trial and are consolidated on appeal.

There are two appeals. In the action to set aside the joint tenancy agreements, the public administrator, as administrator of the estate of Charles E. Kreher, deceased, appeals from a judgment decreeing that the joint tenancy agreements were not procured by "coercion, fraud or undue influence." In the will contest, the contestants, Polly Culbertson, Osgood Sayne, and Estella Sayne, beneficiaries under a prior will, appeal from an order granting a new trial after judgment entered in their favor upon special verdicts of a jury.

Charles E. Kreher (called Charles) and John Jacob Kreher (called Jacob) were brothers. Charles died November 13, 1945, aged 70, a widower, without issue. Jacob was Charles' only heir. Jacob died September 8, 1948, aged 75, unmarried. The fortunes accumulated by the two brothers stem primarily from proceeds derived from the sale of their parents' bakery and confectionary business, from property which was left upon their mother's death, from their personal investments, and in the case of Charles, from half of the proceeds of his wife's estate. Following the sale of the bakery and confectionary business in 1918, the brothers retired and neither was thereafter gainfully employed.

In 1926 the brothers moved to California with their mother who died in 1933. Charles moved to Pennsylvania in 1934 or 1935 and there met Mrs. Polly Culbertson, one of the contestants, and her husband. In 1936 or 1937, he married Edna Giles who was a close friend of Polly Culbertson. On July 2, 1936, while a resident of Pennsylvania and presumably while on one of his several visits to California, Charles opened safe deposit box No. 2945 in joint tenancy with Jacob. On that date he also opened a commercial bank account jointly with Jacob. On July 27, 1942, Charles' wife died. On the day of her death, Charles executed the will under which contestants claim as beneficiaries.

On July 31, 1942, a few days after his wife's death, Charles suffered a stroke, described by one doctor as "of moderate intensity," and was cared for temporarily by Polly Culbertson. On August 3, 1942, Jacob was notified of his brother's illness by the latter's chauffeur, Cadwell. On August 5th Jacob closed the joint commercial bank account and safe deposit box No. 2945. In place thereof he opened in his own name a substitute safe deposit box to which the jointly owned property was transferred, and also a commercial bank account. Thereafter, Jacob, together with Maud Leaf, his housekeeper, left for Pennsylvania. On August 6th Charles was taken to a hospital. On August 8th Jacob arrived in Pennsylvania and was immediately taken to the hospital. Charles told his brother he had been poisoned and wanted to see a lawyer immediately. Eli F. Wismer was procured. Wismer testified that: Cadwell, Charles' chauffeur, made the appointment; he met Charles, as well as Jacob, for the first time that day; he had a private interview with Charles who was in bed and who told him, "I want to make a will, and I want to give everything to my brother"; he did not discuss any matter pertaining to the will with Jacob; the will, which named Jacob as sole beneficiary, was signed by mark and witnessed by Cadwell and himself. Jacob then had Charles transferred to another hospital where he stayed for one week and then went home.

On July 30, 1942, shortly after the death of his wife, Charles employed Isabel Darlington, an attorney, to probate a will left by his wife in Pennsylvania. Miss Darlington testified that Charles told her he was leaving for California and did not want anyone, other than Cadwell, to know where he was, particularly contestant Polly Culbertson, who, he said, "had, after the death of his wife, undertaken to run the household there. * * * He had had almost a fatal illness which he thought had been brought about by her treatment of him * * * and he said, 'I owe my life to the fact that my brother came on and got me out of her clutches.'"

Sometime in September, 1942, the two brothers, with Mrs. Leaf, returned to California where the brothers resided together in the Hillview Apartments until the death of Charles.

On October 14, 1942, Jacob transferred to Charles the contents of the safe deposit box and commercial account, formerly held by them jointly, which Jacob had transferred into his own name on August 8, 1942, prior to leaving for Pennsylvania. The bank account and safe deposit box were then reopened by Charles in his name alone.

On August 30, 1943, Charles received $27,808.22 from the estate of his wife, deposited it to his individual account, and, on the same day, executed the holographic will in contest leaving all his estate to Jacob.

On October 11, 1943, Charles converted the bank account and safe deposit box held by him in his own name into joint ones with Jacob, and Jacob likewise converted his individual bank account and safe deposit box into joint tenancy with Charles.

On November 13, 1945, Charles died suddenly.

On November 14, 1945, Jacob, as surviving joint tenant, without notifying the bank of Charles' death, closed the joint tenancy account and safe deposit box.

Two years after the death of his brother, Jacob was cited into court in a proceeding to discover Charles' assets. While this was pending and on March 28, 1947, Jacob filed Charles' holographic will of August 30, 1943, for probate. It was admitted to probate and letters testamentary issued to Jacob.

On October 17, 1947, Polly Culbertson, Osgood Sayne, and Estella Sayne, beneficiaries under the will executed by Charles on July 27, 1942, filed a contest to revoke probate of the will of August 30, 1943. On the morning the will contest came on for trial, September 8, 1948, Jacob committed suicide. California Trust Company was appointed executor of his will.

On February 2, 1949, the public administrator was appointed administrator with the will annexed of Charles' estate. Thereafter he brought suit against the trust company as executor of Jacob's will, and others, to recover certain bank accounts and securities formerly belonging to Charles. The action was subsequently dismissed as to the other defendants. The first count of the complaint alleged that the joint tenancy agreements, with respect to the bank account and safe deposit box, were procured through Jacob's undue influence. The second count alleged that during Charles' lifetime Jacob converted to his own use certain of Charles' properties of a value exceeding $200,000. The third count sought recovery under Probate Code section 612 of double the value of the properties allegedly "concealed, embezzled, and fraudulently disposed of" by Jacob.

The two actions were consolidated for trial before a jury. In the joint tenancy case, the jury found, upon special interrogation, that Charles had been "induced to sign the joint tenancy agreements of October 11, 1943, for bank and safe deposit box by means of undue influence" exercised by Jacob. The court held that the verdict was advisory only, made findings that the agreements had not been procured by undue influence, and rendered judgment for respondents. In the will contest, the jury found for the contestants. Judgment was entered accordingly. Thereafter, upon motion of the trust company, the court granted a new trial.

Appellants ask us to "analyze all of the evidence in light of reason and human experience and give consideration to the motive and propensities which tend to influence human action, and the appellants are satisfied that after so doing this court can only conclude that the verdicts of the jury were right."

[1] We are impelled to repeat what we said in Overton v. Vita-Food Corp., 94 Cal. 2d 367, 370, 210 P.2d 757, 759: "André Gide once observed: 'Everything has been said already; but as no one listens, we must always begin again.' With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen."

The Joint Tenancy Action

The public administrator, as administrator of Charles' estate, contends that 1) it was an abuse of discretion for the trial court to ignore the advisory verdict of the jury finding that the joint tenancy agreements were procured through Jacob's undue influence, and 2) that the findings, conclusions of law, and judgment are not supported by the evidence.

[2–5] While it is a matter of statutory right, Prob.Code, §§ 371, 382, to have the issue of undue influence in a will contest determined by a jury, there is no right to a trial by jury where the gist of the action is one for the enforcement of a right cognizable only in equity. Ford v. Palisades Corp., 101 Cal.App.2d 491, 499, 225 P.2d 545, and cases there cited. At the trial it was conceded by counsel that the issues presented in the joint tenancy action were equitable. Where a jury trial is not a matter of right, but is nonetheless permitted, the verdict rendered is advisory only. The court may accept or reject it, and, irrespective of the verdict, must make findings to complete the record. Sweetser v. Dobbins, 65 Cal. 529, 530–531, 4 P. 540; Schooler v. Williamson, 192 Cal. 472, 478, 221 P. 195; Simon Newman Co. v. Woods, 85 Cal.App. 360, 363, 259 P. 460. Since the gist of the joint tenancy action was concededly equitable, the court's action in rejecting the verdict was entirely within its discretion. Where the court has rejected the advisory verdict and its findings are supported by substantial evidence, the judgment may not be disturbed on appeal. The basic question, therefore, is the sufficiency of the evidence to support the findings.

The court found that: at "various" times and "from time to time" Charles and Jacob had held individually owned property in joint tenancy; on October 11, 1943, the brothers converted their individual bank accounts and safe deposit boxes into joint tenancy and Charles was not influenced to do so by Jacob's undue influence; on Charles' death practically all of the property of the two brothers, previously individually owned, was held in joint tenancy; and no property or money came into the possession of the defendant trust company, as executor of Jacob's will, by reason of any unlawful act of Jacob.

The court concluded that no undue influence had been practiced by Jacob upon or over Charles, and that both joint tenancy agreements were created as the free and voluntary acts of Charles; that Jacob did not convert to his own use any of Charles' property during the latter's lifetime; and that plaintiff was not entitled to recover from the executor trust company.

Appellant public administrator relies on the rule that where a confidential relation exists between the parties, and the one in whom confidence is reposed actively participates in a transaction whereby he obtains a gift or advantage over the other, a presumption of undue influence arises and the burden of rebutting it and showing fairness and good faith is cast upon the one who has gained the advantage. He also says that irrespective of the presumption, the evidence without conflict established undue influence.

[6] There was evidence from which the court reasonably could have concluded that a confidential relation existed between the brothers. However, mere proof of a confidential relation is not of itself sufficient to establish undue influence or to cast the burden of negativing undue influence upon the party alleged to have exercised it. Proof of such relation must be coupled with proof that the one in whom confidence was reposed actively participated in the transaction and that by the transaction he obtained a gift from or advantage over the the other. Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 384, 189 P.2d 10. There was no evidence as to the contents of the safe deposit boxes which were converted into joint tenancy on October 11, 1943. There was no evidence that Jacob obtained a gift from or advantage over Charles by the execution of the joint tenancy agreements. All that the evidence showed was that the agreements were signed by the brothers on October 11, 1943. It does not appear that they were present at the same time. No one who was present at the signing of either the bank account or joint tenancy agreement was produced as a witness. Assuming that Jacob was present at the time Charles signed the agreements, that fact of itself is not necessarily indicative that Jacob participated or was active in procuring the agreements.

[7] The rules applicable to proof of undue influence in a will contest apply to the creation of joint tenancies where the question of undue influence is involved. Kelly v. McCarthy, 6 Cal.2d 347, 360, 57 P.2d 118; Fish v. Security-First Nat. Bank, 31 Cal.2d 378, 189 P.2d 10.

[8] In order to set aside a joint tenancy agreement on the ground of undue influence, it is necessary to establish that the

influence was such as to destroy the free agency of the party claimed to have been unduly influenced. It is not sufficient to prove general influence, however strong and controlling, but it must be shown that the influence was used directly to procure the joint tenancy. It must amount to coercion destroying the free agency of the party claimed to have been unduly influenced. Opportunity to influence the mind of such party, even coupled with an interest, is not sufficient. Fish v. Security-First Nat. Bank, supra, 31 Cal.2d 378, 385, 189 P.2d 10; Kelly v. McCarthy, supra, 6 Cal.2d 347, 364, 57 P.2d 118; In re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25; In re Estate of Clarke, 62 Cal.App.2d 228, 231, 144 P.2d 425.

[9, 10] We need not nor would it serve any useful purpose to meticulously review in detail the some 1451 pages of oral testimony and the mass of documentary evidence which were before the trial court. The rule is that we must view the evidence in the light most favorable to the prevailing party; consequently we do not recite the evidence favorable to appellant. Suffice it to say that while the evidence was highly conflicting in many respects, there is abundant support in the record of a substantial character from which the court could conclude that the joint tenancy agreements of October 11, 1943, were freely and voluntarily made by Charles at a time when he was mentally alert, physically sound, and fully aware of the import of, and consequences attending, their creation.

While the evidence shows that upon his return to California in September, 1942, Charles had not fully recovered from his illness, it does show that in the early part of 1943 and thereafter until his death he was in "pretty good" health and, as one witness put it, "as well as he ever was," both physically and mentally. It appears that Charles was above average in intelligence, widely traveled, well read, an interesting conversationalist, and active in the stock market and its manipulations. There was evidence that he went from place to place at will, saw and talked to his old friends and others, received his own mail, and was not confined or restrained by Jacob. Although he took daily walks with Jacob, he frequently went out alone, or in the company of others, was in frequent attendance at a stock brokerage house, checked over and studied the market, purchased securities from the bond department of the bank while alone, and almost daily, outside the presence of Jacob, visited with the other tenants in the lobby of the apartment house.

There was no evidence that whatever influence, if any, Jacob, as the elder brother, may have had over Charles was used to procure the joint tenancy agreements. The evidence showed that the brothers since 1936 had pursued some sort of a policy or plan by which, at various times, individual bank accounts and safe deposit boxes had been converted by them into joint accounts with each other. The court was fully justified in inferring therefrom that in converting his individual bank account and safe deposit box into joint tenancies on October 11th Charles was voluntarily and freely pursuing the same policy he had in the past and that he was not unduly influenced by Jacob to do so. Upon the death of Charles, Jacob became the sole owner of the property.

In view of the foregoing, it is unnecessary to determine whether the court erred in granting defendant's motion for nonsuit as to the third cause of action which sought, under Probate Code section 612,[1] double the value of the property allegedly appropriated by Jacob.

The Will Contest

The will contest was based upon three grounds, 1) the holographic will was not entirely written, dated and signed by Charles, 2) unsoundness of mind, and 3) undue influence exerted by Jacob. A motion for nonsuit was granted as to count two and denied as to counts one and three. Respondent's motion for a directed verdict on the remaining counts of the contest was denied. The jury, upon special interrogatories, found 1) that the will was not entirely in the handwriting of Charles, and 2) was procured by undue influence.

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[1] "If any person embezzles, conceals, smuggles or fraudulently disposes of any property of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property, to be recovered for the benefit of the estate." Prob.Code, § 612.

A motion for judgment notwithstanding the verdict was denied and judgment entered setting aside the probate of the will. Respondent's motion for a new trial was granted on the ground that the evidence was insufficient to justify the special verdicts.

"The rules which govern a reviewing court in the determination of an appeal from an order granting a new trial are so well known they need not be repeated. The Supreme Court has recently said that the order of the trial court will be reversed only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689." Brattain v. Pacific Electric Ry. Co., 98 Cal.App.2d 678, 680, 220 P.2d 747, 748.

[11] Appellants claim that the figures "1943," a part of the date in the holographic will, were not written by Charles but were written by Jacob. They concede that the remainder of the will was written by Charles and that he signed it. They contend that this court should conclude, as a matter of law, that the figures "1943" were not written by Charles and on that ground reverse the order granting the new trial. Two qualified handwriting experts testified that in their opinions the figures "1943" were written by Charles. There was no contrary expert testimony. This evidence was sufficient to warrant the trial court in concluding that the evidence was insufficient to support the finding of the jury that the will was not entirely written, dated, and signed by Charles.

[12] We cannot say, as a matter of law, that there was no substantial evidence to support a verdict for respondents on the issue of undue influence as to the will. What we have said with respect to the evidence in the action to set aside the joint tenancy agreements and the law applicable thereto applies to the appeal in the will contest. At most, all that appellants' proof showed was that a confidential relation existed between the brothers and that Jacob had an opportunity to guide Charles in his testamentary act. These facts, however, are insufficient to support a finding of undue influence in the absence of proof that whatever influence Jacob had over Charles was such as to, and that it did, destroy his free agency. There was no proof whatever that Charles was urged or importuned by Jacob or anyone to make the will (or enter into the joint tenancy agreements), or that it was ever suggested by anyone that he ought to give his property to Jacob. To hold otherwise would be to "enter upon the field of conjecture." In re Estate of Muller, 14 Cal.App.2d 129, 130, 57 P.2d 994, 996.

There was ample evidence to warrant the court's conclusion that the evidence was insufficient to justify the verdict of the jury as to undue influence. Blanche L. Deibler, cashier of the Bond Department of the California Bank, testified that about the time the holographic will was dated Charles came to the bank, talked with her concerning the making of an holographic will, and stated "he wanted to have the very best and safest kind of will he could have to protect his brother"; he asked her if she had a form of holographic will; she obtained a form for him, he read it, and asked her to type a copy of it, which she did, but did not "know if he ever used" what she had typed; a "couple of weeks" later Charles came back to the bank, pulled an envelope out of his pocket and said, "This is my will and I am going to put it down in my safety deposit box."

Maud Leaf testified to a conversation she had with Charles about the time the will was made in which he told her he was going "down and make another will tomorrow morning."

[13] We think it obvious that it cannot be said that the court abused its discretion in granting the new trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689.

[14–18] Respondents urge that their motions for a directed verdict and for judgment notwithstanding the verdict should have been granted. An order denying a motion for judgment notwithstanding the verdict may be reviewed on appeal when a new trial is granted to the party moving for such judgment and the adverse party appeals from the order granting a new trial. Code Civ.Proc. § 629; In re Estate of Green, 25 Cal.2d 535, 545, 154 P.2d 692. A motion for judgment notwithstanding the verdict may be granted only when it can be said, as a matter of law, that there is no evidence of sufficient substantiality to support a verdict in favor of the contestants. While the trial judge might be justified in granting a new trial, he might not be justified in granting a motion for judgment notwithstanding the verdict on the same evidence. In re Estate of Green, 25 Cal.2d 535, 546, 154 P.2d 692; Hunt v. United Bank & Trust Co., 210 Cal. 108, 117–118, 291 P. 184; In re Estate of Caspar, 172 Cal. 147, 150, 155 P. 631. We cannot say, as a matter of law, that there was no evidence of sufficient substantiality to support a verdict for contestants.

The order granting a new trial in the will contest (Civil No. 18554) and the judgment in the action to set aside the joint tenancy agreements (Civil No. 18555) are, and each is, affirmed.

SHINN, P. J., and WOOD, J., concur.

* * *

108 Cal.App.2d 84

PEOPLE v. HARRIS.

Cr. 4701.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1951.

Hearing Denied Jan. 3, 1952.

Daniel M. Harris was convicted in the Superior Court of Los Angeles County, Otto J. Emme, J., of copulating his mouth with the sexual organ of the prosecutrix and of rape on the same person by the exercise of force and violence, and the defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained convictions on both counts.

Affirmed.

1. Sodomy 🔑6

Evidence sustained conviction of defendant on charge of copulating his mouth with the sexual organ of the prosecutrix. Pen. Code, § 288a.

2. Criminal Law 🔑1159(2)

Where sufficient facts are proved and believed by the court to warrant an inference of guilt the appellate court is powerless to upset the judgment, and its only function is to ascertain whether upon face of record sufficient facts could not have been found to warrant inference of guilt.

3. Sodomy 🔑1

A person is guilty of committing offense of copulating by his mouth on the sexual organ of another when he has placed his mouth upon genital organ of another. Pen. Code, § 288a.

4. Rape 🔑51(1)

Evidence sustained conviction of defendant for rape.

5. Criminal Law 🔑260(11)

Rape 🔑6

Any instrument that indicates a potential application of force to achieve its possessor's desires establishes an element of violence and whether it does appear to be fraught with peril to another is a question of fact for the trial court.

6. Rape 🔑14

It is for neither aggressor charged with crime of rape nor for courts who try him to determine exact point to which prosecutrix could with safety have carried her resistance and when she determines that opposition had been carried to limits of safety and that she could have ventured no further without peril to her life or safety, it is then for trial court to determine only whether her fears were reasonably grounded.

7. Rape 🔑11

The kind of physical force that may induce fear in the mind of a woman is immaterial, and it may consist in the taking of indecent liberties or of embracing and kissing her against her will.

8. Rape 🔑11

A submission to an act of sexual intercourse induced by fear is not acquiescence.

9. Criminal Law ⚿260(11)

In rape prosecution, whether reasons of prosecutrix for her failure to make an outcry were reasonable was a fact for the trial court.

◆

Earl C. Broady, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of two distinct felonies, (1) of "copulating" his mouth "with the sexual organ" of the prosecutrix, Penal Code, sec. 288a, and (2) of rape upon the same person by the exercise of force and violence. He demands a reversal of the judgment on the ground that the evidence was insufficient to support the implied finding on either count.

On February 1, 1951, the prosecutrix, a factory worker 24 years of age, resided in the southern portion of Los Angeles about six miles from the civic center. Having alighted from a streetcar about one o'clock in the morning, she walked along the sidewalk toward her home. While thus proceeding she observed appellant drive by her, return on the same street and, having again directed his automobile toward her, he stopped, stepped up beside the prosecutrix, and grabbed her by the neck and right arm. Undaunted after his modest approach, in language that would blush the cheeks of a hardened mistress of a brothel, appellant startled the young woman with the announcement that he desired to lick her private parts and then he would let her go. She "struggled a little but then he forced me and dragged me into his car * * * we still argued a few minutes. Then he unbuttoned my slacks, pulled them down a little ways, then went farther; well, we argued, then he finally jerked them down, took them off," while she protested and attempted to keep them on. She asked his purpose. He did not want her money but just "that." As he placed her under the steering wheel she told him to throw out his knife which she had seen while they were on the sidewalk.

After having placed his mouth on the *os uteri* of her body he thereupon "tried to have relations * * * he got mad * * he wasn't ready to." When she resisted he pushed her down and made her take his sexual organ into her mouth. He then inserted it into her and accomplished an act of carnal intercourse. On learning by his inquiry that she was unmarried he asked her to be his girl friend, and to meet him the following morning at a popular street intersection. She agreed to meet him and kept her promise. Having reported the crime to the police, she met him at the corner agreed upon where officers took appellant into custody.

The victim testified that she was in fear of bodily harm as appellant committed his acts; that she did not think he would let her go; that "he might beat me; he said he had a knife * * * he never hit me * * * no real violence because I pretty well was afraid so I gave in." In his conversation with the officers, appellant at first denied having had sexual intercourse. When they told him they had witnesses, he admitted the act but asserted it was by mutual agreement; that she told him she was married to a colored man. At a subsequent interview he admitted that (1) he had expressed to her his desire for sexual intercourse, (2) had kissed her private parts; (3) requested her to play with "it"; (4) she kissed his sexual organ; (5) he had an act of intercourse with her. Thereupon, appellant freely wrote substantially the same confession he had made orally denying that he had a knife on the occasion of his bestial adventure but only a can opener that fell on the street.

Section 288a.

[1,2] That the court's finding of appellant's violation of section 288a is justified by the proof was not contradicted. Where sufficient facts are proved and believed by the court to warrant an inference of guilt the appellate court is powerless to upset the judgment. People v. New-

land, 15 Cal.2d 678, 681, 104 P.2d 778. Its only function is to ascertain whether upon the face of the record sufficient facts could not have been found to warrant the inference of guilt. A scrutiny of the evidence serves only to justify the judgment. It was in the dead of night on a silent street when he, displaying a knife, suddenly seized the young woman and pulled her into his automobile, demanding the privilege of caressing her private parts. He removed her clothing as she protested. Not only did he declare his purpose but he lewdly and lasciviously "placed his mouth on her private parts," a felony. She was an utter stranger to him; but he was bent upon the consummation of his deliberate design to gratify his debased and depraved desires. The still hour of midnight, the solitude of the place, the loneliness of the prosecutrix, the brutal boldness of appellant, his vile and resolute purpose, and withal, his avowed, obscene desire—these omit nothing that was essential to the establishment of his guilt even though he had never spoken to the officers. But to them he confessed his criminal scheme and its achievement. Because the chain of proof is complete and because he offered not a word of testimony in rebuttal, the finding of a violation of section 288a cannot be impeached. People v. Wheeler, 61 Cal.App.2d 394, 395, 142 P.2d 938; People v. Milo, 89 Cal.App.2d 705, 707, 201 P.2d 556; People v. Coleman, 53 Cal.App.2d 18, 26, 127 P.2d 309. It cannot be upset unless the admitted acts of appellant do not constitute a violation as contended by appellant.

[3] The testimony of the prosecutrix and the confessions of appellant are in accord; he placed his mouth on her private parts; he did so for no purpose other than to gratify his lustful desires and to arouse in the prosecutrix a sexual animation, all contrary to the word and the spirit of section 288a. He seeks refuge behind People v. Angier, 44 Cal.App.2d 417, 112 P.2d 659. Angier had been convicted on the testimony of two infants, five and seven years of age. This court was impressed that the mouth of the accused could not have touched the bodies of the children. Such evidence was an indispensable element in the successful prosecution of such crime. On reaching that conclusion we were led into a discussion of the significance of the word "copulate." While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the use of the word in section 288a signifies a legislative intent that an offender of the statute is guilty only when he has committed the repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court. A person is guilty of violating the statute when he has placed his mouth upon the genital organ of another. This is the generally accepted interpretation of the statute. See People v. Milo, 89 Cal.App.2d 705, 708, 201 P.2d 556; People v. Coleman, 53 Cal.App.2d 18, 26, 127 P.2d 309. The Angier decision is not pertinent unless the factual situation under judicial consideration is in all essential details identical with those there adjudicated. People v. Owen, 68 Cal.App.2d 617, 619, 157 P.2d 432.

Rape was established.

[4] It is contended that there could have been no rape as charged for the reason that the prosecutrix acquiesced in the assault upon her. Nothing could be farther from the truth. When a young, white woman returning home from her work meets a strange, male person of the Negro race in the dead of night in a quiet vicinity and he exhibits a knife as he demands that she submit to carnal intercourse with him and pulls her into an automobile, lays her body upon the seat, proceeds to remove her clothing, compels her to perform the nameless act to stimulate his own amorous impulses, it would border upon the stupid to find that she freely acquiesced in his acts as he ravished her body. While she made some resistance, it may be safely presumed that she would have rebelled with a vengeance but for her fear of bodily harm. Why should any young woman under the circumstances described consent freely to the devastation of her virtue and the violation of her body? Appellant's attempt in his closing brief to asperse the character

of the prosecutrix is not commendable. There is not the slightest proof to justify such inference aside from her strategy designed to aid her escape. But if she had been as vile and base as the daughter of Herodias appellant's crime would not be extenuated.

[5] Not only did appellant reveal a consciousness of guilt by his conflicting versions of the episode, but her narrative resounded from the witness stand without a word of opposition or contradiction. His sole reply to the charge that he had a knife for the parley was that it was a can opener in his hand. If it had been, could the "shiney" can opener have been in his hand for any purpose other than to inspire a fear of its possessor? Her yielding to a superior force rather than suffer the possible consequences was more discreet than to cry up to the stars and be left in the gutter unconscious, if not dead. Any instrument that indicates a potential application of force to achieve its possessor's desires establishes the element of violence and whether it does appear to be fraught with peril to another is a question of fact for the trial court. People v. Coleman, 53 Cal.App.2d 18, 26, 127 P.2d 309; People v. Blankenship, 103 Cal.App.2d 60, 67, 228 P.2d 835.

[6–8] It is for neither the aggressor in such a crime nor for the courts who try him to determine the exact point to which the prosecutrix could with safety have carried her resistance. When she determines that her opposition had been carried to the limits of safety and that she could have ventured no further without peril to her life or safety, it is then for the trial court to determine only whether her fears were reasonably grounded. People v. Tollack, 105 Cal.App.2d 169, 233 P.2d 121. The kind of physical force that may induce fear in the mind of a woman is immaterial * * * it may consist in the taking of indecent liberties or of embracing and kissing her against her will. People v. Bradbury, 151 Cal. 675, 677, 91 P. 497. A submission induced by fear is not acquiescence. People v. Blankenship, supra, 103 Cal.App. 2d at page 66, 228 P.2d 835.

Appellant's argument that he approached the prosecutrix merely to ascertain whether she would consent to intercourse is a vain attempt to bolster his case. A man who seeks another to join and collaborate with him in any enterprise never begins negotiations by flashing a weapon by which force is applied; does not seek a friend after midnight of early February in a lonely area far from the "white lights"; does not grasp his friend by the neck and force him into the seat of a motor car beneath the steering wheel! His victim was a strange woman and appellant did not accost her in a friendly manner. His argument that because, during the removal of her slacks, she said, "not so far," she thereby indicated consent, is equally absurd. Those words of the prosecutrix relate to his previous promise that if he might kiss her private parts he would let her go. People v. Bales, 74 Cal.App.2d 732, 169 P.2d 262, does not avail appellant. The victim there was a familiar acquaintance of the accused. They had imbibed spirituous liquors together.

[9] The final contention is that the testimony of the prosecutrix was inherently improbable in that she did not cry for help. It hardly behooves a man who has forced a woman into an automobile and raped her to argue in his desperation that she should have shrieked out her fears at the time! He chose a time and a place and a method of "approaching" her without first consulting her and advising her to arouse the natives to defend her. If the affair was all so simple, why did not appellant mount the witness stand and explain it to the judge? The reasons for the failure of the prosecutrix to make an outcry have been made clear by the recitals herein. Whether they were reasonable was a fact for the trial court. People v. Tollack, supra; People v. Meichtry, 37 Cal.2d 385, 231 P.2d 847; People v. Pullins, 95 Cal.App.2d 902, 905, 214 P.2d 436.

Affirmed.

McCOMB, J., concurs.

108 Cal.App.2d 74

CITY OF GLENDALE v. CHAPMAN et al.

Civ. 18721.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1951.

Hearing Denied Jan. 31, 1952.

Mandamus proceeding by the City of Glendale, a municipal corporation, against Glenn E. Chapman, as city clerk of the City of Glendale, California, and Blanche H. Gartley, as city treasurer of the City of Glendale, California, to compel the city treasurer and clerk to sign bonds. The District Court of Appeal, Moore, P. J., held that ordinance authorizing issuance of municipal waterworks bonds payable only out of net earnings of waterworks is not invalid as authorizing the incurring of indebtedness contrary to Const. art. 11, § 18, requiring vote of people.

Peremptory writ issued.

1. Municipal Corporations 🔑864(4)

An ordinance authorizing issuance of bonds to provide money for construction of reservoir and main pipe lines and additions to and extensions and improvements of independent municipal waterworks system, and providing that source of repayment is revenue collected from operation of waterworks is not invalid as authorizing incurring of indebtedness contrary to constitutional provision requiring vote of people. Const. art. 11, § 18.

2. Municipal Corporations 🔑864(4)

The constitutional provision inhibiting every city to incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year without the assent of two-thirds of qualified electors, is not intended to be a veto of all indebtedness that may be contracted by a city on behalf of an independent agency or of a special fund which may have been established to serve the general welfare and which agency is financed solely by its own operations and to which city's tax funds make no contribution at all. Const. art. 11, § 18.

3. Municipal Corporations 🔑950(15)

City council's authorization of waterworks bond issue does not make the city a party to loan agreement, and fact that city council covenants to fix rates to be charged so as to provide sufficient revenues to meet payment on bonds as they become due out of waterworks revenue fund incurs no liability against the city. Const. art. 11, § 18.

4. Municipal Corporations 🔑864(4)

An ordinance authorizing issuance of municipal waterworks bonds payable only out of net earnings of waterworks would not permit such an invasion of general funds of city as would create indebtedness of city within constitutional provision requiring vote of people. Const. art. 11, § 18.

5. Municipal Corporations 🔑887

The marking of a fund for a special purpose by a municipality has given rise to the special fund doctrine to which the jurisprudence of the state is committed. Const. art. 11, § 18.

6. Municipal Corporations 🔑950(15)

Municipal waterworks bonds payable only out of net earnings of waterworks are within the separate fund theory even though the waterworks is not a separate corporation. Const. art. 11, § 18.

7. Contracts 🔑1

Municipal Corporations 🔑226

The right of contract includes the right to agree upon designated terms and to be guided solely thereby, and this applies to municipalities as well as to persons.

8. Municipal Corporations 🔑864(4), 867(2)

The application of the special fund doctrine to municipal waterworks bond issues cannot fairly be deemed only a subterfuge to subvert the constitutional limitation on municipal indebtedness, or a trick and device to avoid submitting the proposition to the electors. Const. art. 11, § 18.

9. Municipal Corporations 🔑864(4)

The subsistence of outstanding bonds issued for a purpose of improvement and extension of waterworks, certain municipal improvement district bonds and bonds of metropolitan water district do not create out of proposed municipal waterworks bonds payable only out of net earnings of waterworks such municipal indebtedness as is forbidden by constitutional provision requiring vote of people. Gen.Laws, Act 9129; Const. art. 11, § 18.

10. Municipal Corporations ⚿950(15)

Under statute, cities within metropolitan water district may elect to pay money out of water revenues in lieu of taxes, and by virtue of such provision the taxpayer of the city is released from liability on the bonds of the district. Gen.Laws, Act 9129.

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Henry McClernan, City Atty., for City of Glendale, John H. Lauten, Asst. City Atty., Glendale, O'Melveny & Myers and James L. Beebe, all of Los Angeles, for petitioners.

Stephen B. Robinson, Los Angeles, for amicus curiæ in support of petitioner.

Irwin & Melby, Glendale, for respondents.

Orrick, Dahlquist, Neff & Herrington, San Francisco, George Herrington, Walter G. Olson, San Francisco, of counsel, for amici curiæ on behalf of respondents.

MOORE, Presiding Justice.

The City of Glendale, petitioner herein, by ordinance No. 2485 of its city council authorized the issuance of 210 revenue bonds of the par value of $100,000 each and provided for them to be payable in consecutive, numerical order to bear interest at 3 per cent per annum, payable semi-annually. The purpose of the issue is to provide moneys for the construction of a reservoir and the acquisition and construction "of additions to and extensions and improvements" of the city's waterworks system. All formal requirements to make the bonds negotiable have been executed except the signing of the bonds by the city's treasurer and clerk. The latter respectively have refused to sign and countersign the bonds on the ground that Article XXVI of the City Charter and Ordinance 2485 are invalid in that they authorize the incurring of an indebtedness by petitioner, contrary to section 18 of Article XI of the constitution. The sole question for decision then, is whether the issuance of such revenue bonds is violative of the specified section of the state's constitution.

Background

Petitioner has owned and operated its municipal waterworks since September, 1914. Its first venture was the sale then of its "general obligation" bonds in the sum of $248,000 and of a second issue in the sum of $360,000 which was used for improvements and extension of the waterworks. Subsequent additions were made from the proceeds of municipal improvement districts under the Municipal Improvement District Act of 1915, St.1915, p. 99. The Municipal Improvement Districts were numbered 1, 4, and 7. The principal amounts of their bond issues were, respectively, $55,500 in 1918; $30,000 in 1921, and $23,000 in 1922. Thereafter, other pipelines and connections were constructed pursuant to the Improvement Act of 1911, St.1911, p. 730, and substantial additions to and improvements of the waterworks were made and paid for by subdividers and other property owners. At the present time the value of the waterworks, after deducting the sum of $2,806,776.52 as depreciation, is $7,630,355.52 while its replacement value is in excess of $10,000,000. The waterworks serve the domestic needs of about 100,000 people residing within the city, as well as the city's fire department, and alleviates water shortages in neighboring communities.

The ordinance is by its terms the city's contract with the purchasers of the proposed bonds. It establishes a separate fund, to wit, "Waterworks Revenue Bonds, Construction Fund," in the city treasury for the purpose of insuring the investment of the proceeds from the sale of the bonds in the acquisition and construction of additions to and improvements of the waterworks and the construction of a reservoir and main pipelines.

The ordinance (sec. 9) provides for "Waterworks Revenue Bonds, Redemption Fund" in which there must be set aside moneys available and solely for the purpose of redeeming and sufficient to redeem, at the premiums payable, the bonds designated for redemption and such moneys must be applied on or after the redemption date to the payment of the principal and interest of the bonds and to no other purpose.

In addition to the redemption fund, the ordinance (sec. 11) establishes, pursuant to Article XXVI, section 3 of the charter, a "1951 Waterworks Revenue Bonds, Reserve Fund" into which shall be paid from the Waterworks Revenue Fund at least once each month sums such that there will be on hand at least the full amount of cash required to pay, as it becomes due, at maturity, any installment of the principal of or interest on the bonds. Such moneys as are placed in the Reserve Fund are to remain until disbursed solely for payment of principal and interest, provided, however, that any excess of the sum required to be in the Reserve Fund may be temporarily invested in bonds which are legal investments for Glendale so long as such investment does not affect the city's obligation "to cause the full amount required by the terms of this section to be available in said Reserve Fund in cash at the time required by the terms of this section."

Covenants With Bondholders

The ordinance requires that rates to be charged for services by the Waterworks as extended and improved with the moneys received for the proposed bonds shall be so fixed as to provide revenues at least sufficient to pay at maturity all installments of principal and interest as they mature and all other obligations payable from the Waterworks Revenue Fund or from any fund derived therefrom, including the expenses necessarily incurred in maintaining and operating the waterworks which shall not provide any real property rent free or furnish any water or service free to Glendale or to any entity at lower rates than those charged to others for similar service, with the exception of water used for street and sewer flushing as provided by ordinance 1940.

The city covenants also with those who purchase the proposed bonds that no additional bond shall be issued pursuant to any charter provision or other law to have priority in payment out of the revenues of the waterworks over the bonds proposed by Ordinance No. 2485, nor shall any indebtedness of the city payable out of the "Waterworks Revenue Fund" be created or incurred unless the net income[1] of the waterworks for the latest fiscal year shall have amounted to (1) at least twice the amount of interest to accrue on investments other than the waterworks and (2) at least one and one-fourth times the aggregate amount of interest to accrue and payments of principal required to be made in the subsequent fiscal year in which such aggregate interest will be the greatest on all indebtedness outstanding subsequent to the incurring of such additional indebtedness.

The city further covenants that the waterworks shall not be disposed of unless such disposition provide for a continuance of payments into the Waterworks Revenue Fund sufficient to pay the principal interest and premiums due upon the redemption of all bonds payable out of that revenue fund. Books and accounts of the waterworks must be audited annually by an independent certified public accountant and a copy of the report of the accountant shall be furnished to any bondholder.

A copy of the bonds proposed is contained in the ordinance. It obligates petitioner to pay the principal and interest solely from the Waterworks Revenue Fund and declares that it does not constitute an indebtedness of the City of Glendale. It makes provision for its registration and redemption and other conventional rules of procedure relative to municipal bond issues.

The Law

[1, 2] In view of the contract offered by petitioner to those who may purchase the proposed bonds, no legal barrier is found to justify respondents' refusal to sign the bonds. Section 18 of Article XI of the Constitution is not intended to be a veto of all indebtedness that may be contracted by a city on behalf of an independent agency or of a special fund which may have been established to serve the general welfare and which agency is financed solely by its own operations and to which the city's tax funds make no contribution at all. Section 18 inhibits every city to "incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose * * *."

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[1] Including (1) earnings from investments made in additions to the waterworks not in service and (2) an allowance for earnings arising from increase in water rates.

The waterworks whose replacement value is now ten million dollars has been built up from rude beginnings. In its 37 years of existence it has paid its own way without contribution from the general tax fund. In the past six fiscal years its total net income has exceeded $2,500,000, an average of over $400,000 yearly. Not only has the waterworks been a money making agency of Glendale but in the period last mentioned, its Electric Works have earned a net income in excess of $6,400,000—or over a million dollars annually. Judged by its net earnings, the Public Service Department of petitioner is firmly established as a group of successful independent profit-making agencies of a prosperous city. From a practical standpoint, in the light of the waterworks' successes, it cannot be said that it is at all probable that, aside from the legal nonliability of the city on the proposed bonds, one of them would ever default for nonpayment.

But the bonds could not become a debt or liability of the city. The bond on its face declares as much. The ordinance creating the bond issue so provides. The source of repayment is the revenue collected from the operation of the waterworks. The city charter (Article XXVI forbids the issuance of any bonds having priority in payment out of the revenues of the waterworks. The city covenants that (1) no money shall be transferred from Waterworks Revenue Fund into the Public Service Surplus Fund until provision has been made for payment into the Reserve Fund as required by the ordinance; (2) the Waterworks shall make no gift to anyone; (3) the water rates to be charged shall be fixed so as to provide revenues at least sufficient to pay the bonds and the costs of maintaining and operating the waterworks; (4) no debt or revenue bonds shall be payable out of the Waterworks Revenue Fund unless the income of the waterworks shall greatly exceed double the interest to accrue on the proposed bonds; (5) the waterworks shall not be sold unless arrangement be made for a continuance of the payments into the Waterworks Revenue Fund and (6) a report of the accounts of the waterworks by a certified accountant be made annually to the bondholders.

The establishment of (1) the waterworks as an independent agency, (2) the "Waterworks Revenue Bonds, Construction Fund," (3) the "Waterworks Revenue Bonds, Reserve Fund," and the issuance of the proposed bonds as an aid to the waterworks' operation and extensions are ingenious and commendable devices of a city in the conduct of its municipal affairs and serve to prevent its incurring a liability to pay the bonds without binding the general public fund to contribute to the financing of such public works.

[3] The city council's authorization of the bond issue does not make the city a party to the loan agreement. Department of Water and Power v. Vroman, 218 Cal. 206, 217, 22 P.2d 698. How could it do so despite the declaration in the ordinance that no legal obligation is thereby incurred against the city? The fact that the city council covenants to fix the rates to be charged so as to provide sufficient revenues to meet the payments on the bonds as they become due out of the Waterworks Revenue Fund incurs no liability against the city. 218 Cal. at page 218, 22 P.2d 698.

[4] The amici curiæ who appear in support of respondents contend that, although the moneys to be received from the sale of the bonds are payable only out of the net earnings of the waterworks, should that fund prove to be inadequate, the general fund will be invaded and the taxpayer be required to pay the sums due on the bonds. In reason how could such claim be made? In Shelton v. City of Los Angeles, 206 Cal. 544, at page 551, 275 P. 421, at page 424, Mr. Justice Shenk says this obligation "is not a financial one, in default of which the city would be required to disburse the general funds of the city or other moneys derived from taxation." By the ordinance the revenue funds are set aside as a special fund whose obligations are not responsive to section 18 of Article XI. Department of Water and Power v. Vroman, supra, 218 Cal. at page 219, 22 P.2d 698; Shelton v. City of Los Angeles, supra; California Toll

Bridge Authority v. Kelly, 218 Cal. 7, 21 P. 2d 425.

[5] The marking of a fund for a special purpose by a municipality has given rise to the Special Fund doctrine to which the jurisprudence of this state is committed. Amici curiæ contend that such doctrine has been so limited by Garrett v. Swanton, 216 Cal. 220, 13 P.2d 725, as to render it worthless as support for petitioner. In Department of Water and Power v. Vroman Justice Shenk pointed out that in Garrett v. Swanton the contracting party was the city "directly submissive to the constitutional mandate", [218 Cal. 206, 22 P.2d 704] and in California Toll Bridge Authority v. Kelly, 218 Cal. at page 14, 21 P.2d at page 427, the same learned justice suggests that in the Garrett case "The bonds were city bonds, and were not payable solely from the special fund created by segregation of the revenues for that purpose, but also from the general funds of the city in the event the special fund shoud be insufficient." The law governing the operation and disposition of a special fund such as that established as the "Waterworks Revenue Bonds, Reserve Fund" is declared (ibidem) by Justice Shenk in the following: "These funds are special funds, and obligations payable solely from such funds do not constitute a debt within the meaning of the constitutional limitation involved." See Briggs v. Greenville County, 137 S.C. 288, 301, 135 S.E. 153; Wright v. Hardwick, 152 Ga. 302, 109 S.E. 903; Alabama State Bridge Corporation v. Smith, 217 Ala. 311, 116 So. 695. That subordinate municipal boards may contract for payment of moneys from their special funds and that such contracts are not violative of section 18 of Article XI of the constitution was, upon an extensive review of the authorities of other jurisdictions, declared to be the law of this state in Shelton v. City of Los Angeles. The contract of a city for the payment of money out of a special fund, such as is involved herein, may impose a strong moral obligation to approve a schedule of rates to discharge the principal and interest of the indebtedness as it becomes due. Such obligation is not of a financial character in default of which the city would be required to disburse its general funds derived from taxation.

[6, 7] While the "waterworks" of Glendale is not a separate corporation, that fact offers no hindrance to the application of the "separate fund" theory. If a person may contract to pay a sum of money solely out of a specified property or fund without imposing any obligation upon himself personally; if an independent corporation may make an enforceable promise to repay moneys solely from the proceeds of sale of a specific property, why cannot a municipality obtain money on a loan to be repaid solely from a fund set aside for the purpose, without obligating its general fund? The right of contract includes the right to agree upon designated terms and to be guided solely thereby and this applies to municipalities as well as to persons.

Amici Curiæ on behalf of respondents urge with vehemence the inapplicability of the authorities from other jurisdictions[2] cited by petitioner and insist that Garrett v. Swanton, supra, is controlling in the case at bar. To say the worst, the construed authorities of other states are not contrary to the holdings in the Shelton, Kelly and Vroman cases, whereas the quoted passages from the last two decisions clearly distinguish the Garrett case as not applicable to the situation involved herein.

The same amici curiæ contend that the "revenues the city is now using for the payment of municipal expenses * * * will be diverted to an entirely different purpose, namely, the payment of principal and interest of a new issue of Revenue Bonds." Nothing in the record supports such contention. For decades the waterworks has carried on. It has paid no part of the "municipal expenses" and the general fund has contributed no substantial payment to the waterworks. In view of the stupendous operations and the net income of the waterworks during the past six years what chance is there that the city will be compelled to "levy and collect sufficient taxes to pay the cost of operation of the city" to prevent the holders of the new bonds from seizing the entire income of the waterworks?

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[2] McCutchen v. City of Silaom Springs, 1932, 185 Ark. 846, 49 S.W.2d 1037; Johnson v. McDonald, 1935, 97 Colo. 324, 49 P.2d 1017; Chitwood v. Lanning, 1934, 218 Iowa 1256, 257 N.W. 345; Interstate Power Co. v. Town of McGregor, 1941, 230 Iowa 42, 296 N.W. 770, 777, 146 A.L.R. 315; Farmers State Bank of Conrad v. City of Conrad, 1935, 100 Mont. 415, 47 P.2d 853; Seward v. Bowers, 1933, 37 N.M. 385, 24 P.2d 253; Winston v. City of Spokane, 1895, 12 Wash. 524, 41 P. 888; Casto v. Town of Ripley, 1934, 114 W. Va. 668, 173 S.E. 886; Laverents v. City of Cheyenne, 1950, 67 Wyo. 187, 217 P.2d 877.

[8] Amici Curiæ argue that the city is obligated either to feed the special fund or to lose its entire investment in the water system. Such argument is based upon fear or suspicion! A reasonably prudent person will see that the bonds are not obligations of the city but are secured by a special fund which is growing at a rate in excess of over $400,000 annually and which became part of a larger, independent fund for the maintenance of the electric power plants and the waterworks. The application of the special fund doctrine to bond issues, such as that proposed, with the approval of the Supreme Court, Department of Water and Power v. Vroman, supra, cannot fairly be deemed "only a subterfuge to subvert the constitutional limitation" or "a trick and device to avoid submitting the proposition to the electors," as argued on behalf of respondents.

[9, 10] Neither does the subsistence of outstanding bonds issued for the purpose of the improvement and extension of waterworks, certain Municipal Improvement District bonds and bonds of the Metropolitan Water District create out of the proposed bonds such indebtedness as is forbidden by section 18 of Article XI. The "city" bonds and the Municipal Improvement bonds are payable only out of the revenues derived from the sale of water. While the bonds of the Metropolitan Water District may be paid with moneys obtained by the levy of taxes on property within the corporate limits of Glendale, yet since the city may pay its proportionate share of such bonds out of revenues derived from the waterworks, it cannot be reasonably said that the District's bonds constitute a debt of the taxpayers of Glendale. The city is but a small speck of the vast area comprising the District. Its taxable property is less than 4 per cent of that of the District which is not bound by section 18 of Article XI since it is not one of the entities mentioned therein. Cities within the District may elect to pay money out of water revenues in lieu of taxes, Statutes 1927, p. 694, Deering's General Laws, Act 9129, and by virtue of such provision the taxpayer of the city is released from liability on the bonds of the District. Security Trust & Savings Bank v. City of Los Angeles, 120 Cal.App. 518, 524, 7 P.2d 1061. Such bonds, therefore, do not constitute a peril to the credit of Glendale. On the contrary, the waters from the Metropolitan Water District may in time send a refreshing stream through the network of watermains of Glendale and environs, bringing not only comfort and security but a tremendous increase in revenues.

Without regard to whatever may happen to "city" bonds or to the Improvement District bonds which were approved by a two-thirds vote of the electorate by the terms of the ordinance and the proposed bonds, the latter are to be collectible only out of the Waterworks Bonds, Reserve Fund, created out of revenues earned by the waterworks.

While in the Garrett decision the court indicated that the depletion of the revenue fund below the safety point might render taxation necessary for the payment of the outstanding bonds thereby creating an indebtedness forbidden by section 18, Article XI of the Constitution, yet in the subsequent Vroman decision with facts which closely parallel those at bar, the same court held that a depletion of the revenue fund to the same degree would not create an indebtedness contrary to the constitution.

It must therefore be held that petitioner is entitled to the relief demanded.

It is ordered that the peremptory writ issue.

McCOMB, J., concurs.

Hearing denied; EDMONDS, J., dissenting.

108 Cal.App.2d 217

MacDONALD v. JACKSON et al.

Civ. 18585.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1951.

Finley J. MacDonald, as executor under the will of Elizabeth H. Ussher, deceased, brought action against Cecil M. Jackson, and another, to recover on two notes payable to testatrix and for other relief. The Superior Court, Los Angeles County, William B. McKesson, J., denied defendants' motion to quash a writ of attachment issued against the business assets of defendants, and the defendants appealed. The District Court of Appeal, Moore, P. J., held that the causes of action on the notes were both based upon contracts for the direct payment of money and writ of attachment was properly issued, and that order denying defendants' motion for rehearing of their motion to quash, and order granting motion to quash exception to surety, were not appealable.

Order denying motion to dissolve attachment affirmed; appeals from other orders dismissed.

1. Appeal and Error ⚷99

In executor's action on notes payable to testatrix and for money had and received, wherein executor caused a writ of attachment to be levied upon business assets of defendants, and defendants' motion to quash the writ was denied, order denying defendants' motion for rehearing of the motion to quash was not "appealable".

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

2. Appeal and Error ⚷99

In executor's action on notes payable to testatrix and for money had and received, wherein executor caused writ of attachment to be levied upon business assets of defendants, and defendants' motion to quash the writ was denied, order granting motion to quash exception to surety was not "appealable".

3. Attachment ⚷5

Executor's action on notes payable to testatrix were based upon a contract for the direct payment of money and writ of attachment against business assets of defendants was properly issued. Code Civ. Proc. § 537.

4. Attachment ⚷211

Where, in executor's action on notes payable to testatrix, executor's affidavit for writ of attachment against defendants' business assets averred that the causes of action were based upon a contract for the direct payment of money, and the executor's complaint declared that fact, allegations of the complaint supported the affidavit. Code Civ.Proc. § 537.

5. Attachment ⚷211

Where original complaint and amended complaint by executor stated an action ex contractu to recover on two notes payable to testatrix, but original complaint also alleged that defendants took advantage of testatrix' illness and obtained execution of a note consolidating the two notes, and that cancellation by testatrix of the subsequent note was procured by fraud, additional allegations of original complaint were an anticipation of defendants' probable defense and were mere surplusage, and did not operate to alter the contractual nature of the action to a tort action which would preclude issuance of a writ of attachment against defendants' business assets. Code Civ.Proc. § 537.

Elbert E. Hensley, Los Angeles, for appellants.

Frank G. Falloon, Los Angeles, for respondent.

MOORE, Presiding Justice.

[1, 2] Defendants appeal from the order (1) denying their motion to quash the writ of attachment, (2) the order denying their motion for a rehearing of their motion to quash, and (3) the order granting motion to quash exception to surety. Inasmuch as the appeals from orders (2) and (3) are nonappealable, the appeals from them will be dismissed.

Plaintiff sued on promissory notes payable to his testatrix and caused a writ of attachment to be levied upon the business assets of defendants. The latter promptly moved to quash the writ "on the ground that said defendants herein are sued on a cause of action alleging tort."

The second amended complaint contains three causes of action: Counts I and II are actions to recover on two notes executed by appellants in favor of plaintiff's testatrix, one being in the sum of $5,000 and the other for $7,880. The third cause of action is one for money had and received in the sum of $10,000 allegedly paid to appellants for a security allegedly void, having been issued in violation of law.

However, the original complaint contained additional allegations in Counts I and II with respect to the subsequent execution by defendants of a note for $12,880, apparently representing a consolidation of the two earlier instruments. It was alleged that on August 20, 1950, defendants took advantage of testatrix' serious illness and took the two notes from her and gave her the written promise to pay her $12,880 in $50 monthly installments. It was further alleged that such note was void (1) for want of consideration and (2) that testatrix' endorsement thereon, purporting to cancel the indebtedness upon her death, was procured by fraud and duress.

[3, 4] Insofar as the first two causes of action are concerned, the attachment was justly issued. They are both based "upon a contract * * * for the direct payment of money." Code Civ.Proc., sec. 537. The affidavit so avers, Baldwin v. Napa & Sonoma Wine Co., 137 Cal. 646, 649, 70 P. 732, and since the complaint declares the fact, its allegations are found to support the affidavit. Powers v. Freeland, 114 Cal.App. 146, 149, 299 P. 736.

[5] Counts I and II of the original complaint herein state an action *ex contractu* which constitutes the basis for an attachment. By the original and amended complaints plaintiff seeks recovery upon two promissory notes. All the allegations and recitals in regard to the note urged by appellants as the basis for holding Counts I and II of the original complaint to be an action for fraud, appear to be only by way of anticipating a probable defense to be raised by defendants. Such matter has no proper place in the pleading. It constitutes mere surplusage. Watson v. Poore, 18 Cal.2d 302, 316, 115 P.2d 478; Jaffe v. Stone, 18 Cal.2d 146, 159, 114 P.2d 335, 135 A.L.R. 775; Canfield v. Tobias, 21 Cal. 349, 350. Consequently, it cannot operate to alter the actual, contractual nature of the action.

This conclusion is further substantiated by the affidavit for attachment submitted by plaintiff as the basis for obtaining his writ. Therein it is recited that the action is "upon an express contract, for the payment of money, to wit: Two Promissory Notes."

The appeals from the order denying defendants' motion for rehearing and from the order granting motion to quash exception to surety are dismissed. The order denying the motion to dissolve the attachment is affirmed.

McCOMB, J., concurs.

SPENCER v. NELSON et al.*

Civ. 14610.

District Court of Appeal, First District,
Division 1, California.

Dec. 7, 1951.

Rehearing Denied Jan. 5, 1952.

Hearing Granted Feb. 1, 1952.

Action by Glenn H. Spencer against Ted Nelson and Alice M. Nelson for declaratory relief with respect to validity of a contract between the parties. From a judgment for defendants in the Superior Court in and for the County of Alameda, James L. Atteridge, J., the plaintiff appealed. The District Court of Appeal, Bray, Acting P. J., held that the evidence supported the conclusion of the Superior Court that the contract was void, that a prior decision did not establish the law of the case so that all that plaintiff had to show was that defendant had knowledge of the contract, and that under its reserved powers in the judgment, the Superior Court could do equity and declare the further rights of the parties independently of the contract.

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* Dismissed April 21, 1952.

Judgment affirmed.

1. Appeal and Error 🔑989

In considering sufficiency of evidence on appeal it is not a question of how appellate court would decide the case in the first instance, but whether there is substantial evidence, including the reasonable inferences to be drawn therefrom to support the trial court's findings.

2. Attorney and Client 🔑123(1)

In action involving the validity of a contract between attorney and an inventor for the development of defendant's inventions whereby plaintiff gave up his law practice and defendant was to give him an interest in the corporation formed to develop inventions, evidence justified conclusion that success of the business was due to a combination of the defendant's patents and his engineering and production abilities and the plaintiff's initiative, executive ability and effort.

3. Attorney and Client 🔑123(1)

Contracts between an attorney and client are scrutinized by the courts with jealous care and are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts concerned with such transaction and fully understood their effect.

4. Attorney and Client 🔑123(1)

An attorney must offer clear evidence that transaction between attorney and client was fair and equitable and no advantage was taken by him, and attorney must also prove, that client was fully informed of all matters relative to the transaction, and was so placed as to be able to act understandingly, and to deal with the attorney at arm's length.

5. Attorney and Client 🔑123(1)

Where relation of attorney and client exists, the client is entitled to advice independent of that of the attorney, and although that fact alone is not conclusive, it is a circumstance to be considered, as is the presumption arising from the contract that there was good and sufficient consideration.

6. Attorney and Client 🔑123(1)

Burden is always upon the attorney to show that dealings with the client were fair and just and that the client was fully advised.

7. Attorney and Client 🔑123(1)

In action involving the validity of a contract between attorney and defendant for the formation of a corporation for the development of defendant's inventions and the rendition of legal services by the plaintiff, evidence supported finding that while defendant at all times knew the terms of the contract, he did not know or understand its full meaning and effect.

8. Fraud 🔑22(1)

It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with discovery in advance of actual knowledge on his part. Civ.Code, § 19.

9. Fraud 🔑23

In cases involving fiduciary relationship, facts which would ordinarily require investigation may not excite suspicion and the same degree of diligence in discovery of fraud is not required. Civ.Code, § 19.

10. Fraud 🔑23

Where parties are in confidential relationship, victim of the fraud may justifiably rely upon the good faith of the guilty party, even though there may be circumstances putting a prudent man on inquiry if the parties were dealing at arm's length. Civ. Code, § 19.

11. Fraud 🔑23

Where there is a confidential relationship one may act upon presumption that there exists no intent to cheat or defraud him.

12. Estoppel 🔑52

Principal and Agent 🔑166(1)

Doctrine of waiver or ratification is founded upon the fact of knowledge of all the facts and not upon negligence.

13. Attorney and Client ⚷123(1)

In action to determine validity of contract between attorney and defendant for the formation of a corporation for development of defendant's inventions under which plaintiff was to render legal services, whether situation was such to have put defendant on inquiry that he had allegedly been overreached and whether situation was such that it overcame the confidential relationship between the parties and put defendant on inquiry as to the validity of the contract was for the trier of facts.

14. Attorney and Client ⚷123(1)

Under a contract between attorney and inventor for the formation of a corporation for development of inventions of defendant by which plaintiff was to render legal services, rescission was not precluded because the parties could not be restored to the status quo since if equity could still be done between the parties, court would grant relief to the inventor.

15. Attorney and Client ⚷123(1)

In action to determine the validity of contract between attorney and defendant for the formation of a corporation for development of defendant's inventions under which plaintiff was to render legal services evidence supported conclusion that notice of rescission of the contract was properly given by defendant, where within approximately a month of the time within which defendant learned the full effect of the contract and right to disaffirm, defendant acted.

16. Appeal and Error ⚷1099(3)

In action involving validity of a contract, decision on prior appeal that if evidence was forthcoming that defendant had "knowledge" of the writing, plaintiff would be entitled to judgment enforcing the agreement was not intended to limit the new trial merely to consideration whether defendant had knowledge of the agreement where sole question before court was whether issue of ratification was severable from another issue in the inception of the contract.

17. Appeal and Error ⚷1097(1)

Dictum does not become the "law of the case".

See publication Words and Phrases, for other judicial constructions and definitions of "Law of the Case".

18. Contracts ⚷265

The fact that the status quo cannot be restored does not preclude rescission of a contract if equity can be done between the parties.

19. Declaratory Judgment ⚷3

The powers of a court acting under declaratory relief statute are broad and extensive. Code Civ.Proc. § 1060.

20. Declaratory Judgment ⚷385

In action for declaratory relief with respect to the validity of a contract between attorney and defendant for development of the defendant's inventions whereby plaintiff was to render legal services, plaintiff was entitled to a determination of the reasonable value of his services where in carrying out the contract he gave up a lucrative law practice and devoted his entire time to the business and put a considerable portion of his own income back into the business Code Civ.Proc. § 1060.

21. Attorney and Client ⚷123(1)

In action to determine the validity of the contract between attorney and defendant for formation of a corporation for development of the defendant's inventions under which plaintiff was to render legal services, evidence supported conclusion that the contract was void.

22. Declaratory Judgment ⚷385

In action for declaratory judgment with respect to the validity of a contract between attorney and defendant for formation of a corporation for development of the defendant's inventions where evidence supported conclusion of the lower court that the contract was void and the court reserved jurisdiction to enter necessary orders and decrees and to administer further equity between the parties, the lower court was authorized to do equity and declare the further rights of the parties independently of the contract. Code Civ.Proc. § 1060.

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Morse Erskine, David C. Dunlap, Erskine, Pillsbury & Tulley, all of San Francisco, for appellant.

Norman Elkington, San Francisco, Hardin, Rank, Meltzer & Fletcher, Oakland, Hancock, Elkington, Rothert & Low, San Francisco, for respondent.

BRAY, Acting Presiding Justice.

Plaintiff brought this action for declaratory relief. At the first trial, judgment went for defendants. Thereafter, the court granted a new trial on the sole issue of ratification. Plaintiff appealed from the order granting the new trial, contending that the new trial should have been granted on all issues. This court, holding that the issues were separable, affirmed the action of the trial court. Spencer v. Nelson, 84 Cal.App.2d 61, 190 P.2d 40. On the new trial, by stipulation, the record of the first trial was considered. Additional evidence was produced, and judgment again went for defendants. Plaintiff appeals.

Questions Presented

Principally—sufficiency of the evidence (1) as to the finding that in the execution of the contract upon which the action is based plaintiff overreached defendants; (2) as to the finding that defendants did not ratify the contract. The determination of this latter question depends mainly on the effect of the relationship of attorney and client, if it then existed, on the later failure of defendants to inquire as to their rights. An additional question is: Is there "law of the case?"

Findings

The action involves the validity of a contract entered into between the parties on September 5, 1942. The findings at the first trial were to the following effect: The contract was executed when an attorney-client relationship existed between the parties and when they were not at arm's length. Plaintiff did not give them disinterested advice nor advise them to get independent advice. Defendants did not act with full knowledge of their rights or liabilities nor fully understand the legal effect of the contract. The transaction and the consideration were neither fair nor equitable. While plaintiff occupied the relation of attorney toward his clients he acquired an advantage to their detriment by reason of the contract. The assets acquired by plaintiff were of the reasonable value of $100,000. As part of the purported consideration, plaintiff agreed to cancel an indebtedness of defendants to him which was thereafter fixed at $10,000.

On the issue of ratification—the judge of the second trial found as follows: From the execution of the contract to August, 1945, defendants believed it to be an enforceable agreement. They knew of its contents, the meaning of its language, and how the contract purported to bind them, but they did not realize all of its implications and eventualities and had received no independent advice concerning it. All this time they worked according to it and the relation of attorney and client existed. Approximately one and a half years after its execution there existed feelings of hostility between the parties. Until late in August, 1945, defendants had no knowledge of a right to disaffirm, nor had they made any inquiry concerning such right. At no time did they relinquish this right nor ratify, confirm or waive such right.

Evidence

[1] In considering the sufficiency of the evidence there must be borne in mind the well known rule that it is not a question of how this court would decide the case in the first instance, but whether there is substantial evidence, including the reasonable inferences to be drawn therefrom, to support the trial court's findings. There is substantial evidence to support the following facts:

Defendant Ted Nelson[1] was 35 years old, a high school graduate, and had been employed as a welder at Mare Island for about five years prior to 1942. In about 1940 he invented a stud welding device for welding studs to metal plates, which proved to be a great time saver over other methods. He patented this device and commenced manufacturing it on a small scale in an enlarged garage back of his home in Vallejo. Plaintiff was about 37 years old. He had had considerable experience in both business and accounting. He then studied law and commenced practice in 1937. At the time of the contract plaintiff was a partner in an Oakland law firm and claims that his own earnings were about $1500 per month. In the early part of 1942 defendant's device had become highly important in war production and the government threatened to take over its manufacture if he did not expand. The Navy suggested that he obtain an RFC loan for this purpose. It was necessary for him to incorporate to do so. One of his employees suggested plaintiff, whom defendant did not know, as a good attorney to take care of the incorporating. Defendant employed plaintiff who incorporated the Nelson Specialty Welding Equipment Corporation, and for the next several months handled various executive, administrative and legal matters for defendant. All of the stock in the corporation was issued to defendant. His patents were not transferred but were licensed to the corporation under a license agreement prepared by defendant's patent attorney, Evans. (Incidentally, at all times thereafter except as herein set forth, all patent matters were handled by Evans, and not by plaintiff. However, Evans did not advise defendant concerning his relations with plaintiff or on business matters of either defendant or the corporation.) At plaintiff's suggestion a new location for the plant was determined upon, plaintiff selecting the site, obtaining the necessary priorities and employing the architect.

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[1] As most of the conversations and actions took place between plaintiff and defendant Ted, "defendant" as used herein will refer to Ted unless otherwise noted.

By September, 1942, the business had grown to such proportions that defendant was bogged down in a mass of administrative detail. He wanted to be free to concentrate his efforts on the production and engineering part of the business. Attorney Evans suggested that he hire an office manager for $600 or $700 per month. Defendant told plaintiff of Evans' suggestion. Plaintiff then told defendant to follow plaintiff's advice in all business matters and not to let Evans or any other attorney "upset" him. The next day plaintiff and defendant took a trip to Hanford to check into the nondelivery of certain machines needed in the business. They discussed the need of someone experienced in business, administrative, and accounting matters to assist defendant. Plaintiff told defendant of his background in these matters. Defendant then asked plaintiff to give up his law practice and to come to work for him. Plaintiff stated that he had a good law practice and he doubted very much if defendant could afford to pay him what would be necessary to get him to give it up. Defendant asked plaintiff to give the matter consideration and plaintiff agreed to think it over. There is considerable conflict between the parties as to what happened next, plaintiff contending that they went on to Los Angeles from Hanford and continued to discuss the matter at great length (a registration card shows that they did go on to Los Angeles). Defendant contends that nothing further was said about it until the day following their return from Hanford when plaintiff presented the contract to him at the plant, and that none of the details set forth in the contract had been discussed at all. Plaintiff testified that they had been discussed and that defendant wanted only an oral contract, but finally suggested that it be in letter form. Plaintiff's secretary testified that plaintiff drew the contract with great care, making three drafts of it before being satisfied. Although the agreement starts out "In order that our understanding may be made a matter of record" defendant testified that the proportions in the contract had never been discussed. When the contract was presented plaintiff thoroughly read and explained it to defendant. Plaintiff did not urge defendant to sign. Defendants knew the terms but did not know their significance. At no time did plaintiff suggest that defendants obtain independent advice concerning the contract.

The contract provided: "In consideration of the services rendered by you [plaintiff] and for other and valuable consideration" defendants assign to plaintiff 166–2/3 shares (one-third) of the capital stock of the corporation plus one-third of all shares "which might hereafter be issued to us" for any consideration other than cash; one-third of all inventions and discoveries (plus all patents, royalties, rights and benefits thereon and therefrom) made or hereafter to be made by "either of us" during the entire time that plaintiff and defendant are connected with the corporation. All stock of all parties then issued or thereafter to be issued is placed in a voting trust to be voted as a unit. In directing the vote plaintiff has an equal voice with defendant. Provision is made for arbiters in case plaintiff and defendant cannot agree. Plaintiff and defendant are each to receive a salary of $1000 per month. When salaries are changed, the salaries of each shall be equal. If the corporation shall pay a bonus to defendant, plaintiff shall receive one-half such bonus. The stock shall never be voted in any manner to reduce plaintiff's stock to less than one-third of the capital stock nor deprive plaintiff of the right to receive one-third of all bonuses, profits, or other net income of the corporation, except bonuses to employees. The agreement inures to the benefit of and is binding on the heirs, executors and assigns of the parties. It was signed by both defendants. Below their signature plaintiff signed a statement that the foregoing agreement is in accordance with his understanding and is the sole agreement of the parties.

During the half hour discussion of the agreement before its signing defendant called plaintiff's attention to the fact that it nowhere provided that plaintiff was to devote any time to the business. Thereupon plaintiff wrote on the back of it a promise to devote his entire time and efforts to "the furtherance of our mutual interests in connection with" the corporation, except that he should have time to finish up law cases then in his office, at an estimate of an average of not more than one hour a day. It stated that it would be necessary for him to try several cases in the next six months and to take that time away from his work for the corporation. "I shall maintain my identity as an attorney in Oakland, California, but will not practice law in any manner to interfere with my efforts on your behalf." Both parties performed under the contract. Shortly after plaintiff started to work he raised his and defendant's salary to $3000 retroactive to September 1. $2000 of each month's salary was put back by each into the business. Plaintiff contends that defendant was receiving a salary of $3000 per month in September, 1942. However, the evidence supports defendant's testimony that he was not. Plaintiff paid no money for the agreement. At all times plaintiff maintained a law office in Oakland and was listed in the phone directory as an attorney, although there is no evidence that he practiced law at all, except for finishing up a few matters as provided in the agreement and taking very little time.

Defendants knew the terms of the contract, the proportion of the stock, royalties and patents plaintiff was to receive, the fact that plaintiff and defendant were to be together as long as the business existed, that plaintiff had given up his law practice for which defendant was giving him an interest in the business for as long as it was carried on. But defendants did not know the full significance and effect of the contract. They did not realize how binding the contract would be and defendant believed that if the parties could not agree "some means of provision would be made for dissolving this agreement and he could go his way and I go mine."

[2] The $10,000 referred to in the findings apparently came out of a $25,000 bill for plaintiff's services prior to the agreement and salary thereafter. Defendant testified that he knew nothing of this and that there had been no agreement that plaintiff was to pay any money consideration. Defendant endorsed the $10,000 check. Although the court found that it was consideration, plaintiff testified that it was paid as a bookkeeping item for tax purposes. During the three years following, plaintiff devoted his entire time and attention to the business. He became secretary and executive vice president of the corporation, took over the administrative business of the corporation, and executed with defendant personal guarantees of corporate indebtedness. He put back into the business the sum of $160,000, which was a substantial part of his receipts from the business, including the receipts by his family to whom transfers of interests were made, apparently for tax purposes. The business was expanded to a nationwide scale, probably due in large measure to plaintiff's initiative and efforts. Defendant, too, worked

hard, improved his patents. It is not necessary to detail the work done by plaintiff or the expansion of the business. The evidence justifies the conclusion that plaintiff pulled his own oar and rendered yeoman service, and that the success of the business was due to the combination of defendant's patents, his engineering and production abilities, and plaintiff's initiative, executive ability and effort. The relationship of the parties subsequent to the signing of the contract will be discussed under "Ratification."

The Law

[3–6] In considering the evidence it is well to bear in mind the principles applicable to a contract between attorney and client. "* * * inasmuch as the relation of attorney and client is one wherein the attorney is apt to have very great influence over the client, especially in transactions which are part of or intimately connected with the very business in reference to which the relation exists, such transactions are always scrutinized by courts with jealous care, and are set aside at the mere instance of the client, unless the attorney can show by extrinsic evidence that his client acted with full knowledge of all the facts connected with such transaction, and fully understood their effect. * * * If on his own account he has any transaction with his client about the subject of the litigation, he must with respect to such transaction be able to give, and must give, to his client all that reasonable advice against himself that he would have given him against a third person." 3 Cal.Jur. p. 623. "'* * * Not only must the attorney offer clear and satisfactory evidence that the transaction between himself and his client was fair and equitable and no advantage was taken by him, but he must also offer proof that the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length.'" Carlson v. Lantz, 208 Cal. 134, 138, 280 P. 531, 533. The client is entitled to advice independent of that of the attorney. Id., 208 Cal. at page 140, 280 P. 531; 5 Am.Jur. 288. Although that fact alone is not conclusive, it is a circumstance to be considered, as is the presumption which arises from the contract that there was a good and sufficient consideration. Munfrey v. Cleary, 75 Cal.App.2d 779, 785, 171 P.2d 750; Donovan v. Security-First Nat. Bank, 67 Cal.App.2d 845, 853, 155 P.2d 856. The burden of proof is always upon the attorney to show that the dealing was fair and just and that the client was fully advised. 3 Cal.Jur. 624, § 35. Bailey v. Security Trust Co., 179 Cal. 540, 177 P. 444, cited by plaintiff, has no application to this case. There the plaintiff charged misrepresentations by his attorney through which the latter obtained an option to purchase plaintiff's stock at a price which the court held was not its fair value. However, at the trial plaintiff did not testify. The attorney did, denying any misrepresentations and claiming that the client was in no wise deceived. The court held that there is no rule which prevents dealings between attorney and client in the absence of unfaith or unfairness on the part of the attorney, and that the mere fact that the sale price was less than the fair value did not overcome the showing of fairness made by the attorney and not denied by the client. Marlenee v. Brown, 21 Cal.2d 668, 134 P.2d 770, differs from the case at bar in that the trial court had found all issues in favor of the attorney and even doubted that the attorney had gained an advantage over the client. In Munfrey v. Cleary, supra, 75 Cal.App.2d 779, 171 P.2d 750, the trial court found that the deed from client to attorney was freely and voluntarily executed and delivered for a "good and valuable considerations" and with full knowledge of its contents and "legal effect." 75 Cal.App.2d at page 782, 171 P.2d 751. Therein the case differs from ours. Moreover, the court held that the question of whether the presumption that arises when an attorney deals with his client is overcome by the evidence is one for the trial court.

[7] There is substantial evidence to show that not only did plaintiff fail to advise defendant fully as to the full effect of the contract but discouraged defendant from seeking any independent advice concerning it; and that the contract was highly advantageous to plaintiff. He was ob-

taining one-third of the stock of the corporation, one-third of defendant's patents and royalties, which one-third was of the then value of $100,000 (defendant believed at the time that it was worth one million, dollars), and those thereafter to be obtained as long as the parties were associated together; an equal control through the voting trust of the corporation, and an equal salary with defendant. For all this, plaintiff first attempted to have defendants sign a contract which did not bind plaintiff to devote any particular time or render any particular service to the business. For all this, defendant was to receive only the cancellation of a $10,000 indebtedness, and plaintiff's services, which, however, were to be compensated for, regardless of their character, on the same basis as defendant's services. Again, plaintiff's title to stock, patents and royalties, including the latter which might thereafter be obtained by defendant, was not dependent upon any particular length of service with the company. It was transferable and inheritable even though plaintiff might not remain long with the company or his services be unsatisfactory. At the very least, in the event of a short service by plaintiff, it would have taken a law suit to determine what would become of plaintiff's interests. While it is true that plaintiff was giving up a lucrative law practice, that fact in no wise detracts from the fact that the contract was considerably one-sided. Plaintiff himself said that "the business had unlimited possibilities and was a good deal and ought to make a fortune." The evidence supports the conclusion that while defendant at all times knew the terms of the contract, he did not know or understand its full meaning and effect.

While it is true that defendant's patents had not been tested and there was competing equipment on the market, that there were serious problems of production to be solved and uncertainties as to labor and materials, that there were income and other taxes and renegotiation to be considered, the evidence shows, as stated by the trial court, that without the investment of a single dollar plaintiff obtained a one-third present interest in, and a one-half control of, an extremely valuable going concern, which owned and controlled a most valuable invention of vital worth to the war effort and whose present and potential value was well known to plaintiff. This brings us to the claim of—

Ratification.

The evidence pertinent to this issue follows. As soon as plaintiff assumed the administration of the business the salaries of plaintiff and defendant were raised to $3000 per month. Within four months plaintiff and his family had received $24,000 in royalties and similar amounts every six months. Plaintiff advised defendant for income tax purposes to transfer some of defendant's interests to his family. Plaintiff made such a transfer to his own family. Most of the receipts by both parties were put back into the business. The operations of the enterprise were expanded to a nationwide scale. Sales organizations and field representatives were established throughout the country. A separate corporation was formed in New Jersey to handle eastern production and sales. A partnership in which the parties were the principal partners was organized in Chicago. Plaintiff went abroad to establish marketing channels. There were many problems which were handled by plaintiff or under his supervision, such as priorities, negotiation, taxation, wage ceilings, production planning, advertising, personnel promotional work and accounting. Defendant, too, was equally busy in handling the production and engineering end of the business. Defendant, even up to about the time of the split, stated that plaintiff had done a good job and had contributed considerably to the success of the enterprise. Defendant let plaintiff run the administrative end of the business, signing, many times without reading them, checks which had been prepared through plaintiff's direction. The same is true of minutes of the corporation. The relationship of the parties was extremely friendly for about a year after the signing of the agreement; then, as defendant expressed it, the friendly relationship gradually changed although the business relationship continued and defendant continued to give plaintiff practically free reign in the administrative end of the business. In spite of the fact that defendant's relations with plaintiff had become very strained, defendant continued to work under the contract, because the business was going along satisfactorily and he believed the contract to be "a legal and binding document." Originally the two men occupied the same office. Later, however, plaintiff made an office for defendant in the shop portion of the plant and required defendant to use it and told defendant he would not have any interference from him in plaintiff's end of the business. About May of 1945 plaintiff presented defendant with a new agreement dated back to December, 1944, for the Chicago partnership which had been formed by an agreement dated December 28, 1943. In examining the new agreement defendant noticed that the interests of the parties were expressed therein as 50–50. He then learned for the first time that the interests had been so expressed in the 1944 agreement which he and his wife had signed. Defendant insisted that the new agreement be changed to provide the interests as 1/3–2/3 in accordance with the contract of 1942. Plaintiff changed it. Defendant desired that the corporation go into the production of sailplanes. This plaintiff urgently opposed, on the ground that it would not pay. (His prediction proved correct. After plaintiff was ousted from participation in the business, the corporation did start producing sailplanes and lost considerable money as a result.) In July, 1945, there was a telephone conversation between plaintiff in New York and defendant at the San Leandro plant in which defendant informed plaintiff of his intention of going ahead with the sailplane production in spite of plaintiff's opposition. Defendant did not like plaintiff's vulgar reply. Shortly thereafter, in August, 1945, while talking to Attorney Evans concerning patent matters, defendant told him of the situation between him and plaintiff. Evans advised him to consult an attorney in general practice. Defendant did, and for the first time learned that the contract was voidable. On September 5 defendant notified plaintiff of his intention to disaffirm the contract. Negotiations for settlement were had but were unsuccessful. Thereupon plaintiff filed this action for declaratory relief.

The court found that at all times from the making of the contract until August, 1945, the relationship of attorney and client existed between plaintiff and defendants. The evidence shows that plaintiff as well as being secretary and executive vice-president of the corporation also acted as its attorney. Defendant had no personal attorney other than plaintiff until around the middle of 1945. Shortly after the execution of the contract plaintiff advised defendant for tax purposes to transfer certain of his interests to his wife and children and supervised the making of the transfers. Each became the trustee for the other's children, and this relationship continued at all times. Plaintiff also commenced court proceedings for the change of defendant's name. In 1943 plaintiff represented defendant and the latter's mother in the legal details of a sale of Eureka property. In June, 1943, plaintiff advised defendant concerning certain licensing agreements between defendant and the corporation Plaintiff prepared the Chicago partnership agreements, the last being prepared in the spring of 1945.

Contentions of the Parties

Plaintiff contends that if defendants were overreached by plaintiff in the contract, defendants understood the contract fully from its inception and accepted during the three year period the benefits of plaintiff's performance thereunder, particularly during the last one and a half years during which the court found there existed feelings of hostility between the parties, thereby ratifying the contract. Defendants contend that while they at all times knew the terms of the contract they did not understand fully their significance and that although in their personal relations they became hostile towards each other, the relationship of attorney and client continued and because of that and the circumstance that defendants still relied on plaintiff in most of their business relationships, defendants are excused from not making inquiry concerning their legal rights. The evidence supports the conclusion that at no time during the three year period did defendants fully understand the significance of the contract. Also it supports the further conclusion that in spite of the personal hostility between them, defendants until about the middle of 1945 still considered plaintiff their lawyer and that of the company, and had full confidence in plaintiff's business judgment and advice.

[8] Section 19 of the Civil Code provides: "Every person who has actual notice of circumstances *sufficient to put a prudent man upon inquiry* as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." (Emphasis added.) "'Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. *The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.*' * * *

"* * * '* * * It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.' * * *

[9] "Another pertinent factor is that there was a fiduciary relationship between the parties at the time of the fraudulent representations. Although the general rules relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, it is recognized that in cases involving such a relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required. In Rutherford v. Rideout Bank, 11 Cal.2d 479, 486, 80 P.2d 978, 117 A.L.R. 383, it was said that because of such a relationship plaintiff could not be charged with lack of diligence even though an inquiry would have disclosed the true value of the property involved." Hobart v. Hobart Estate Co., 26 Cal.2d 412, 438, 439, 440, 159 P.2d 958, 972. Emphasis added.

"* * * no act will be held as an act of confirmation by a court of equity unless it was done with a knowledge of the legal and equitable rights of the parties whose rights are sought to be concluded by such act." Turnley v. Nixon, 112 N.J.Eq. 116, 163 A. 800, 804. "A party who is entitled to set a transaction aside cannot be charged with * * * confirmation, unless there has been knowledge of all the facts and perfect freedom of action. Acts which might appear to be acts of acquiescence will not be held to be such if the client is ignorant of the circumstances." Id. 163 A. at page 804.

[10–12] When parties are in a confidential relationship the victim of the fraud may justifiably rely upon the good faith of the guilty party, even though there may be circumstances which would put a prudent man on inquiry if the parties were dealing at arm's length. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 576, 126 P. 351, 42 L.R.A.,N.S., 125. Where there is a confidential relationship "one can act upon the presumption that there exists no intention to cheat or defraud him". Laraway v. First Nat. Bank of La Verne, 39 Cal.App.2d 718, 728, 104 P.2d 95, 100; Anderson v. Thacher, 76 Cal.App.2d 50, 70, 172 P.2d 533. "The doctrine of waiver or ratification is founded upon the fact of knowledge of all the facts, and not upon negligence." Most Worshipful Grand Lodge Free & Accepted Masons v. Hayes, Tex.Civ.App.1935, 82 S.W.2d 411, 414.

[13] The character of the hostility between the parties must be considered. Mostly it was disagreements over policies; they would not speak to each other for weeks at a time. The arrangement of their occupying adjoining desks was changed when plaintiff, over defendant's objection, had an office constructed for defendant in the shop. However, these facts did not cause defendant to lose confidence in plaintiff both as a business man and an attorney. "Our friendship as pure friends no longer existed, but it did not affect our business operations." They did not always agree but defendant still permitted plaintiff to run the administrative end of it as originally planned and each remained trustee

for the other's children. Up until the spring of 1944 defendant signed documents, letters and checks prepared under the direction of plaintiff, generally without reading them. Thereafter he paid more attention to them and on occasions examined the files on plaintiff's desk. However, he testified that this was so he would know what was going on. Prior to that time he kept in touch with what plaintiff was doing in the administrative end by discussions with plaintiff. In paying more attention to what he was signing and in getting copies of all letters written by plaintiff (as he did of all letters written by others in the company) it did not necessarily mean he no longer trusted plaintiff, but that he wanted to know what the company was doing, so that if he disagreed with any of the policies inaugurated by plaintiff he could do so. "Differences might have existed without destroying confidence in each other's honesty and integrity." Shiels v. Nathan, 12 Cal.App. 618, 108 P. 34, 40. There husband and wife had had "differences" and separated on the very date the contract was entered into, relying upon the husband's representations. In Ramos v. Pacheco, 64 Cal.App.2d 304, 309, 148 P.2d 704, it was contended that by reason of respondent's fear of appellant induced by his threats against her the confidential relationship ceased to exist. The court held that this did not destroy the confidential relationship. The question of whether the situation should have put defendant on inquiry is one of fact for the trial court. We cannot say as a matter of law that during this period anything occurred which should have made defendant suspicious that he had been overreached. A reasonable interpretation of the hostility is that it indicated at most that plaintiff was standing strictly on his rights under the contract but gave no indication to defendants that the contract itself was not binding. Nor was it such that we can say as a matter of law that it overcame the confidential relationship which in spite of it still existed between plaintiff and defendants and therefore put defendants on inquiry as to the validity of the contract. The language of Anderson v. Thacher, supra, 76 Cal.App.2d 50, 70, 172 P.2d 533, 544, is applicable here. "Under the facts of the instant case it can not be said that plaintiff's conduct in the light of her own intelligence and information was manifestly unreasonable. * * * Defendant Thacher cannot be heard to complain that plaintiff reposed too much confidence in him. * * * The law does not applaud fraud and condemn the victim thereof for his credulity. * * *

" 'The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part. The present case is not of that character.' * * * Courts rather will hold that one can act upon the presumption that there exists no intention to defraud him."

In Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383, in order to gain an advantage for a friend, the manager of the bank in which plaintiff was a depositor and whom she constantly consulted on business affairs, made misrepresentations which caused her to sell her ranch to the banker's friend for less than its true value. It was not until approximately seven years later than plaintiff discovered the fraud. In the meantime plaintiff had made no effort to ascertain the truth of the representations. In holding that this fact did not bar her action for damages the court said that in view of the confidential relationship between plaintiff and the bank manager she could not be charged with lack of diligence in not making independent investigation either at the time or afterward.

Plaintiff relies on certain cases enunciating the principle that where an attorney openly assumes a hostile attitude towards his client, the latter may no longer rely upon the confidential relationship to excuse acting to protect his own rights. Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; Boardman v. Crittenden, 52 Cal.App. 438, 198 P. 1020. In both cases the attorney was openly hostile to his client in the very inception of the contract upon which the respective action was based. In Black v. Riley, 20 Cal.App. 199, 202, 128 P. 764, 765, the court said: "It is only when he openly assumes a hostile attitude that his transactions with his client will be free from the presumption of undue influence on the part of the attorney." There was nothing in the unfriendly attitude of the parties which caused defendant to have any suspicion that the inception of the contract could be attacked by him, nor until the very end did the parties deal with each other at arm's length.

Henigan v. Yolo Fliers Club, 208 Cal. 697, 698, 284 P. 906, cited by plaintiff, was a case where the court held that the appellant should have discovered the fraud of his confidential agent at least three years prior to suit for the reason that "facts abundant came to the notice of appellant that could not but have aroused an inquiry as to the true facts." 208 Cal. at page 703, 284 P. at page 908. In considering the contention that appellant was excused from making inquiry by the confidential relationship, the court pointed out that that relationship had long since terminated. It then, referring to Simpson v. Dalziel, 135 Cal. 599, 67 P. 1080, said that the confidential relationship between attorney and client did not excuse the duty to follow up the lead to full knowledge as to the conduct of such attorney, "which inquiry was required by known facts." 208 Cal. at page 704, 284 P. at page 909.

Simpson v. Dalziel, supra, 135 Cal. 599, 67 P. 1080, was an action to recover a balance of certain moneys which plaintiff's attorney had collected for him five years before. In affirming an order sustaining without leave to amend the demurrer to the complaint on the ground that it appeared that the action was barred by the statute of limitations, the court pointed out that it appeared from the complaint that at no time had the plaintiff ever inquired of the attorney what amount he had collected for him, and held that the lack of such care and diligence did not stop the running of the statute. Such an inquiry would have been consistent with his confidence in the attorney. Natural curiosity and business prudence would have compelled such inquiry. The case holds that confidence in an attorney does not absolve a plaintiff from the exercise of reasonable or ordinary care.

Under all of the circumstances of this case we cannot say as a *matter of law* that because of the type of hostility which grew up between the parties defendants failed to exercise such care as a reasonably prudent person would have exercised under like circumstances. "Appellants contend that the means of knowledge is the equivalent of knowledge. Appellees concede that appellees or the owners had the means of discovering the inadequacy of the selling price. But it is of no consequence that the facts disclosing the fraud could have been discovered had an investigation been undertaken sooner. Appellees or the owners were not bound to make an investigation until they had knowledge of facts of such a character as to put them upon a duty of inquiry. * * * Moreover, in view of the fact that the confidential relationship between appellants and the owners of the property continued within three years of the bringing of the suit, lack of diligence was not present in failing to make an independent investigation * * *." Anglo California Nat. Bank v. Lazard, 9 Cir., 106 F.2d 693, 704.

[14] Plaintiff contends that there can be no rescission because the parties cannot be restored to the status quo, citing Solorza v. Park Water Co., 86 Cal.App.2d 653, 195 P.2d 523; Lupton v. Domestic Utilities Mfg. Co., 173 Cal. 415, 160 P. 241; and Black on Rescission, vol. 1, p. 3. Restoration of the status quo is not always required. In Spencer v. Deems, 43 Cal.App. 601, at page 605, 185 P. 671, at page 672, the court quoted from Green v. Duvergey, 146 Cal. 379, 389, 80 P. 234: "'It is not an invariable rule that the rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in *statu quo*. If equity can still be done between the parties, courts will grant relief to the defrauded party.'" Here the trial court expressly retained jurisdiction for the purpose of doing equity between the parties.

[15] Plaintiff contends that defendants did not rescind promptly and therefore are barred from relief. Assuming that such question can be raised by a plaintiff in an action for declaratory relief under the contract, the evidence supports the conclusion that the notice was timely given. Within approximately a month of the time defendants made inquiry and learned the full effect of the contract and their right to disaffirm, they acted. Thereafter, for a period of approximately four months, negotiations for settlement went on between the parties. The acts of defendants and the corporation in issuing salary checks of $1000 (they reduced the salary from $3000) in plaintiff's name but holding up the delivery thereof, and the other acts during that period, could not constitute a ratification. Plaintiff was expressly on notice that defendants were repudiating the contract, but were maintaining the status quo during the period of negotiation for settlement.

Defendants' right to avoid the contract is not based, as contended by plaintiff, solely on lack of knowledge of their legal rights. Hence cases like Bancroft v. Woodward, 183 Cal. 99, 190 P. 445, and the quotation from section 484, Restatement, Contracts, and the other cases cited by plaintiff, holding that the power of avoidance for fraud is lost if the injured party after acquiring knowledge of the fraud manifests to the other party an intention to affirm the transaction, even though he is ignorant of the law when he made the manifestation, do not apply. Here defendants did not acquire knowledge of the fraud. As pointed out heretofore, when a party is put on notice of fraud it is his duty to inquire as to his legal rights. After such duty arises and he fails to exercise it, his ignorance of his legal rights will not excuse his failure to inquire, but the determination of when defendants were put on notice under the circumstances of this case was for the trial court.

Law of the Case

[16, 17] In the decision on the prior appeal of this case, 84 Cal.App.2d 61, at page 63, 190 P.2d 40, at page 41, we said: "However, on the retrial he may be able to prove that when defendants had *knowledge* of the writing of September 5, 1942, they consented to and worked under the terms of the agreement. If such evidence is forthcoming, plaintiff will be entitled to a judgment enforcing the provisions of the agreement of September 5, 1942." Plaintiff contends that this statement establishes the law of the case, and hence all he had to show was that defendant had *knowledge* of the contract. This statement could not possibly be one intended to limit the new trial merely to a consideration of whether defendants had knowledge of the contract for several reasons: (1) There never was any contention at the first trial or at any other time that defendants did not have knowledge of the contract in the sense that they knew that they had signed it and knew of its terms. Therefore, this court could not have intended to send the case back for the trial of an issue which was conceded. (2) It is obvious, too, that the statement was not for the purpose of laying down a rule in the case but was a part of the discussion to show that the issue of ratification was separable from the other issue which the court had determined. (3) The court had not been asked to define the issue of ratification; there was no discussion concerning definition, and the court was not attempting to define it. The sole question before the court was whether the issue of ratification was severable from the issue of fraud in the inception of the contract. "* * * it is well settled that dicta do not become the law of the case." Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, 906. (4) The word "knowledge" is italicized, indicating that something more was intended than mere acquaintance with the terms of the contract. (5) Were knowledge all that was required, the court's prior language, 84 Cal.App.2d at page 63, 190 P.2d at page 41, "but statements or acts tending to ratify the execution * * * stand as separate issues" would have no meaning.

Reserved Power of the Court

[18–22] In both judgments the court reserved jurisdiction "and control over this cause and to that end it may make and enter all orders and decrees from time to time as are or shall be necessary for it to do and administer further equities between the parties arising from their previous association and relationship, independently however, of any claims or rights arising from or under the said written instrument dated September 5, 1942, which said written instrument, and all rights arising thereunder, the court hereby reaffirms are and were null and void; subject further however to the duty of the court to carry out such directions or modifications of this judgment, as may be finally given or ordered by any appellate court upon appeal from this judgment." Plaintiff contends that it is practically impossible for the court to restore the status quo and do equity to plaintiff. As before stated, the fact that the status quo cannot be restored, if such be the case, will not cause a denial of relief, if equity can be done between the parties. Green v. Duvergey, supra, 146 Cal. 379, 389, 80 P. 234; Metropolis Trust & Savings Bank v. Monnier, 169 Cal. 592, 599, 147 P. 265. We see no reason why equity cannot be done here. The powers of a court acting under section 1060 of the Code of Civil Procedure, the declaratory relief section, are broad and extensive. Adams v. Cook, 15 Cal.2d 352, 362, 101 P.2d 484. The evidence shows that plaintiff rendered a valuable service. He gave up a lucrative law practice and devoted his entire time to the business. Its success was partially due to his efforts, even though the record indicates he made a number of mistakes. He put back into the business a considerable portion of his income from it. The questions concerning taxes paid by plaintiff and his family on salary put back into the company, plaintiff's renegotiation liability, if any, and the other questions suggested by plaintiff, can easily be determined. Undoubtedly plaintiff is entitled to a determination of the reasonable value of his services and in making such determination all these matters will be taken into consideration by the trial court. They are for the trial court rather than for this court. This is an action for declaratory relief. The court declared that the contract is void. The evidence supports that conclusion. The court may now do equity and declare the further rights of the parties independently of the contract.

The judgment is affirmed.

FRED B. WOOD, J., and DONOVAN, J. pro tem., concur.

38 Cal.2d 230

Ex parte OCHSE.

Cr. 5270.

Supreme Court of California, in Bank.

Dec. 19, 1951.

Proceeding in the matter of Audrey Nadine Ochse for a writ of habeas corpus. The Supreme Court, Gibson, C. J., held that petitioner was entitled to have a psychiatrist, chosen by petitioner or her attorneys, examine her in private as an aide to petitioner's attorneys in interpreting her mental condition.

Order to show cause discharged with directions.

1. Criminal Law 🔑641(1)

A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney must be afforded reasonable opportunity to prepare for trial, and to make that right effective, counsel is entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing the defense. Pen.Code, § 1027.

2. Criminal Law 🔑666½

An accused person in custody of the law is entitled to consult with his attorney in private, without the presence of the sheriff or other representatives of the state.

3. Witnesses 🔑198(1)

A client is accorded a privilege against disclosure of private conversations with his attorney. Code Civ.Proc. § 1881, subd. 2.

4. Witnesses 🔑206

Where medical advice is required to interpret a client's condition to his attorney, the information discovered upon a private examination of the client by a physician employed by attorney falls within scope of rule protecting communications between attorney and client. Pen.Code, § 1027.

5. Criminal Law 🔑666½

Where attorney of defendant, charged with crimes of murder and assault with intent to murder, required a psychiatrist's aid in interpreting defendant's mental condition, defendant was entitled to have a psychiatrist, selected by defendant or her counsel, examine her in private.

Harold R. Haberkorn, Theo. G. Krumm, San Bernardino, for petitioner.

Lowell E. Lathrop, Dist. Atty., County of San Bernardino, Daniel J. Cowett, Deputy Atty., San Bernardino, for respondent.

GIBSON, Chief Justice.

Petitioner is confined in the San Bernardino County Jail charged by information with the crimes of murder and assault with intent to murder. She entered pleas of not guilty and not guilty by reason of insanity, and her attorneys employed a licensed physician, who is a psychiatrist, to examine her and to advise them with respect to her sanity. At the direction of petitioner's attorneys, the psychiatrist went to the jail to make the examination, but the sheriff refused to permit him to examine her in private and informed him that he could conduct the examination only in the presence of alienists appointed by the court. Petitioner refused, upon advice of counsel, to submit to examination by court-appointed psychiatrists.

In a proceeding for habeas corpus, the superior court made an order permitting any alienist selected by petitioner to examine her, but only "in conjunction with" the psychiatrists appointed by the court. Thereafter application was made to this court for a writ of habeas corpus, and we ordered the sheriff to show cause why an alienist chosen by petitioner's attorneys should not be permitted to examine her in private.

[1–3] A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney must be afforded reasonable opportunity to prepare for trial. Powell v. State of Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158; People v. Sarazzawski, 27 Cal.2d 7, 17, 161 P.2d 934. To make that right effective, counsel is obviously entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing the defense. Cf. Penal Code, § 1027. Adequate legal representation, of course, requires a full disclosure of the facts to counsel, and in order to assure that a client may safely reveal all the facts of his case to his attorney, the law has long recognized the need for secrecy with respect to communications between them. See City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26; 8 Wigmore on Evidence (3rd ed., 1940) 550 et seq. In applying this principle it has been held that an accused person in custody of the law is entitled to consult with his attorney in private, without the presence of the sheriff or other representatives of the state. In re Qualls, 58 Cal.App.2d 330, 136 P.2d 341; In re Snyder, 62 Cal.App. 697, 217 P. 777; In re Rider, 50 Cal.App. 797, 195 P. 965; State v. Davis, 9 Okl.Cr. 94, 130 P. 962, 963–964; Turner v. State, 91 Tex.Cr.R. 627, 241 S.W. 162, 163–164, 23 A.L.R. 1378, see 14 Am.Jur. 885–886. For the same basic reasons of policy, the client is accorded a privilege against disclosure of private conversations with his attorney. Code Civ.Proc. § 1881, subd. 2; Verdelli v. Gray's Harbor etc. Co., 115 Cal. 517, 525–526, 47 P. 364, 778; see 8 Wigmore on Evidence (3rd ed., 1940) 550 et seq.

[4, 5] The right of private consultation has been held to include interviews through an interpreter chosen by accused where the services of an interpreter are required. Louie Yung v. Coleman, D.C., 5 F.Supp. 702; see People v. Larrios, 220 Cal. 236, 249–250, 30 P.2d 404. This court has also held that where medical advice is required to interpret a client's condition to his attorney, the information discovered upon a private examination of the client by a physician employed by the attorney falls within the scope of the rule protecting communications between attorney and client. City & County of San Francisco v. Superior Court, 37 Cal.2d 227, 231 P.2d 26 (holding that the physician could not be compelled to testify with respect to his examination). Since the same general policy underlies both the right to consultation in private and the privilege against disclosure, it follows that where, as here, petitioner's attorney requires a psychiatrist's aid in interpreting her mental condition, she is entitled to have the psychiatrist examine her in private.

There is, however, no showing that the information under which she is charged is insufficient or that she cannot properly be held for trial if she is afforded the relief discussed above. Accordingly, the order to show cause is discharged, see In re McCoy, 32 Cal.2d 73, 76–77, 194 P.2d 531, and the sheriff is directed to allow a private examination of petitioner by an alienist or alienists selected by petitioner or her counsel.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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38 Cal.2d 146

WESTERN STATES CONST. CO. v. MUNICIPAL COURT OF CITY & COUNTY OF SAN FRANCISCO et al.

S. F. 18482.

Supreme Court of California, in Bank.

Dec. 14, 1951.

Proceeding by Western States Construction Co., a copartnership, composed of Victor Morso, and another, against the Municipal Court of the City and County of San Francisco, State of California, and others, for a writ of mandate to compel the judge of the Superior Court to settle a statement upon appeal. The Superior Court, San Francisco County, Lile T. Jacks, J., denied the petition, and petitioner appealed. The Supreme Court, Edmonds, J., held that absence of proposed amendments to a statement because of the death of counsel for respondent did not relieve the trial judge of his duty to settle the proposed statement with such corrections and additions as might be necessary.

Judgment reversed with directions.

Prior opinion 234 P.2d 777.

1. Appeal and Error 🔑607(1)

Basic purpose of rule providing for condensed statement on appeal in lieu of reporter's transcript is to permit filing of narrative statement, thus obviating record on appeal which is longer than necessary and which greatly increases costs of litigants as well as labors of appellate court without corresponding benefit. Rules on Appeal, rule 7(a).

2. Appeal and Error ⚿607(1)

Under rule providing that on appeal condensed statement in narrative form may be had in lieu of reporter's transcript, trial judge may not arbitrarily refuse to settle statement in absence of justifiable excuse. Rules on Appeal, rule 7(a).

3. Mandamus ⚿167

Withdrawal of answer to verified petition for writ of mandate conceded truth of all facts stated. Code Civ.Proc. § 1094.

4. Appeal and Error ⚿607(1)

Where judge asked to settle statement on appeal has forgotten important matters by reason of lapse of time, he can have reporter read notes taken at trial and can direct appellant as to manner and character of statement which should be prepared and which only he is willing to settle. Rules on Appeal, rule 7(a).

5. Appeal and Error ⚿607(1)

In ordering amendments to statement on appeal, trial judge has available the suggestions of respondent, judge's own memory, notes made by judge during trial, right to recall witness to repeat testimony, and right to have reporter reread such of his notes as may prove helpful, and if such is insufficient, it should be made to appear clearly from the record and reasons given why judge was convinced of his inability to settle satisfactory statement. Rules on Appeal, rule 7(a).

6. Appeal and Error ⚿607(1)

Death of counsel for party could not deprive opposing party of statutory right to have trial judge settle statement on appeal. Rules on Appeal, rule 7(a).

7. Appeal and Error ⚿607(1)

It is not duty of judge to prepare statement for appeal in lieu of reporter's transcript, but he must see that one is properly prepared and then sign it, and if attorney has omitted anything jury must direct and require him to insert it or require him to correct it. Rules on Appeal, rule 7(a).

8. Appeal and Error ⚿607(1)

Absence of proposed amendments because of death of counsel of respondent did not relieve trial judge of duty to settle appellant's proposed statements in lieu of reporter's transcript with such corrections and additions as might be necessary. Rules on Appeal, rule 7(a).

9. Appeal and Error ⚿607(1)

Purpose of rule allowing record on appeal to be presented by settled statement is to reduce cost of litigation as much as possible, and use was particularly justified where cost of reporter's transcript was nearly one-half of amount of judgment. Rules on Appeal, rule 7(a).

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A. Don Duncan, San Francisco, for appellants.

Dion R. Holm, City Atty., and Louis T. Kruger, Deputy City Atty., San Francisco, for respondents.

EDMONDS, Justice.

In an action brought by Anna Perez in the municipal court, she obtained a judgment against Western States Construction Co. When a proposed statement upon appeal was filed by Western States, the trial judge refused to settle it. There is now before this court an appeal from a judgment of the superior court denying a petition for a writ of mandate to compel him to do so.

The proposed statement, Western States alleges in its petition, "was prepared in accordance with the * * * Rules on Appeal from Municipal Courts in Civil Cases * * *, and filed within the time required by law and said Rules." It "contains all the material evidence, and is fair, and is a condensed statement in narrative form of all portions of the oral proceedings as appellants deem material to the determination of the points on appeal."

Other facts relied upon by Western States concern the proceeding at the time the proposed statement was presented to Judge Golden for settlement. According to the appellant, Scholars, an attorney of record for Perez, then stated that Crawford, one of his associates, who had taken the principal part in the trial of the action, died shortly thereafter. Because of that situation, said Scholars, he could not propose any amendments to the statement.

Upon that representation, the appellant asserts, Judge Golden made an order refusing to settle the statement. He advised the appellant, it declares, that the record on appeal would have to be a complete reporter's transcript of the proceedings at the time of the trial. The basis of his order, said the judge, was that Mr. Crawford is dead, and there were no proposed amendments to the statement, and "nothing to settle", and he could not remember all of the proceedings.

The appellant declares that the trial consumed five days and a transcript would cost approximately $300. It says that it is unable to pay for a transcript and believes Perez to be insolvent.

When the mandate proceeding was tried, the answer of the respondent municipal court was withdrawn "to expedite argument on the legal issues". Thereafter, the petition for the writ of mandate was denied.

Western States now contends that the trial judge abused his discretion in refusing to settle the statement, there being no amendments proposed and no objections made to the statement by opposing counsel or the judge. The cost of a reporter's transcript, it says, is out of all proportion to the amount of the judgment, $725, and Perez is insolvent.

The respondents argue that the reasons given by the judge in refusing to settle the statement show no abuse of discretion. He could not remember all the proceedings and the death of Crawford cast upon him the burden of acting as counsel for Perez and proposing amendments to the statement offered. For these reasons, it is said, his refusal to assume this burden, without a reporter's transcript of the whole proceedings, was within his sound discretion.

[1, 2] Rule 7(a) of the Rules on Appeal from Municipal Courts in Civil Cases provides: "If, in lieu of a reporter's transcript, the appellant desires to set forth the oral proceedings by a settled statement, he shall serve and file a notice so stating * *. Within 30 days thereafter the appellant shall serve and file a condensed statement in narrative form of all or such portions of the oral proceedings as he deems material to the determination of the points on appeal. * * *" The basic purpose of the rule "* * * is to permit the filing of a narrative statement 'in lieu of a reporter's transcript', thus obviating records on appeal being many times longer than there is any necessity for, and which very greatly increases the costs of litigants as well as the labors of the appellate court without any corresponding benefit". Keller v. Superior Court, 100 Cal.App.2d 231, 236, 223 P.2d 309, 312. Unless there is some justifiable excuse, a trial judge may not arbitrarily refuse to settle the statement. "To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty." Sansome v. Myers, 80 Cal. 483, 486, 22 P. 212, 213.

[3] In the present case, the respondents withdrew their answer to the verified petition for the writ of mandate, thereby conceding the truth of all of the facts stated by the appellant. Pereria v. Wallace, 129 Cal. 397, 400, 62 P. 61; Code Civ. Proc. § 1094; 16 Cal.Jur. 870. One of the material facts thus conceded is that the proposed statement on appeal is in condensed narrative form, "contains all of the material evidence, and is fair."

[4] The inability of the trial judge to "remember all of the proceedings" was a matter commented upon in Cripe v. Unangst, 20 Cal.App. 75, 78, 128 P. 345, 347, where it was said that in Vatcher v. Wilbur, 144 Cal. 536, 538 [78 P. 14], the correct rule to be followed by trial courts in proceedings of this nature has been laid down. "If, as alleged by respondent [judge] in his affidavit, he has forgotten by reason of the lapse of time many important matters, that difficulty can be obviated by having the reporter read to him the notes taken at the trial, from which the judge may intelligently and properly direct appellant as to the manner and character of the statement which should be prepared and which only he is willing to settle."

[5] In Keller v. Superior Court, 100 Cal.App.2d 231, 223 P.2d 309, the trial judge had pointed out certain specific deficiencies in the proposed statement and then objected generally that all of the evidence

relevant to the various points on appeal was not included. An offer was made to amend the statement to correct the specific deficiencies and to adopt the much longer proposed statement of the opposing party. The trial judge denied leave to amend and refused to settle the statement. In granting a writ of mandate, it was said that the specified deficiencies could easily have been corrected. As to the general objection that neither the proposed statement nor the amendments offered " 'contained all the evidence material to the various "points on appeal," ' nowhere does the respondent judge point out or specify any deficiencies * * *." The appellate court concluded as follows: "Before a litigant can be compelled to expend the sum of $325 for a complete reporter's transcript surely the trial judge, in the interests of justice, should specify wherein the statement as offered and amended is deficient. While a trial judge has undisputed power to settle as the record anything he wants therein, he cannot arbitrarily refuse to settle the record without disclosing a single item of relevant testimony that was omitted from the proffered statement on appeal. Under the facts here present, the respondent judge should either have allowed the amendments and ordered the statement prepared accordingly, or required such other changes as would make it conform to the facts. In ordering amendments to the statement on appeal the trial judge has available (1) the suggestions of the respondents on appeal; (2) the judge's own memory, Vatcher v. Wilbur, 144 Cal. 536, 78 P. 14; (3) notes made by the judge during the trial, 4 Corpus Juris 257, 4 C.J.S., Appeal and Error § 846; and (4) the right to recall a witness to repeat testimony, 4 Corpus Juris 257, 4 C.J.S., Appeal and Error § 846; and (5) the right to have the reporter reread such of his notes as may prove helpful. If the foregoing prove insufficient, then it should be made to clearly appear from the record, and reasons given therefor, why the trial judge was convinced of his inability to settle a satisfactory statement, agreed to by both appellant and respondents on appeal, without the benefit of a complete reporter's transcript." Keller v. Superior Court, supra, 100 Cal.App.2d at pages 235–236, 223 P.2d at page 312.

[6, 7] Nor can the death of counsel for Perez deprive Western States of its statutory right to have the trial judge settle a statement on appeal. The effect of counsel's death, it is argued, is that there were no amendments proposed to the statement offered by Western States. However, as pointed out in Sansome v. Myers, 80 Cal. 483, 486, 22 P. 212, 213, the failure of opposing counsel to offer amendments to the proposed statement does not justify the trial judge in arbitrarily refusing to act. In the Sansome case, the opposing counsel had "neglected his duty by failing to propose the necessary amendments", but the comments in that opinion are applicable equally to the present circumstances. Here, as in the Sansome case, "* * * it was not the duty of the judge to prepare a statement, but it was his duty to see that one was properly prepared, and then sign it. If the attorney for the petitioner had omitted anything material the judge should have directed and required him to insert it; or if matter was incorrectly stated he should have required him to correct it * * *. If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge would, no doubt, have been justified in refusing to settle the same, but not otherwise. This the findings show was not done. The respondent refused in the first instance to *settle* the statement, not to sign it. This we think he had no right to do. To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty."

[8, 9] So in the present case, the absence of proposed amendments, from whatever cause, did not relieve the trial judge of his duty to settle the proposed statement with such corrections and additions as might be necessary. In doing so he does not have to rely solely upon his memory; several of the memory aids suggested in the Keller case are available to him. The purpose of the rule allowing a record upon appeal to be presented by a settled statement is to reduce the cost of litigation as

much as possible. Its use is particularly justified where, as here, the cost of a reporter's transcript is nearly one-half of the amount of the judgment.

The judgment is reversed and the superior court is directed to issue a peremptory writ of mandate requiring the settlement of the statement on appeal.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

38 Cal.2d 195

Ex parte DRAKE.

Cr. 5254.

Supreme Court of California, in Bank.

Dec. 18, 1951.

Proceeding in the matter of the petition of Roy Drake for a writ of habeas corpus to have a hold order voided and to direct the Adult Authority to disregard it. The Supreme Court, Edmonds, J., held that assuming that petitioner would not be subject to extradition if sought, petition was still premature and failed to state any grounds for present relief in view of fact that he admitted that he was legally and lawfully imprisoned.

Writ discharged.

Schauer, J., dissented.

Prior opinion 233 P.2d 931.

1. Habeas Corpus ⚷50

Where prisoner alleged hold order against him by another state and that, aside from hold order, he was eligible for parole and sought writ of habeas corpus to have hold order adjudged void and to direct Adult Authority to disregard it, and conditional order of Adult Authority declared that petitioner would be paroled in 1952, subject to hold, assuming petitioner would not be subject to extradition if sought, petition for writ of habeas corpus was still premature and failed to state any grounds for present relief in view of fact that he admitted that he was legally and lawfully imprisoned.

2. Habeas Corpus ⚷1

Purpose of writ of habeas corpus is to inquire into legality of detention, and detention being admittedly legal, no ground for issuance of writ exists. Pen.Code, § 1473.

3. Pardon ⚷7

Where prisoner was extradited from Mississippi upon the initiative of Mississippi governor and imprisoned in California for escape, and hold order was issued against prisoner, hold order in no way affected prisoner's right to parole under California statutes.

4. Pardon ⚷14

Where prisoner, who had been extradited from Mississippi upon initiative of Mississippi governor and imprisoned for escape, was subject to Mississippi hold order, and Adult Authority issued conditional order of future parole subject to hold order, under conditional order prisoner had no basis to litigate right of Mississippi to again imprison him.

5. Pardon ⚷14.3

Where Adult Authority issued conditional order that at a future date prisoner would be released on parole, until effective date of order, prisoner had no vested rights under order, and action of Authority neither granted nor deprived him of any rights whatsoever.

6. Habeas Corpus ⚷9

Where petitioner was extradited from Mississippi upon initiative of Mississippi governor and imprisoned for escape, and Mississippi filed hold order, subject to which Adult Authority issued conditional order granting parole at future date, and prisoner sought to avoid hold order by writ of habeas corpus, but no extradition proceedings were pending, and prisoner had not been released from detention, which he admitted was legal, until prisoner is detained for extradition proceedings, there would be no detention which could be questioned by means of habeas corpus. Pen.Code, § 1550.1.

7. Habeas Corpus 🔑**1**

Habeas corpus does not lie to challenge validity of an anticipated future action nor to secure declaratory relief in advance thereof.

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Mento & Buchler, and George K. Littlefield, all of Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., Gail A. Strader, Deputy Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

In his petition for a writ of habeas corpus, Roy Drake, an inmate of Folsom Prison, alleges that in 1943 he was sentenced to imprisonment on his plea of guilty to two charges of first degree robbery. Seven months later, he and three other convicts escaped. The following year, in Mississippi, he was sentenced to imprisonment for 100 years for robbery with firearms.

Drake asserts that as a prisoner of Mississippi he was subjected to brutal and inhuman treatment on a prison farm. According to his petition, in 1947 the Governor of Mississippi asked the California prison authorities whether they would accept Drake to complete his term of imprisonment from which he had escaped. California agreed to do so and forwarded extradition papers.

At the time of the issuance of these papers, Drake says, he was, without the advice of counsel and in the presence of several Mississippi prison guards, ordered to sign a document if he "knew what was good for him". This document, as set forth in his petition, constitutes an agreement "freely and voluntarily * * * to accompany San Quentin prison authorities as a prisoner from the Mississippi State Penitentiary". Drake alleges that he signed this document "without any intent of waiving any of his rights and only because he knew that he would receive a sadistic lashing by the guard if the document was not signed".

The extradition papers of California were honored by the Governor of Mississippi, who authorized the superintendent of the Mississippi State Penitentiary to release Drake into the custody of the California authorities. The authorization, as set forth in Drake's petition, reads: "This release to the California authorities is granted with the distinct understanding that in the event this prisoner is ever granted executive clemency of any kind in California or is ever released for any reasons from the San Quentin Prison, State of California, he will be delivered to authorities from the State of Mississippi for return to the Mississippi State Penitentiary, and it is expressly understood that the State of Mississippi will exercise its right to return this prisoner to the State of Mississippi in the event his release is ever contemplated." However, it does not appear that Drake entered into any agreement to return to Mississippi if and when released by the California authorities.

After his return to California, Drake was tried and convicted upon the charge of escaping from San Quentin. The Adult Authority fixed his term at a maximum of 12 years. Later he was transferred to Folsom Prison and informed that Mississippi had filed a "hold order" against him.

Drake says that, aside from the "hold order", he is eligible for parole. Requests to the Governor of Mississippi for withdrawal and dismissal of the "hold order", he alleges, have been denied upon the ground that his release from the Mississippi prison was an "indefinite suspension of sentence revokable at the will of the Governor".

The record in this proceeding includes a certified copy of the minutes of the Adult Authority which recite that Drake was, "Granted parole effective April 14, 1952 to go to family in Indiana subject to Hold." He here asks the court to adjudge the "hold order" to be void and direct the Adult Authority to disregard it. He takes the position that he is not a fugitive from justice from Mississippi and, therefore, is not extraditable to that state. If extradited to Mississippi, he says, he would be subjected to cruel and inhuman punishment in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.

By an answer and return to the petition, the attorney general declares that Drake is now lawfully imprisoned under a sentence which has not expired. For that reason, it is said, Drake is not now entitled to his discharge from custody. The allegations of Drake's petition are not denied. The state treats them as being insufficient to justify the relief requested.

[1, 2] Drake asserts that he is entitled to the relief asked by him because of the state's failure to deny the facts stated in his petition. However, even if those facts are considered as being true, no ground for issuance of the writ of habeas corpus is shown. Assuming that Drake would not be subject to extradition if sought, the petition still is premature and fails to state any grounds for present relief for he admits that he "is legally and lawfully imprisoned". The purpose of the writ of habeas corpus is to inquire into the legality of the detention. (§ 1473, Penal Code.) The detention being admittedly legal, no ground for issuance of the writ exists.

[3] Drake argues, however, that his situation is analogous to the inquiry on habeas corpus into a prisoner's status as an habitual criminal as that status affects his rights to parole. But the inquiry in such a case directly concerns the legality of the detention under an adjudication as an habitual criminal. On the contrary, the "hold order" here questioned in no way affects Drake's right to parole under the statutes.

[4, 5] Under the conditional order made by the Adult Authority, Drake has no basis to litigate the right of Mississippi to imprison him. The Adult Authority may alter, modify or revoke its order at any time before the specified effective date. "The situation here is that the action of the board is nothing more than a determination that it will, at a future date, release the prisoner on parole unless intervening circumstances should prompt the board to retain him in further custody." In re Allen, 27 Cal.App.2d 447, 448, 81 P.2d 168. Until the effective date of the order, Drake has no vested rights under it; the action of the Adult Authority heretofore taken neither grants nor deprives him of any rights whatsoever.

[6, 7] No present extradition proceedings are pending. Should Drake be detained at some future date upon extradition proceedings, he may then apply for the writ of habeas corpus to test the legality of such detention. (§ 1550.1, Penal Code.) Until that time, there is no detention which Drake can question by means of the writ. Whether Drake is subject to extradition, or whether his constitutional rights would be violated by extradition, are questions not now presented. Habeas corpus does not lie to challenge the validity of an anticipated future action nor to secure declaratory relief in advance thereof. Ex parte Rockwell, D.C., 75 F.Supp. 702; Boyce v. United States, D.C., 52 F.Supp. 115, 116.

The writ is discharged and the petitioner is remanded to custody.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I concur in the conclusion that the writ should be discharged. However, I dissent from the holding that the prisoner cannot in this proceeding question the correctness of the Adult Authority's determination to grant parole "subject to Hold." In my opinion petitioner at this time has the right to test the legality of the Adult Authority's recognition of the Mississippi "hold order." It is implicit in the action taken by the Authority that it accords validity and gives effect to such order; it has given consideration to that hold order in the action it has taken and it has refused to pass on petitioner's application independently of such order. It is true that petitioner has no vested right to the grant of parole effective April 14, 1952, but he does have the right to have the action which the authority has taken, or may take, based upon correct legal grounds; he has the right to have the Authority consider and act on his application for parole excluding from their consideration the Mississippi hold order if it is invalid as he contends and prima facie shows.

Habeas corpus is the proper remedy for a prisoner who seeks, not release, but a direction to the Authority that in fixing the prisoner's term or considering his application for parole it should act under a correct view of the prisoner's status and his rights thereunder. The situation is analogous to that of a prisoner who has been erroneously committed as an habitual criminal, or erroneously committed as an habitual criminal with three rather than two prior convictions. Such a prisoner, on petitioning for habeas corpus, is entitled to an opinion correctly declaring his rights and "The proper course to pursue is for the constituted authority to refix the sentence of the petitioner in accordance with the declaration of his rights as stated in * * * [such] opinion." (In re Seeley (1946), 29 Cal.2d 294, 303, 176 P.2d 24.) Similarly, where there is a question of such a prisoner's eligibility for parole, he is entitled to a declaration that "it is his right to have a request for parole considered and determined by the Adult Authority." (In re Bramble (1947), 31 Cal.2d 43, 54, 187 P.2d 411.) Likewise, petitioner here should be able to obtain a declaration (if on the merits he is entitled to it) that the Authority consider his case and act on it without consideration of the "hold order," which (it prima facie appears) is invalid because it was the result of coercion.

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38 Cal.2d 214

JOHN DEERE PLOW CO. OF MOLINE v. FRANCHISE TAX BOARD OF CALIFORNIA.

Sac. 6153.

Supreme Court of California, in Bank.

Dec. 19, 1951.

The John Deere Plow Company of Moline (an Illinois corporation) brought action against the Franchise Tax Board of the State of California to recover an additional franchise tax assessed against plaintiff. The Superior Court of Sacramento County, B. F. Van Dyke, J., entered a judgment adverse to the plaintiff, and the plaintiff appealed. The Supreme Court, Spence, J., held that use of a three-factor formula in measuring plaintiff's net income for business done within the state for franchise tax purposes, was proper, though according to the factors of the formula, the plaintiff's jobbing house within the state had not been so productive of income as other jobbing houses in other parts of the country.

Judgment affirmed.

1. Taxation 🔑376(4)

Fact that taxpayer may show that according to a separate accounting system, the activities in the taxing state were less profitable than those without the state, or even resulted in a loss, does not preclude use of a formula as a method of apportionment of the unitary income for franchise tax purposes, and the only requirement is that the formula used be not intrinsically arbitrary or produce an unreasonable result. Gen.Laws, Act 8488, § 10.

2. Taxation 🔑376(4)

In the apportionment of a unitary business of a taxpayer doing business both within and outside the state, for franchise tax purposes, the formula used must give adequate weight to the essential elements responsible for the earning of the income, and must not include income unconnected with the unitary business. Gen.Laws, Act 8488, § 10.

3. Taxation 🔑376(4)

Where a business is unitary in character, so that its separate parts cannot be fairly considered by themselves, and the whole business in the several states derives a value from unity of use, allocation of income on a reasonable formula for franchise tax purposes is proper. Gen. Laws, Act 8488, § 10.

4. Taxation 🔑376(4)

In determining franchise tax in California of Illinois corporation, which did business in many states, and which maintained a jobbing house in San Francisco to serve California, Arizona, and part of Nevada, it was proper to use a three factor formula relating to property, payroll, and sales, though according to those factors, the San Francisco jobbing house was not so productive of income as other jobbing houses, in other parts of the country. Gen.Laws, Act 8488, § 10.

Kent & Brookes, Arthur H. Kent, and Valentine Brookes, all of San Francisco, John S. Best, Milwaukee, Wis., Lewis D. Wilson, Chicago, Ill., of counsel, for appellant.

Fred N. Howser, Edmund G. Brown, Attys. Gen., James E. Sabine and Irving H. Perluss, Deputy Attys. Gen., for respondent.

SPENCE, Justice.

Plaintiff brought this action to recover an additional franchise tax assessed against it for the taxable year 1938, based upon income for the year 1937, under authority of the Bank and Corporation Franchise Tax Act, Stats.1929, p. 19, as amended, 2 Deering's Gen.Laws 1937, Act 8488, p. 3851, and paid under protest. The trial court found in defendant's favor, and from the judgment accordingly entered, plaintiff appeals.

The sole point in controversy is the propriety of the Franchise Tax Commissioner's application of a three-factor formula in measure of plaintiff's net income from business done within this state for the year involved. Plaintiff maintains that such formula attributes to California income derived wholly from business done without this state, so that such allocation is not only contrary to the governing act but likewise is objectionable as violative of the due process and equal protection of the law clauses of the Fourteenth Amendment. But an examination of the record in the light of settled legal principles sustains the use of the challenged formula as a reasonable method of apportionment for determining plaintiff's franchise tax liability in this state, and accordingly the judgment must be affirmed.

At all times herein mentioned plaintiff was an Illinois corporation, authorized to do business within this state, which business consisted of the sale of a full line of agricultural machinery, implements, and tractors at wholesale to dealers. It maintained a jobbing house in San Francisco to serve the states of California, Arizona and part of Nevada, and in addition, it did a certain amount of exporting to the Orient. It also owned and operated four other jobbing houses, each serving trade in the surrounding territory and respectively located at Moline, Illinois; Omaha, Nebraska; Portland, Oregon; and Salt Lake City, Utah.

All of plaintiff's capital stock was owned by Deere & Company, an Illinois corporation, which was engaged in the business of manufacturing and selling farm equipment, with operations extending from the purchase of raw materials to the distribution of the finished products. Deere & Company also owned the capital stock of some 83 other corporations—manufacturing plants, factories, jobbing houses, and retail outlets—integrated into the general flow of business of Deere & Company in its production, handling and marketing of a full line of farm equipment. The various acquired companies functioned in the overall operations of Deere & Company in the following manner: different items were produced in the several manufacturing plants and factories, with the production process regulated so there would be no overlapping; the manufactured products were then transferred to Deere & Company, which in turn consigned them to the subsidiary jobbing corporations, and the latter thereupon disposed of the goods either through their own retail outlets or through independent retail dealers. In furtherance of the overall business, Deere & Company maintained at its offices a central purchasing department for quantity buying of the raw materials needed for the affiliated factories and manufacturing plants; a central financial department for negotiating bank loans, with Deere & Company advancing funds to the subsidiary companies as required; a central research laboratory for testing and improving the products of the factories; a central sales department for directing sales activities, fixing maximum terms and minimum prices to be observed by the jobbing houses, prescribing dealers' uniform contracts for said houses, and setting forth general policies on all sales matters; a central traffic department for arranging freight routing in response to orders from the jobbing houses as part of the marketing function; a central advertising department for publication of a trade magazine and circulars, as well as for placement of national advertising; and a central insurance department for supervision of all insurance coverage for the properties and personnel of the affiliated companies. These and other central administrative departments in the Deere & Company organization established general management policies and operating procedures. Among important matters of policy determined by Deere & Company were volume discounts to be allowed by each jobbing house to retail dealers, warranties, retail store operations, accounting procedure, and pension plans affecting all the employees in the organization. Many of these matters were covered in branch house bulletins regularly sent by Deere & Company to its affiliated companies; the latter in turn rendered monthly accounts to Deere & Company as to financial status and operating expenses; and the jobbing houses, in reporting sale transactions, remitted to Deere & Company excess funds to be applied against their respective net accounts. Considerable freedom of action was allowed the local managers of the various jobbing houses so long as they kept within the broad outline of policy established by the central management. By such unity in ownership and control of the affiliated companies, Deere & Company effected substantial savings in the organization's integrated activities.

In 1934 Deere & Company entered into a distribution arrangement with the Caterpillar Tractor Company to meet a competitive trade development. That year the International Harvester Company and Allis-Chalmers Manufacturing Company, both of which produced lines of farm machinery competitive with the Deere line, commenced to manufacture track-type tractors and so provided their distributors with a decided advantage in being able to offer customers a complete line of agricultural equipment—tractors plus the implements to be used with them. While Deere & Company manufactured wheel-type tractors along with its line of farm machinery, it did not manufacture track-type tractors. On the other hand, Caterpillar did manufacture track-type tractors but not the farm equipment to be used with them. In recognition of their mutual business interest, the Deere organization and Caterpillar arranged to have their respective products handled together by the same dealers, thus offering a full line of tractor and complementary farm equipment on a competitive basis with International Harvester and Allis-Chalmers. This connection with Caterpillar also enabled the Deere organization to develop its industrial as well as agricultural business so that it was not so completely dependent upon the farmer trade. Thus Caterpillar distributors throughout the country could handle the sale of Deere wheel-type tractors to industrial users so as to promote the use of such tractors with Caterpillar road machinery and other industrial equipment. The arrangement with Caterpillar was effected as a matter of policy by Deere & Company for general application to the entire organization.

The competitive situation was particularly acute on the West Coast in that differences in topographical, climatic and soil conditions as compared with other parts of the country caused track-type tractors to be much more widely used in that area than the wheel-type machines. This situation caused plaintiff to make some basic changes in its method of doing business pursuant to the arrangement between Deere & Company and Caterpillar to use common dealers, who would sell the combined products of both organizations to all classes of customers. In plaintiff's San Francisco trade territory the Caterpillar dealers were more strongly established, and accordingly plaintiff's San Francisco house discontinued doing business with practically all of its former dealers, numbering approximately 250, and began marketing its goods through Caterpillar distributors. Upon this basis plaintiff reduced its selling outlets to 44—retaining 25 of its old dealers as established in isolated communities and replacing its other dealer customers with 19 new Deere-Caterpillar distributors.

The use of former Caterpillar dealers for the distribution of the Deere line of products in the trade territory of plaintiff's

San Francisco jobbing house necessitated plaintiff's undertaking an extensive program of education with regard to the selling and servicing of such goods; and additional salesmen were employed to visit the new dealers and acquaint them with the Deere output. Plaintiff's repair and service departments in the San Francisco territory were revised and expanded, staffed with additional trained employees, and equipped with facilities to provide equivalent maintenance and care for both lines of goods. Upon the termination of its accounts with many of its former dealer customers, plaintiff's San Francisco house had to arrange for the goods in their hands either to be transferred to the new Deere-Caterpillar distributor who took over that part of the San Francisco trade territory or returned to plaintiff's San Francisco jobbing house. In some instances, after initial transfer to the new dealer, the old goods would subsequently be returned to plaintiff's San Francisco jobbing house for credit. The handling of all this merchandise by plaintiff's San Francisco jobbing house involved considerable checking and reconditioning of the goods, as well as the renting of additional storage space, with a resulting increase in warehouse and transfer expenses for plaintiff's San Francisco house.

The bulk of the goods sold by plaintiff's San Francisco house was purchased from Deere & Company for a price determined by applying agreed discounts to the minimum resale price of the goods to the retail dealers. Deere & Company charged the same uniform price to all jobbing houses in the organization for the various lines of goods, adjusting, of course, for freight differentials. The prices and terms so fixed for plaintiff's San Francisco house allowed it a gross profit margin from its sales comparable to that realized by the other jobbing houses operating in the Deere organization. However, in plaintiff's San Francisco trade territory the change in the dealer outlets markedly affected not only the expenses but also the income of the San Francisco house. Thus the new dealers, stronger and better financed as established Caterpillar distributors than the former Deere dealers with plaintiff's San Francisco house, were able to take greater advantage of the cash and volume discount rates allowed to plaintiff's dealers; and also the financial resources of the new dealers did not make it necessary for them to ask plaintiff for the rediscount of farmers' paper as received on the sale of goods. Upon such basis plaintiff claims that net income of its San Francisco jobbing house was materially reduced.

For the taxable year 1938 plaintiff filed an amended franchise tax return showing a California net income of $70,446.79, according to its separate accounting system, and the tax computed thereon was paid. Thereafter plaintiff received notice of an additional tax assessment of $12,167.53, based upon the commissioner's determination of plaintiff's California net income in the total amount of $378,047.71, computed through use of a three-factor formula—property, payroll and sales—in allocating to plaintiff's California business a percentage of net income out of the consolidated net income of all the affiliated companies in the Deere organization. After protest had been made and overruled by the Franchise Tax Commissioner, plaintiff paid the additional assessment plus interest, and then filed this action for recovery of such payment.

Section 10 of the Bank and Corporation Franchise Tax Act, as in effect during the period here involved, provided that "if the entire business * * * is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. * * * determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation." 2 Deering's Gen.Laws

1937, Act 8488, pp. 3851, 3858, Stats.1929, p. 19, amended by Stats.1931, p. 2226, Stats.1935, p. 965.

Plaintiff does not question the Franchise Tax Commissioner's determination that its California business was part of the unitary enterprise of Deere & Company as a multistate manufacturing and selling organization, and it concedes that formula allocation ordinarily produces a reasonable measure of taxing values for franchise tax purposes where a unitary business is involved. The commissioner here used the three factor formula of property, payroll and sales in computing the net income of plaintiff's San Francisco house, considered as an integral unit in the entire business comprising Deere & Company and all its affiliated companies. Edison California Stores v. McColgan, 30 Cal.2d 472, 475, 183 P.2d 16. Such formula has been recognized as embracing factors sufficiently diversified to reflect "the relative contribution of the activities in the various states to the production of the total unitary income" so as to allocate to California, its just proportion of the profits earned from a unitary business. Butler Brothers v. McColgan, 17 Cal.2d 664, 678, 111 P.2d 334, 341 affirmed 315 U.S. 501, 509, 62 S.Ct. 701, 86 L.Ed. 991. Its fairness in the apportionment of unitary income to sources within and without the state has been declared settled, Edison California Stores v. McColgan, supra, 30 Cal.2d 472, 479, 183 P.2d 16, consistent with "practical administrative difficulties that necessarily arise in fixing upon a workable formula for general application." El Dorado Oil Works v. McColgan, 34 Cal.2d 731, 738, 215 P.2d 4, 9. However, plaintiff maintains that here, as shown by its separate accounting system, the formula used has produced unreasonable results by assigning to this state extra-territorial values in the apportionment of the unitary income, and it therefore may not serve as an appropriate measure of its California franchise tax. But an analysis of the record fails to sustain plaintiff's position.

Plaintiff claims that the impropriety of the formula in question stems from its disregard of differences in both the expenses of operation and the productivity of income from the three factors of property, payroll, and sales in relation to its California business for the tax period involved. As shown by the accounting records, prepared at the home office of Deere & Company and covering the 9 affiliated jobbing houses in the organization but treating them as separate entities, plaintiff submits that its San Francisco house was not conducted so profitably as other jobbing houses in the national system. In this connection it refers to these conditions of variation from the national average as found by the trial court: that in 1937 "the San Francisco ratio was $6.76 in wages and salaries for each $100 of sales, whereas the average ratio for all included United States houses was $4.46," a difference of almost 50 per cent; that "in net tangible assets * * * the San Francisco ratio was $18.26 invested for each $100 of sales, whereas the average ratio for all included United States houses was $6.76," a difference of nearly 200 per cent; that "in selling and general expenses * * * the San Francisco ratio was $13,676 of such expenses for each $100 of sales, whereas the average ratio for all included United States houses was $8,781," a difference of about 64 per cent; and that "the cash and volume discounts allowed to customers of the San Francisco jobbing house * * * were substantially higher in relation to sales than were such discounts allowed, on the average, by the other United States jobbing houses" in the organization. The trial court found that these accounting records were "accurately kept according to generally accepted accounting practices and * * * truly reflected" the ratio of the respective factors to the "gross receipts from sales." In this state of the record showing "proof of variations from the norm," plaintiff maintains that the formula operates to distort the productivity of its California business and cannot work properly in reasonably reflecting the proportionate part of the unitary income attributable to this state.

[1] But in so arguing plaintiff fails to take into account the underlying concept of formula apportionment in the allocation

of income from a unitary business: that the unitary income is derived from the functioning of the business as a whole, to which the activities in the various states contribute; and that by reason of such interrelated activities in the integrated overall enterprise, the business done within the state is not truly separate and distinct from the business done without the state so as reasonably to permit of a segregation of income under the separate accounting method rather than use of the formula method in assigning to the taxing state its fair share of taxable values. Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 667–668, 111 P.2d 334; Edison California Stores v. McColgan, supra, 30 Cal.2d 472, 477–479, 183 P.2d 16; El Dorado Oil Works v. McColgan, supra, 34 Cal.2d 731, 735, 215 P.2d 4. As above stated, here the overall organization of Deere & Company was a manufacturing and selling business having its operations extending into a number of different states and providing an example of a typical unitary business subject to formula allocation as a reasonable method of apportionment for franchise tax purposes. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; Bass, Ratcliff & Gretton, Ltd. v. State Tax Com., 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282; North American Cement Corp. v. Graves, 299 U. S. 517, 57 S.Ct. 311, 81 L.Ed. 381; International Harvester Co. v. Evatt, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. 390. The fact that the taxpayer may show that according to a separate accounting system, the activities in the taxing state were less profitable than those without the state, or even resulted in a loss, does not preclude use of a formula as a method of apportionment of the unitary income. (Ibid.) The only requirement is that the formula used be not intrinsically arbitrary or produce an unreasonable result. Such was the situation in the case of Hans Rees' Sons v. State of North Carolina ex rel. Maxwell, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879, where the court recognized the unitary character of the business as a manufacturing and selling enterprise extending into several states and to which a formula method of apportionment was appropriate, but refused to approve the particular formula employed for the reason that it consisted simply of the property factor and failed to give proper weight to the extensive activities of the company without the state, so that the result reached was unreasonable. See Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 673, 111 P.2d 334; Southern Pacific Co. v. McColgan, 68 Cal.App.2d 48, 60, 156 P.2d 81.

[2] In the apportionment of a unitary business the formula used must give adequate weight to the essential elements responsible for the earning of the income, Butler Brothers v. McColgan, supra, 315 U.S. 501, 509, 62 S.Ct. 701; see Pacific Fruit Express Co. v. McColgan, 67 Cal. App.2d 93, 100, 153 P.2d 607, and must not include income unconnected with the unitary business, People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 129 N.E. 202, 204–205, certiorari denied 256 U.S. 702, 41 S.Ct. 624, 65 L.Ed. 1179; also Fargo v. Hart, 193 U.S. 490, 501–502, 24 S.Ct. 498, 48 L.Ed. 761; Union Tank Line Co. v. Wright, 249 U.S. 275, 282–293, 39 S.Ct. 276, 63 L.Ed. 602; Southern Pacific Co. v. McColgan, supra, 68 Cal.App.2d 48, 82, 156 P.2d 81; see Altman and Keesling, Allocation of Income in State Taxation, 2nd Ed., 1950, p. 97, but its propriety in a given case does not require that the factors appropriately employed be equally productive in the taxing state as they are for the business as a whole. Varying conditions in the different states wherein the integrated parts of the whole business function must be expected to cause individual deviation from the national average of the factors in the formula equation, and yet the mutual dependency of the interrelated activities in furtherance of the entire business sustains the apportionment process. North American Cement Corp. v. Graves, supra, 299 U.S. 517, 57 S.Ct. 311, 81 L.Ed. 381; Ford Motor Co. v. Beauchamp, 308 U.S. 331, 336, 60 S.Ct. 273, 84 L.Ed. 304. Thus in the case of Crane Co. v. Carson, 191 Tenn. 353, 234 S.W.2d 644, certiorari denied 340 U.S. 906, 71 S.Ct. 282, 95 L.Ed. 655, the taxpayer was engaged in a unitary business

consisting of a manufacturing and selling enterprise extending into several states. In challenge of the use of the statutory formula for apportionment of the overall business done within the taxing state, the taxpayer introduced voluminous records, according to its separate accounting system, to show that its factory in the taxing state suffered enormous losses by reason of unusual expenses for the tax period involved: increased payrolls upon the hiring of additional personnel, extended capital expenditures for enlargement and improvement of the manufacturing plant, and cost of reconversion from war-time to peace-time needs. The business as a whole was profitable. In upholding the statutory allocation formula as fairly calculated to assign to the taxing state that portion of the net income of the unitary business reasonably attributable to business done within its borders and involving no assessment of extra-territorial values, the court expressly noted that the taxpayer sought to treat the factory in question as "a separate entity" and "as though it did not maintain any retail sales organization", so that no consideration was given to their respective integrated contributions to the successful operation of the overall enterprise. 234 S.W.2d at page 645.

A like situation prevails here in that plaintiff argues that unusual conditions affecting the conduct of its San Francisco jobbing house preclude reasonable application of the three-factor formula. Thus it refers to the effect of the above-mentioned Caterpillar transaction on its California business as involving an increase of operating expenses—through expanded payrolls, added repair and service facilities, extended warehouse handling and transfer charges—and a decrease in productive financial return—through the greater demand for cash and volume discount allowances on sales to the new strongly financed dealers. While plaintiff admits that the sales of its San Francisco jobbing house were slightly more productive of gross income than were the sales of the other United States jobbing houses in the overall system (24.673 per cent as against 23.668 per cent, or an amount of $29,765.44 in favor of the San Francisco house above the average), it maintains that this advantage was more than offset by the substantially higher operating expenses of that house. But these expenses are not chargeable only to the San Francisco jobbing house and without regard for their effect on the business of the organization as a whole. As the record shows, the Caterpillar transaction was not an arrangement confined to plaintiff's San Francisco house as a local expedient, but was of general application to the entire organization as a matter of national policy and adopted as such by the directors of Deere & Company. By such arrangement both Deere & Company and Caterpillar were able to meet a serious competitive condition, which though more acute on the West Coast, nevertheless prevailed to a limited extent in other trade territories served by the jobbing houses in the Deere organization. Moreover, the arrangement gave Deere & Company an opportunity to develop on a national scale an industrial as well as an agricultural business, entailing not only an overall increase in business through entry of its farm equipment into the new field but also less dependence upon the farmer trade. As such matter of national policy, the Caterpillar transaction is not properly segregable to the San Francisco jobbing house in sole reduction of the income from its sales in view of the fact that it contributed to the advantageous operation ot the entire business.

Likewise the property investments and payroll expenses of plaintiff's San Francisco jobbing house are not segregable solely to California business and in disregard of the unitary business of which it is an integrated part. In the balance of the three factors of the formula—property, payroll, and sales—the operation of the portion of the unitary business within one state is dependent upon or contributes to the operation of the unitary business without the state, and the California business of plaintiff's San Francisco jobbing house may not fairly be considered as a unit separate not only from other jobbing houses in the entire system but also from the manufacturing activities in the national enterprise. Underwood Typewriter Co. v. Chamberlain, supra, 254 U.S. 113, 120–121, 41 S.Ct. 45, 65 L.Ed. 165; Bass, Ratcliff & Gretton, Ltd. v. State Tax Com., 266 U.S. 271, 282, 45 S.Ct. 82. With regard to a unitary business, the place where expenses affecting the entire business are incurred has little or no bearing on the question of how such expenses should be allocated. Thus, in the situation here involving the manufacture and sale of goods as a composite enterprise, selling expenses in one state may logically affect the amount of income realized from sales in other states through the following chain of processes: more sales in the aggregate, calling in turn for an increase in production, resulting in a reduced per unit cost, in consequence of spreading certain fixed or more or less constant charges over a broader base and increasing purchasing power so as to lessen the cost per unit of raw material, with the decrease in unit cost of goods manufactured causing an increase in the profit or income gained from sales in other states. Equally appropriate here is the statement made in Crane Co. v. Carson, supra, 234 S.W.2d 644, at page 646, in relation to the propriety of formula allocation of unitary income from a manufacturing-selling enterprise: "* * * the final stage in the complainant's operation is the retail sale. However, the sale is merely the act by which the income is captured which has been the result of the complainant's entire operation, commencing with the purchase of raw material, its manufacture, and the transportation and distribution of the manufactured product to the final sale by the retail outlet." The same observation may be made with respect to plaintiff's property investments in California redounding to the benefit of the entire organization.

Nor does the fact that the trial court found that the accounting records of plaintiff's San Francisco jobbing house accurately set forth its California sales and operating expenses preclude the further finding that such "records * * * during the period involved did not accurately reflect the income of the plaintiff attributable to its operations and property within the State of California for said period." There is "no necessary inconsistency between the accuracy and fairness of the taxpayer's accounting and the different result obtained by the formula method of allocating income", Edison California Stores v. McColgan, supra, 30 Cal.2d 472, 483, 183 P.2d 16, 23, since a "particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders" Butler Brothers v. McColgan, supra, 315 U.S. 501, 507, 62 S.Ct. 701, 704, so that for "taxation purposes the one does not impeach the other." Edison California Stores v. McColgan, supra, 30 Cal. 2d at page 483, 183 P.2d at page 23.

[3] Plaintiff argues that contrary to the situation in Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 677, 111 P.2d 334, 341, it has not "failed to show a variance from normal in either the California sales, property or payroll, or in either expenses or revenues," and that accordingly its showing responds to the test prescribed in Norfolk & Western Ry. Co. v. North Carolina ex rel. Maxwell, 297 U.S. 682, 688, 56 S.Ct. 625, 628, 80 L.Ed. 977, in providing "clear and cogent" evidence "directed to each of [the related terms] alike" in the formula so as to establish the unfairness of its application in the particular circumstances here involved. But regardless of the fact that the formula equation is not framed on the assumption that there must be uniformity of operating revenues and expenses in the relative functions of the various units contributing to the earnings of an integrated multistate business, an assumption which would be "contrary to notorious facts" see Norfolk & Western Ry. Co. v. North Carolina ex rel. Maxwell, supra, 297 U.S. at page 688, 56 S.Ct. at page 628, plaintiff's evidence is directed solely to prevailing ratio deviations affecting the selling activities of the Deere organization severed from the interrelated processes. Thus plaintiff shows merely that according to the three factors of the formula—property, payroll, and sales—its San Francisco jobbing house has not been so productive

of income as other jobbing houses in the Deere organization; and so maintains that the formula, though fair on its face as representing a proper balance of accepted income producing factors, Silverstein, Problems of Apportionment in Taxation of Multistate Business, 4 Tax L.Rev. [1949], pp. 207, 258; Altman and Keesling, Allocation of Income in State Taxation, 2nd Ed., 1950, p. 37, works unfairly here. Such partial showing on the basis of plaintiff's separate accounting system misconceives the whole purport of the unit rule of assessment as resting on the principle that "where a business is unitary in character, so that its separate parts cannot be fairly considered by themselves and the whole business in the several states derives a value from the unity of use, allocation of income upon a reasonable formula is properly sustained." Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 673, 111 P.2d 334, 339; see, also, 315 U.S. 501, 507–508, 62 S.Ct. 701.

Plaintiff does not suggest that another formula embracing different factors would produce a more accurate apportionment of the unitary business of the Deere organization done within and without the state, cf. Pacific Fruit Express Co. v. McColgan, supra, 67 Cal.App.2d 93, 95, 153 P.2d 607; El Dorado Oil Works v. McColgan, supra, 34 Cal.2d 731, 735–736, 215 P.2d 4, but it takes the position that notwithstanding the unitary character of the business, a separate accounting method furnishes an adequate measure of the activities of an intergral part of that business—a proposition which has been consistently rejected by the courts. Edison California Stores v. McColgan, supra, 30 Cal.2d 472, 480–481, 183 P.2d 16. The fact that plaintiff, unlike the taxpayer in Butler Brothers v. McColgan, supra, 17 Cal.2d 664, 665, 111 P.2d 334, in computing its California income according to its separate accounting system, has not taken any deduction for a pro rata amount of central office expenses or service charges, is of no significance insofar as determining the propriety of the use of a formula method of allocation. Although, as plaintiff maintains, such circumstance does indicate that it "has not sought the benefits of allocation of certain items while at the same time seeking to escape the burdens of allocation with respect to others," such claim of deduction was manifestly not the basis of the Butler Brothers decisions. 17 Cal.2d 664, 111 P.2d 334, 315 U.S. 501, 62 S.Ct. 701.

[4] A state in attempting to place upon a business extending into several states "its fair share of the burden of taxation" is "faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders" Underwood Typewriter Co. v. Chamberlain, supra, 254 U.S. 113, 121, 41 S.Ct. 45, 47, and as a matter of practical tax administration it has been "declared that 'rough approximation rather than precision' is sufficient." International Harvester Co. v. Evatt, supra, 329 U.S. 416, 422, 67 S.Ct. 444, 447. As the record has been here analyzed, and particularly in the light of the decision in Edison California Stores v. McColgan, supra, 30 Cal.2d 472, 183 P.2d 16, plaintiff's San Francisco jobbing house operated as an integrated unit in the Deere organization, a manufacturing-selling enterprise, providing the advantages of a unitary business through "unity of ownership, unity of operation by centralized purchasing, management, advertising and accounting, and unity of use in the centralized executive force and general system of operation." 30 Cal.2d at pages 479–480, 183 P.2d at page 21. Consistent with these observations, the three-factor formula in its application to plaintiff's San Francisco jobbing house appears to have "fairly calculated" the portion of the unitary income of the Deere organization "attributable to the business done within this state", and as so computed it is not open to constitutional objection as operating to tax extra-territorial values. Edison California Stores v. McColgan, supra, 30 Cal.2d 472, 483, 183 P.2d 16; Butler Brothers v. McColgan, supra, 315 U.S. 501, 507–509, 62 S.Ct. 701; International Harvester Co. v. Evatt, supra, 329 U.S. 416, 422–423, 67 S.Ct. 444. It therefore follows that the trial court properly sustained the additional franchise tax assessed against plaintiff for the year in question. Underwood Type-

writer Co. v. Chamberlain, supra, 254 U.S. 113, 41 S.Ct. 45; Bass, Ratcliff & Gretton, Ltd. v. State Tax Com., supra, 266 U.S. 271, 45 S.Ct. 82.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

38 Cal.2d 151

In re FIELD'S ESTATE.

AUBRY et al. v. BOTH et al.

S. F. 18113.

Supreme Court of California, in Bank.

Dec. 18, 1952.

Proceeding in the matter of the estate of William Austin Field, deceased, wherein Edna F. Aubry, as administratrix of the estate of Anna Caroline Field, deceased, filed a petition against Walter Both as executor of the last will of William Austin Field, deceased, and others to revoke the probate of the will of William Austin Field. From an adverse decree in the Superior Court for San Francisco County, Lile T. Jacks, J., Edna F. Aubry as administratrix appealed. The Supreme Court, Shenk, J., held that where widow was an "interested person" entitled to contest the will of her deceased spouse, the widow's right of contest survived her death and could be prosecuted by her personal representative.

Judgment reversed.

Prior opinion 229 P.2d 419.

1. Wills 🔑229

Where widow had an interest which would be impaired by probate of will of predeceased spouse or benefitted by setting aside, she was a "person interested" who might contest the will. Probate Code, §§ 370, 380.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested".

2. Wills 🔑226

On death of one having a right to contest a will, the right of contest survives.

3. Wills 🔑222

Purpose of a "will contest" is to establish a violation of contestant's right of property and in its essence, the contest is an action for recovery of property unlawfully taken or about to be taken from the ownership of a contestant.

See publication Words and Phrases, for other judicial constructions and definitions of "Will Contest".

4. Abatement and Revival 🔑52

So long as the right survives as a right of property, the right to maintain an action as survivor, may not be made to depend on whether the action was commenced before the owner of the right died.

5. Pleading 🔑216(1)

Incidental matters of duties and powers of administrator, of court instructions, and the like, are not proper subjects of investigation on a general demurrer to the sufficiency of a petition to revoke probate.

6. Wills 🔑226

Where widow was an "interested person" entitled to contest the will of her deceased spouse, the widow's right of contest survived her death, and could be prosecuted by her personal representative. Probate Code, §§ 370, 380.

See publication Words and Phrases, for other judicial constructions and definitions of "Interested Person".

◆

G. I. Hoffman, San Francisco, for appellant.

J. Clark Benson, San Francisco, for respondent, Shriners Hospital etc.

Marion Vecki and John E. Anderton, San Francisco, for respondents Both et al.

SHENK, Justice.

This appeal is from a judgment entered after the demurrer of respondents to a petition to revoke probate was sustained without leave to amend.

The record shows the following: William Austin Field died testate on January 6, 1949, leaving his widow, Anna Caroline Field, and a cousin surviving. At the time of his death both spouses were in their eighties and had been married for more than fifty years. On January 25th, 1949, on petition of Walter Both, an instrument dated December 30, 1948, was admitted to probate as the will of the decedent. The provisions thereof bequeathed the entire estate to the widow during her life. Apparently subject to that provision residence property designated as 324, 326, 328 and 328A Hayes Street in San Francisco was devised to Walter and Martha S. Both, friends, "as a token for the many acts of kindness they have done for me and my said wife during the past years." The residue was left to the Shriners Hospital for Crippled Children in San Francisco. Some years previously the spouses had executed reciprocal wills.

Prior to his death and in November, 1948, allegedly with the connivance of Walter Both, the decedent obtained a judicial declaration of his wife's incompetence and the appointment of himself as her guardian. She thereupon was placed in a sanitarium where she remained until her death on June 19, 1949.

On July 11, 1949, the will of Anna Caroline Field was admitted to probate, and Edna F. Aubry, a niece was appointed administratrix with the will annexed. On July 21, 1949, as such administratrix she filed the petition to revoke the probate of the will of the predeceased spouse, alleging as grounds of contest nonexecution of the instrument, lack of capacity to make a will due to age and mental and physical infirmities and debilities, and undue influence of Walter Both between whom and the decedent husband a confidential relationship existed.

The petition to revoke probate was filed within the six months limitation of section 380, Probate Code and no question of untimely filing arises. The only question is whether the widow's administratrix may file the petition to contest the will of the predeceased spouse.

[1] This court has recently reviewed the question of what interest entitles a person to contest a will within the meaning of sections 370 and 380 of the Probate Code. Estate of Plaut, 27 Cal.2d 424, 164 P.2d 765, 162 A.L.R. 837. Under the circumstances here appearing the widow unquestionably had an interest which would be impaired by the probate of the instrument in question or benefited by setting it aside, and was therefore a person interested who might contest the will. The problem on this appeal, therefore, relates to the matter of the survival of the widow's right of contest and whether after her death the alleged cause may be prosecuted by her personal representative.

[2] The respondents refer to a conflict in the authorities on the question of survival of the right of contest. In some jurisdictions the right is held not to be a right of property but a personal non-assignable right which does not survive the death of the party or the person having the right. But in the majority of the cases where the question has arisen it has been held that on the death of one having a right to contest a will, the right of contest survives. See Annotation, 129 A.L.R. 324, and cases cited. One of the leading cases is Ingersoll v. Gourley, 1913, 72 Wash. 462, 130 P. 743, where it was pointed out that the question was not whether the administrator was a person interested who might contest the will, but was merely one of assignability and consequent survival of an admitted right of contest. After reviewing numerous cases the court held that the right and interest of a disinherited heir was the subject of voluntary or involuntary assignment which carried with it survival of the right to contest the will. The court rejected the Illinois doctrine that the right was personal and did not survive. See Selden v. Illinois Trust & Sav. Bank, 1909, 239 Ill. 67, 87 N.E. 860, 130 Am.St.Rep. 180. Cf. Havill v. Havill, 1928, 332 Ill. 11, 163 N.E. 428, and Glos v. Glos, 1930, 341 Ill. 447, 173 N.E. 604, 72 A.L.R. 1328, decided after an amendment to the Illinois Statute of Wills by which upon the death of a contestant before final determination the cause of action was declared to survive and descend to the heir, devisee, legatee, personal representative, or assignee of such contestant. The court disposed of the argument that will contests were avaricious and should be discouraged, also here advanced in substance, by conceding

soundness to the extent of requiring clear proof of fraud or undue influence, and observing that fraudulent wills which are also avaricious should not be encouraged by closing the courts to the righting of wrongs.

[3] Further discussion of the basis of the conflicting views is unnecessary inasmuch as in Re Estate of Baker, 170 Cal. 578, 150 P. 989, following the Ingersoll and other cases, and rejecting the Illinois doctrine, this court has declared that the right of contest survives under the statutes of this state. In the Baker case it was held that the right of an interested person to contest a will is fundamentally based upon the loss of property or property rights resulting from the recognition of an invalid instrument depriving him of those rights; that the purpose of a will contest is to establish a violation of the contestant's right of property; that in its essence the contest is an action for the recovery of property unlawfully taken or about to be taken from the ownership of the contestant; and that the statutes placed no limitation on the assignability or survivability of such a chose in action. The right of contest was therefore declared to be a thing in action arising out of the violation of a right of property which upon the death of the owner passes to his personal representative pursuant to section 954 of the Civil Code. Thus the reasoning rested solely upon provisions of the law whereby the statutory right of contest, founded upon an attempt to divest or a divestiture of property rights, gave to the original possessor of the right a chose in action which was assignable and survived.

The question arose in the Baker case because the contestant died during the pendency of the contest. Following the holding that the cause of action survived, it was concluded that pursuant to section 385 of the Code of Civil Procedure the proceeding did not abate. Likewise in Estate of Johnson, 31 Cal.App.2d 251, 87 P.2d 900, the contest was continued after the substitution of the administrator of the contestant who died before final judgment.

[4] The respondents seek to distinguish the present case because the widow who had the right of contest died before a contest proceeding was commenced. No such distinction may be made. The same test of survivability determines the outcome in the present case. So long as the right survives as a right of property, the result may not be made to depend on whether the contest was commenced before the owner of the right died. The doctrine of survivability applies in either case and the administratrix of the widow who owned the right has the same power to pursue it by commencing proceedings to revoke probate as such administratrix would have had to continue the proceedings if the widow had died during the pendency of the contest. The Baker case was followed in Re Estate of Clark, 94 Cal.App. 453, 460–461, 271 P. 542, in holding that the right of contest was assignable as a property right.

[5, 6] Incidental matters of the duties and powers of the administrator, of court instruction, and the like, are not proper subjects of investigation on a general demurrer to the sufficiency of the petition to revoke probate. The respondents attempt to invoke numerous cases holding that the widow's exercise of her right to elect to take under the will or by succession is a right personal to her which cannot be exercised after her death by her representative on court instruction or otherwise. But this line of reasoning merely confuses two distinct subject matters, viz.: the widow's right to accept or reject the provisions for her in a valid will, and the survival of her right to contest an alleged invalid will. In all of the cases relied on the validity of the will was assumed, and no case is presented holding that a widow is bound by an asserted election under an invalid will. Whether there was a binding election if the will be held valid is not a question for determination on this appeal. Nor are we here concerned with the legality of the charitable bequest under a valid will.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.

EDMONDS and SPENCE, JJ., concur in the judgment.

CITY & COUNTY OF SAN FRANCISCO et al. v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO.

METROPOLITAN LIFE INS. CO. v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO et al.

Nos. 18442, 18443.

Supreme Court of California, in Bank.

Dec. 18, 1951.

Rehearing Denied Jan. 15, 1952.

The City and County of San Francisco and others brought proceedings for a writ prohibiting the enforcement of an order of the Superior Court of the State of California, in and for the City and County of San Francisco, Lile T. Jacks, J., which order provided for inspection of documents and data claimed to be in the records of official proceedings conducted by the civil service commission of the petitioner. A companion case sought by the Metropolitan Life Ins. Co. involved the same controversy and sought similar relief. The Supreme Court, Shenk, J., held that the Superior Court had exceeded its jurisdiction in granting a motion by municipal employees, in their mandamus action, for inspection of documents containing confidential matter, disclosure of which would have adverse effect on public interest.

Application granted.

Prior opinions 231 P.2d 583, 231 P.2d 592.

1. Prohibition 🔑10(1)

Notwithstanding fact that Superior Court has jurisdiction in the suit, Supreme Court may act by writ of prohibition in proper case when it appears that otherwise failure of justice will occur, in a matter of public importance, by a wrongful or excessive exercise of jurisdiction. Code Civ. Proc. §§ 1102, 1103.

2. Prohibition 🔑11

If municipal corporation which had procured data from private employers for purposes of fixing compensation of municipal employees were entitled to protection against being forced to violate its agreement with employers to keep such information confidential, writ of prohibition would lie to prevent enforcement of Superior Court order for inspection of documents revealing data thus collected, even though Superior Court had jurisdiction to issue such order. Code Civ.Proc. §§ 1000, 1102, 1103.

3. Records 🔑14

The right of inspection may be curtailed in relation to communications or portions thereof where public policy, enacted into statutory law, demands that disclosure be prohibited. Code Civ.Proc. §§ 1000, 1881, subd. 5, 1888, 1892, 1893; Political Code, § 1032.

4. Prohibition 🔑11

In determining whether enforcement of order for inspection of public documents containing confidential information should be prohibited, concern should be to require keeping of faith with confidential informants as indispensable condition of future efficiency of governmental unit utilizing such information.

5. Records 🔑14

Public interest in preserving confidential information outweighs in importance interest of private litigant, in absence of considerations involving life or liberty.

6. Mandamus 🔑171

Records 🔑14

Where private employment data required for purpose of fixing compensation of municipal employees could not be obtained except upon express pledge that the source of material would be treated as confidential, and where disclosure of information thus acquired would have adverse effect on public interest, municipal corporation would be entitled to have confidential matter thus assembled deemed privileged, and therefore in mandamus proceedings brought by municipal employees to compel municipal corporation to fix their wages in accordance with charter provision which authorized data collection, Superior Court exceeded its jurisdiction in granting employees' motion for inspection of confidential data thus assembled. Code Civ.Proc. §§ 1000, 1881, subd. 5, 1881, 1892, 1893; Political Code, § 1032.

◆

Dion R. Holm, City Atty., Norman Sanford Wolff, Deputy, San Francisco, for petitioners, City and County of San Francisco et al.

Frank J. Hennessy, U. S. Atty., San Francisco, William S. Tyson, U. S. Solicitor, Bessie Margolin, Asst. U. S. Solicitor and Kay Kimmell, U. S. Atty., all of Washington, D. C., Kenneth C. Robertson, Regional Atty., James F. Scott, Senior U. S. Atty., San Francisco, Fred N. Howser and Edmund G. Brown, Attys. Gen., Hartwell H. Linney, Chief Asst. Atty. Gen., Wilmer W. Morse and James E. Sabine, Deputies Atty. Gen., Sullivan, Roche, Johnson & Farraher, Long & Levit, and George England, all of San Francisco, amici curiae for petitioners.

Knight, Boland & Riordan, F. Eldred Boland and John H. Riordan, all of San Francisco, for petitioner, Metropolitan Life Ins. Co.

Milton Marks, Milton Marks, Jr., San Francisco, for respondents, Superior Court in and for the Citv and County of San Francisco.

SHENK, Justice.

The petitioners seek a writ prohibiting the enforcement of an order of the respondent Superior Court for the inspection of documents and data claimed to be in the records of official proceedings conducted by the Civil Service Commission of the City and County of San Francisco. An alternative writ was issued.

In September 1949 several hundred employees of the city and county, representing as well other employees similarly situated, filed in the superior court a petition for the Writ of Mandate naming as respondents the City and County of San Francisco, its board of supervisors, and its civil service commission. The purpose of the petition was and is to compel the respondents to fix, establish and pay to each of the petitioners and to persons similarly situated for the fiscal year commencing July 1, 1949, and ending June 30, 1950, the rates of compensation for the respective classifications referred to in the petition in accordance with the requirements of section 151 of the Charter of the City and County.

Prior to July 1, 1949, but effective as of that date, the board of supervisors enacted salary standardization and annual salary ordinances providing for schedules of compensation to be paid officers and employees whose compensations were subject to the provisions of section 151 of the charter. That section as amended in 1943 provides that schedules of compensation for municipal employees shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in the state. The schedules are required to be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive investigation and survey. The commission is required to "set forth in the official records of its proceedings all of the data thus obtained" on the basis of which it makes findings and an order whereby a rate of pay for each classification is recommended to the board of supervisors. The section provides that the salaries and wages paid to employees shall be those fixed in the schedule of compensations adopted by the board as provided by the charter and in accord with the provisions of the ordinance enacted in pursuance thereof.

It was alleged in the petition filed in the Superior Court that the commission made such a survey; that the commission transmitted its findings and recommendations to the board and that the salary ordinance was adopted in accordance therewith. The rates of compensation thus adopted for the several classifications were set forth at length. The rates of compensation for employees in the same classifications in private employment and other comparable governmental organizations were also set forth. It was charged that the commission and the board disregarded the generally prevailing rates of wages and that the established schedules were not in accord with the prevailing rates for the period 1949–1950 as required by the charter provisions and as alleged. The adopted rates as to 49 classifications, listed on a comparative basis with those alleged to be prevailing, were stated to be grossly less than rates in private and other governmental employment. The petitioners also sought declaratory relief and the recovery of the difference between the ordinance rates and the alleged prevailing rates in outside employment.

The defendants answered, making certain denials and admissions. The plaintiffs thereupon moved pursuant to section 1000 of the Code of Civil Procedure for an inspection of all the documents, papers and data including the complete survey in connection with the preparation of the adopted wage schedules. A hearing was had on the motion at which the respondents presented evidence of the confidential nature of the specific data sought to be examined, and the effect of disclosure on the public interest. In making the wage rate survey the commission solicited information from private employers on the written promise and agreement with each that the source of all information supplied would be held in confidence, that the wage scales and other data would not be identified except by a code known only to the commission. The defendants gave testimony to the effect that but for the written agreements and pledges to hold in confidence the source of and identity of the employers furnishing the information, it would be impossible to obtain the voluntary cooperation of the private employers in making the survey. The names of nearly 200 private employers are in the record, as are also the lists of wage rates assumed to have been submitted by them; but unprocurable except by compliance with the order for inspection is the data whereby to identify the employer submitting a specific wage list. It was also shown without conflict that disclosure would foment public disturbance and unrest in industrial employment relations and would interfere with the competitive activities of the employers in private industry.

The trial court granted the motion for inspection and a stay order was entered for the purpose of permitting the filing of the present applications for the writ of prohibition. The members of the board of supervisors and of the civil service commission joined in filing one application (S.F. 18442), and Metropolitan Life Insurance Company, one of the employers affected, filed another application (S.F. 18443) for the writ to restrain the enforcement of the order for inspection. Numerous briefs are also on file on behalf of the state personnel board, various employers, and the Secretary of Labor, United States Department of Labor, as amici curiae in support of the application for the writ of prohibition.

A preliminary question relates to the basis for the issuance of the writ of prohibition. That writ is an appropriate remedy to arrest the proceedings in a court when they are "without or in excess of" its jurisdiction and there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civ.Proc. §§ 1102, 1103.

[1] Notwithstanding the fact that the respondent court unquestionably has jurisdiction to grant or deny the motion for inspection, this court may act in a proper case when it appears that otherwise a failure of justice will occur in a matter of public importance by a wrongful or excessive exercise of jurisdiction. The reviewing courts have frequently acted to resolve the problem on jurisdictional grounds where the public interest has indicated the necessity for prompt settlement of the issue. See Spreckles Sugar Co. v. Industrial Acc. Comm., 186 Cal. 256, 260–261, 199 P. 8; Rodman v. Superior Court, 13 Cal. 2d 262, 269–270, 89 P.2d 109; Fortenbury v. Superior Court, 16 Cal.2d 405, 407–408, 106 P.2d 411; Rescue Army v. Municipal Court, 28 Cal.2d 460, 466–467, 171 P.2d 8. Thus the writ of prohibition has been held to lie to prevent the exercise of an unauthorized power in a matter as to which the subordinate tribunal has jurisdiction, no less than where the entire cause is without its jurisdiction; and has also been directed to prevent the enforcement of an order. Evans v. Superior Court, 14 Cal.2d 563, 579–581, 96 P.2d 107 and cases cited; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 290–291, 109 P.2d 942, 132 A. L.R. 715. In Franchise Tax Board v. Superior Court, 36 Cal.2d 538, 225 P.2d 905, the writ was issued to prohibit the enforcement of an order for inspection of tax returns; and in Kohn v. Superior Court, 12 Cal.App.2d 459, 55 P.2d 1186, the writ issued to restrain inspection of private doc-

uments as an unauthorized exercise of judicial power in a matter otherwise cognizable by the respondent court.

In Coldwell v. Board of Public Works, 187 Cal. 510, 522, 202 P. 879, claimed confidential matter had been opened to public inspection and it was held that it had lost its confidential character; and to similar effect is People v. King, 122 Cal.App. 50, 57, 10 P.2d 89. Thus to leave the matter for possible correction on an appeal would be too late, would render that remedy inadequate and would result in a failure of justice. See also Gorbacheff v. Justice's Court, 31 Cal.2d 178, 180, 187 P.2d 407.

[2] Tested by these and similar cases no good reason appears justifying the denial of the writ if otherwise the petitioners are entitled to protection against violation of the agreements of confidence. We shall not pause to consider whether the application filed by Metropolitan Life Insurance Company as one of the employers shows that it is entitled to the issuance of the writ. The question might be pertinent were that the only petitioner. But since the issuance of the writ in the proceeding brought by the City and County of San Francisco would inure to the benefit of that petitioner as well as all other employers who furnished information pursuant to the agreements of confidence, the matter does not require further notice.

Section 1000 of the Code of Civil Procedure deals with the power of the court to permit inspection of documents in the possession of the adverse party or under his control which contain evidence relating to the merits of the action.

Section 1032 of the Political Code provides that the public records and other matters in the office of any officer are at all times during office hours open to inspection of any citizen. Section 1888 of the Code of Civil Procedure states that all written acts or records of official bodies, tribunals and public officers are public writings. Section 1892 of the same code accords every citizen the right to inspect and take a copy of any public writing of this state except as otherwise expressly provided by statute; and section 1893 requires a public officer to give a certified copy thereof on demand and payment of the fee therefor.

Section 1881, subdivision 5, of the Code of Civil Procedure provides the exception to the foregoing by the requirement that a public officer may not be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure. The petitioners invoke protection of the agreements of confidence pursuant to this section.

The statutory policy of preserving official confidence inviolate has been recognized in appropriate cases. In Runyon v. Board of Prison Terms and Paroles, 26 Cal.App.2d 183, 79 P.2d 101, the writ of mandate was sought for the purpose of inspecting communications made to that board as constituting public records. In denying the writ the court observed the confidential nature of the information bearing upon applicants for parole, some of which necessarily could be obtained only upon the understanding that the persons giving the information would be protected and their communications treated as confidential. The record in the present case without conflict likewise shows that the information could not be obtained from the private employers solicited except upon the express condition and pledge that the identity of the source of the material would be treated as confidential. To like effect are Franchise Tax Board v. Superior Court, supra, 36 Cal.2d 538, 225 P.2d 905, where every requested item of information was supplied with the exception of the identity of the individual taxpayers; Whelan v. Superior Court, 114 Cal. 548, 46 P. 468, and People v. King, supra, 122 Cal. App. 50, 56–57, 10 P.2d 89. See also Opinions of the Attorney General of California, Vol. 1, p. 144; Vol. 5, p. 145; Vol. 11, p. 41; Vol. 13, p. 180; State ex rel. Spencer v. Freedy, 198 Wis. 388, 223 N.W. 861; Gilbertson v. State, 205 Wis. 168, 236 N.W. 539; Lee v. Beach Pub. Co., 127 Fla. 600, 173 So. 440.

[3, 4] The foregoing and other cases demonstrate that the right of inspection may be curtailed in relation to communications or portions thereof where the public

policy, enacted into our statutory law, demands that disclosure be prohibited. It has been well said by the United States Attorney General, now Justice Robert Jackson, (40 Op.Attorney General No. 8, April 30, 1941) that the concern should be to require the keeping of faith with confidential informants as an indispensable condition of future efficiency. The United States Supreme Court in Norwegian Nitrogen Prod. Co. v. United States, 288 U. S. 294, 53 S.Ct. 350, 77 L.Ed. 796, declared that although the plaintiff would be adversely affected it was not entitled to disclosure of information of business details, publication of which would reveal the identity of the manufacturers and might prove useful to competitors, where the information had been secured by public officials under pledges of secrecy. In United States v. Kohler, D.C.E.D.Pa.1949, 9 F.R.D. 289, voluntary statements to FBI investigators were withheld from inspection since disclosure would seriously prejudice the future usefulness of the bureau and since the information was given in confidence under pledge not to disclose its source. In Federal Life Ins. Co. v. Holod, D.C.Pa.1939, 29 F.Supp. 852, the Secretary of War was protected from disclosing the defendant's draft records.

[5] The courts generally have concluded that the public interest in preserving confidential information outweighs in importance the interest of a private litigant in the absence of considerations involving life or liberty. In Gilbertson v. State, supra, 205 Wis. 168, 236 N.W. at 541, it was said that in all such situations a choice must be made between policies, each independently desirable; that not only are the courts faced with the necessity of making the choice, but with the extremely delicate question concerning the relation between the courts and other branches of the government; and that the right of the state to preserve the secret may be superior to that of the litigant to compel its disclosure even though he may thereby be handicapped as an unavoidable consequence. It is also here shown by affidavits and otherwise that the recognition of the right of inspection in such cases will have far-reaching adverse effect in other branches of government, both state and federal. In such other branches, as here, the desired information cannot be had at least from private employers without the similar agreements of confidence. Therefore, pending more thorough inquiry into the larger issues presented in the action, the court should not direct the respondent public officials to violate their agreements of confidence where the result may be so far-reaching and harmful and thus disrupt the functions of government both local and national.

[6] In answer to the contention that the charter provisions should override the agreements of confidence and the policy invoked by the petitioners, it may be said that we are not here determining the effect of the recognition of the agreements of confidence. In this proceeding we are concerned only with the question of the propriety of the respondent court's exercise of its power in granting the motion for inspection of the data relating to the source of the information agreed to be treated as confidential. There is no conflict in the evidence as to the adverse effect of disclosure on the public interest. On the evidence and the law it is concluded that the petitioners are entitled to have the confidential matter deemed privileged under section 1881(5) of the Code of Civil Procedure and that the respondent court misapplied and therefore exceeded its jurisdiction in granting the motion for inspection. What may be the relation of the agreements of confidence to the alleged cause of action or defense is not a matter for consideration at this time. Questions of compliance by the commission and the board of supervisors with the charter requirements are deemed not to be involved in this proceeding. They are more properly to be treated with the larger issues presented in the pending mandamus proceeding. It is therefore not appropriate now to declare what application City and County of San Francisco v. Boyd, 22 Cal. 2d 685, 140 P.2d 666, may have in the solution of those issues. The Boyd case involved a question of compliance with the same charter provisions in relation to

the controller's refusal to pay wages in accordance with the adopted scale on the ground that it was higher than the prevailing rate. The city prevailed. The question whether compliance is sufficient for the purpose of establishing the validity of the wage scales when questioned by the employees can be decided only on the trial in the mandamus proceeding. Therefore consideration and determination of questions relating to the powers of the commission and the board, the effect of the agreements of confidence on the existence of bases or support for the adopted wage scales, and the validity of the ordinances are not precluded by the language herein nor by the granting of the writ in recognition of the official agreements of confidence. In view of the necessarily restricted issue here, other points do not require notice.

The application for the peremptory writ of prohibition is granted as prayed.

GIBSON, C. J., and TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, J., I concur in the judgment.

CARTER, Justice (concurring).

I concur in the result but not the reasoning in the majority opinion. As I understand the opinion, it holds that the court cannot properly compel the Civil Service Commission to include, as a part of its public records, the names of the private employers and the information each gave on his wage scale, in spite of the charter provision (§ 151) requiring the Commission to "set forth in (its) official records of its proceedings *all* of the data thus obtained," that is, by its investigation. That result is reached by reasoning that inasmuch as the Commission gave a pledge of secrecy, it would be against public policy to compel it to divulge the information. I agree with that result. The opinion goes on to state, however, that it does not decide whether the charter requires the Commission to include the information in its official records. It reserves that question for determination in the mandamus proceeding where it might be held that the charter provision compels those matters to be a part of the record, and inasmuch as the Commission has not done so, it has not complied with the law (charter) in fixing the rates of pay. Thus on that ground alone the ordinance fixing the wage scale could be set aside. In that manner the Commission would be required to keep faith with its pledge of secrecy by the court's refusal to compel it to break its pledge, but still the Commission or the city would suffer, for the reason that all its procedure and ordinance fixing wages are a nullity. In other words, the city bears the brunt of the failure of its Commission to follow the charter.

This is an indirect approach for which I see no reason. The charter is clear and specifies that *all* the data obtained by the Commission shall be set forth in its official records, and *it should be so held at this time.* If it is believed that data obtained by a promise of secrecy should not be used in this case even though the Commission had no authority to give such a pledge, the more pertinent basis for such holding is estoppel. That is to say, the one giving the information, having done so on the assurance that it was confidential, may now claim that the city cannot reverse its position and betray that confidence. If it thus will not be permitted to comply with the law, it follows that the wage scale cannot stand, for it is not based upon the *public record* of the data obtained. The result is that the scale fixed is invalid on that ground alone and the trial court should be so advised to guide its decision in the mandamus action.

It may be said that City & County of San Francisco v. Boyd, 22 Cal.2d 685, 140 P.2d 666, holds that the Commission need not set forth the name of each private employer and his wage scale, but if it does it is incorrect, for it fails to consider the effect of such a ruling. It would mean that there could be no effective review of the Commission's action. It is not clear from the face of the opinion, however, that that precise data was omitted from the public records of the Commission in the Boyd case.

My view is that the city is estopped from disclosing the data obtained in confidence, but the ordinance fixing the wage scale, which is based upon said data, is invalid, and we should so hold. However, because of the pledge of secrecy the Commission should not be required to divulge the information and therefore its order to the contrary should be made ineffective by prohibition, as is done by the majority opinion.

Rehearing denied; EDMONDS and CARTER, JJ., dissenting.

108 Cal.App.2d 297

CITY OF CHICO v. FIRST AVE. BAPTIST CHURCH OF CHICO et al.

Civ. 8035.

Sac. 6193.

District Court of Appeal, Third District, California.

Dec. 20, 1951.

Action by the City of Chico, a municipal corporation, against the First Avenue Baptist Church of Chico, California, E. J. Combs, and John Gray, to enjoin defendants from carrying on and conducting a church and other religious functions or services without a use permit in certain premises located in a private residence district from which churches were excluded by zoning ordinance. The Superior Court, Butte County, Dudley G. McGregor, J., issued an injunction and defendant appealed. The District Court of Appeal, Adams, P. J., held that since appellant had not exhausted his administrative remedy of obtaining a use permit from plaintiff city, injunction would be affirmed.

Judgment affirmed.

1. Appeal and Error 🔑714(5)

Where neither church's use permit, attached to plaintiff city's brief in proceeding to enjoin church and members thereof from conducting church services in private residence district from which churches were excluded without a use permit by zoning ordinance, nor minutes of business meeting of church congregation attached to defendant church member's answering brief, allegedly authorizing an appeal, were made part of record on appeal from ruling of trial court granting injunctive relief, they were disregarded.

2. Municipal Corporations 🔑122(2)

Presumption exists that zoning ordinance as a whole is justified under police power and adopted to promote the public health, safety, morals and general welfare.

3. Administrative Law and Procedure 🔑229
Injunction 🔑89

Where city was granted injunction restraining church member from conducting services in private residence district from which churches were excluded without use permit by zoning ordinance, and where church member failed to exhaust his administrative remedy by applying to city for use permit, injunction restraining member from conducting church services in zoned district would be affirmed.

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John Gray, pro se.

Price & Morony, Chico, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action to enjoin the defendant church (a corporation) and several fictitious defendants from "carrying on and conducting a church and/or church and/or religious functions or services" in those certain premises commonly known as 1119 Esplanade, Chico, California, and more particularly described as Lots 4 and 5, of the Locey Subdivision of Block 70 of Chico Vecino, Chico, California. It was alleged in the complaint that said property is situated in "the single family residence district or R–1 district of the City of Chico," and that under the provisions of subdivision 3 of section 1790 of the Municipal Code of Chico, churches are prohibited in said R–1 district, according to the official zoning map of the city, unless a use permit shall first have been obtained; that at the time of the adoption of said ordinance, and the official zoning map of the city, said premises were used solely as a single-family residence, and that defendants did not come into possession thereof or seek to conduct a church, or church and religious functions, in said premises until after the adoption of the zoning map designating the area as a single-family residence one, but that defendants were at the time of the filing of the action, and with full knowledge of the ordinance, operating and conducting a church and/or church and/or religious functions on said premises without having obtained a use permit, and that they threatened to, and would continue to do so unless restrained.

A provision of the Municipal Code, Ordinance 404, amending section 1796 of said code, was set forth in the pleading. It declared that any land, building, or premises operated or maintained contrary to the provisions of the ordinance was unlawful and a nuisance; and it authorized proceedings for abatement of same. The complaint then alleged that the city council had directed that such proceedings be brought.

Upon the filing of the complaint the court issued an order to show cause why a temporary injunction should not issue. The defendant church, by its president, filed an answer in which it asserted that the aforesaid provisions of the Municipal Code are unconstitutional in that they unlawfully restrict the right to worship on the premises in controversy, in contravention of the First and Fourteenth Amendments to the Constitution of the United States. The church also filed a demurrer to the complaint on both general and special grounds. One E. J. Combs, appearing voluntarily as one of the fictitious defendants, also filed a demurrer and an answer. He alleged that he and other individuals had assembled on the premises in controversy, for the purpose of worship; and he relied upon the same grounds of unconstitutionality averred by the church corporation. John Gray, appellant here, later appeared voluntarily as a fictitious defendant, demurred, and filed an answer, in which he stated that he was one of the persons meeting as the congregation of defendant church; and he purported to appear not only for himself but "for those meeting with him"; and he claimed that they had a right to worship together on said premises in whatever form such worship should take, without having a permit from the city, its planning commission or the city council. He asserted that an application for a use permit had been made, and that hearings had been carried on before the planning commission which had given an adverse report, after which there had been an appeal to the city council, but that said appeal had been dismissed before a decision was rendered by the council.

Plaintiff demurred to Gray's answer on general grounds, and also averred that said answer was uncertain and ambiguous in that it could not be ascertained therefrom whether defendant Gray was appearing for himself alone, or for himself and others, or, if he appeared for others, who such others were. Plaintiff also filed a motion to strike from Gray's answer the allegations as to his appearing for others, and certain allegations asserted to be purely evidentiary, or conclusions of the pleader. Plaintiff also demurred to the answers of the church and Combs, on general grounds.

The demurrrers of defendants were overruled, the motion to strike granted, and plaintiff's demurrers to the various answers sustained. No request for permission to amend was made; and on the motion of plaintiff judgment for plaintiff was then given on the pleadings, and an injunction issued which restrained the church, and defendants Combs and Gray "from carrying on or conducting a church or church functions or church services in or upon the premises described in plaintiff's complaint."

Gray alone appealed "from the judgment * * * and from each and every part thereof." Also after the judgment was entered he filed a notice of motion to recall, suspend or dissolve the injunction "in so far as it affects this defendant," which said motion was denied by the trial court, though this was subsequent to the filing of appellant's notice of appeal, which avers appeal from the judgment alone.

As grounds for reversal Gray asserts that the decree violates his rights under the First and Fourteenth Amendments, saying that the city ordinance has no application to the right of a person to pray or preach; that the language of the ordinance was not "intended to regulate when and where a man may pray"; that no standards as conditions for "granting or denying the right to worship" are fixed by the ordinance, but are left to the whim or caprice of the officials of the city; that no case can be found where it was sought to restrain religious worship on the ground that it was forbidden in residences; that the position of the trial court was that before any question of right to worship could be considered the citizen must submit to the regulation, that is, must bow to the administrative officials of the city, and ask them for a permit; that regardless of a proper construction to be placed on the ordinances, though they unequivocally require a permit and forbid worship in the absence of such permit, appellant is not bound thereby, and is not required in any case to apply for such permit; that "counsel suggests, and the trial judge agrees, religion is not involved, only the question that before *any* defense can be made appellant must show that he has complied with ordinance in question by having applied for permission to pray on the property in question." (Italics added.) He asks for reversal of the judgment and dissolution of the injunction "which restricts his religious freedom."

Respondent's contentions in reply are that appellant did not exhaust his administrative remedy before resorting to the court for relief; and that the issues raised by appellant have become moot.

Regarding the latter contention it is set forth in respondent's brief that three days after the entry of judgment the defendant church applied to the planning commission for a use permit, which was granted. A certified copy of said permit is attached to the brief as an exhibit, and we are asked to take judicial notice of same as a public record (though no authority for such notice is cited).

Appellant replies to this contention by urging that the permit appears to have been issued on the application of E. J. Combs, though it recites that the church was the applicant; and he attaches to his reply brief an affidavit of one Alice Totten, purporting to be the clerk of the church, that at a business meeting of the congregation of the church they voted 10 to 0 that "the church appeal the case immediately."

[1] Neither the permit attached to respondent's brief nor the minutes of the meeting which are attached to appellant's answering brief is made a part of the record on appeal. They may, for that reason, if for no other that might be recited, be disregarded, particularly since we find no merit in the contentions of appellant Gray.

[2] Corporation of the Presiding Bishop of the Church of Jesus Christ, etc. v. City of Porterville, 90 Cal.App.2d 656, 203 P.2d 823, seems to be a complete answer to appellant's contentions. There a writ of mandate was sought to compel the issuance of a permit to erect a church upon premises owned by petitioners, which were situated in an area zoned for single family residences only. Plaintiff urged that the zoning ordinance was invalid as bearing no relation to the public health, safety, morals, or general welfare, and that its application resulted in a restriction of religious worship. The court held that such zoning ordinances constitute a justifiable exercise of police power, and that the exclusion therefrom of other structures is a legitimate exercise of such power. It said, 90 Cal.App.2d at page 661, 203 P.2d at page 826, "In enacting zoning ordinances, the municipality performs a legislative function and every intendment is in favor of the validity of such ordinances. Jardine v. City of Pasadena, 199 Cal. 64, 72–73, 248 P. 225, 48 A.L.R. 509. It is presumed that the enactment as a whole is justified under the police power and adapted to promote the public health, safety, morals, and general welfare. Lockard v. City of Los Angeles, 33 Cal.2d 453, 460, 202 P.2d 38, [7 A.L.R.2d 990]." And regarding the argument that the application of the ordinance to petitioner resulted in an unwarranted restriction of religious worship it said, 90 Cal.App.2d at page 660, 203 P.2d at page 825, "The petitioner is not a congregation, but holds its property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the

State, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record before us to indicate that the church building could not be erected if located in the area zoned for that purpose." Hearing in the California Supreme Court was denied and an appeal to the United States Supreme Court was dismissed.

[3] It is also apparent that not only the church, but this appellant, too, failed to exhaust their administrative remedies. The church and Combs are alleged by appellant to have appealed to the city council from the decision of the planning commission, but to have dismissed such appeal before decision. It does not appear that appellant ever even made application for a permit. Metcalf v. County of Los Angeles, 24 Cal.2d 267, 148 P.2d 645, holds that such remedies must be exhausted before relief may be granted by the courts. At page 269 of 24 Cal.2d, at page 646 of 148 P.2d, the court said: "A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief. [Many citations.]" In that case appellants said, as does this appellant, that the doctrine of exhaustion of remedies does not require them to follow the procedure prescribed by an ordinance which they allege is void as to their property; but the court overruled that contention.

In conclusion it is to be noted that appellant Gray appears before us for himself alone, as a member of the congregation of the church. Appellant is not a member of the bar and has shown no authority to appear for anyone else; and while he states in his brief that the injunction restrains him from "conducting church services, or church functions, singing, praying, preaching, and worshipping God on the premises described," the injunction does not so state. It merely enjoins the defendants from "carrying on or conducting a church or church functions or church services" upon the premises involved, and there is no allegation that appellant has authority to do any of the things actually enjoined; the judgment in no sense enjoins or restrains appellant individually from singing, praying or worshipping God as and where he pleases.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

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108 Cal.App.2d 198

In re FROLING'S ESTATE.

PAULSSON v. WARREN et al.

Civ. 18388.

District Court of Appeal, Second District,
Division 1, California.
Dec. 13, 1951.

Proceeding in the matter of the estate of Emma Froling, also known as Emma S. Froling, wherein Elinda Paulina Paulsson filed a petition to determine heirship. Ann E. Warren, administratrix of the estate, filed a statement of claim of interest. The Superior Court of Los Angeles County, Roy L. Herndon, J., rendered decree determining heirship, and Elinda Paulina Paulsson appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to support trial court's conclusion that real property had been the community property of deceased wife and her predeceased husband, so that husband's daughters by former marriage were entitled to inherit the property.

Judgment affirmed.

Husband and Wife ⚷264

Evidence was sufficient to support trial court's conclusion that real property had been the community property of deceased wife and her predeceased husband, so that husband's daughters by former marriage were entitled to inherit the property.

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Walter G. Danielson, Los Angeles, for appellant.

Dana R. Williams, Long Beach, for respondents.

DORAN, Justice.

This is an appeal "from the Decree determining Heirship" in the matter of the estate of Emma Froling.

As recited in appellant's brief, "The appellant, a niece of decedent, Emma Froling, filed herein a Petition to Determine Heirship in which she alleged that she along with certain other designated nieces and nephews, were the heirs at law of the decedent and the only persons entitled to participate in the distribution of the above estate. Ann E. Warren, administratrix of the estate, filed a statement of claim of interest in which she alleged that the real property in the estate had been the community property of the deceased and her predeceased husband, Hiram R. Froling, and that a portion of it had come to decedent under the terms of his Last Will and Testament and a portion of said real property had come to the decedent by virtue of a joint tenancy between the said spouses. Said statement also alleged that the predeceased spouse Hiram R. Froling was survived by two daughters, the issues of a former marriage, to-wit, Tillie Froling Seif and Mae Wenger.

"After a hearing on the matter the trial court concluded that the real property had been the community property of the above decedent and her predeceased spouse Hiram Froling, and that the aforesaid daughters of the predeceased spouse were entitled to inherit the same. Appellant prosecutes this appeal from the decree determining that said daughters are entitled to succeed to the real property in the estate."

Respondent concedes the foregoing to be a correct statement of the "nature of the controversy" and, in addition pointed out that, "The basic question is whether two parcels of realty of which the decedent, Emma Froling, died, seized were her separate property or were the accumulated community property of Mrs. Froling and her predeceased spouse, Hiram Froling".

It is contended on appeal that the evidence "is insufficient to sustain the findings" and that certain "evidence relating to the character of the real property as community or separate property was for the most part hearsay, and was improperly admitted over the objection of the appellant".

Primarily the issue being one of fact, was for the trial court to determine. Appellant's argument with regard to the inadmissibility of certain evidence may, from a strictly technical standpoint, be sound in some instances. However, no prejudice resulted therefrom. The evidence was sufficient to support the court's conclusions. In such circumstances, as pointed out by respondent, the overall picture plays an important part. And, in such situations as presented by the evidence in the within action the "status of the property may * * 'appear from the surrounding circumstances'". Long v. Long, 88 Cal.App.2d 544, 199 P.2d 47, 50. In that connection, as recited in respondents' brief, "When it is shown that a man and a woman, in the lowest economic levels, marry each other, live together in utmost frugality for over a quarter of a century, and at their demise leave an estate admittedly accumulated by them under purchase contracts calling for the lowest payments known to such contracts, an estate that is extremely modest even when measured by a most liberal standard, does not such selfsame situation sustain the view that such estate was the community accumulation of the parties? In many, many instances, we submit, by looking over the years of the long married life of parties, taking into account their humble beginnings, their long and slow process of accumulation and their constant and unswerving frugality, every suggestion that either was ever possessed of a separate estate is dispelled, and the judgment that the accumulated estate is of community character is irresistible.

"The admitted historical facts in our controversy impressively establish a factual situation from the survey of which no judgment would be defensible other than that the two parcels of realty in question are of community character."

The trial judge obviously reached the same conclusion.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

108 Cal.App.2d 235

In re FRINCHABOY'S ESTATE.

FRAYSSINOUS v. BRUGNOLI et al.

Civ. 14866.

District Court of Appeal, First District,
Division 1, California.
Dec. 17, 1951.

Hearing Denied Feb. 14, 1952.

Proceeding in the matter of the estate of Anna Frinchaboy to determine the claim of Georgette Brugnoli and others to be pretermitted heirs of the testatrix, opposed by Leon Frayssinous, surviving son of the testatrix. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., held that the claimants were pretermitted heirs, and the son appealed. The District Court of Appeal, Bray, J., held that the claimants, children of testatrix's daughter, who was deceased at time of the making of the will and the death of the testatrix, were pretermitted heirs of testatrix and entitled to an undivided one-half of her estate.

Affirmed.

1. Wills 🔑489(2)

Extrinsic evidence may be resorted to where there is a latent ambiguity in will due to fact that there are two or more persons exactly measuring up to the designation or description of person mentioned in will.

2. Wills 🔑489(2)

Where two daughters of testatrix were deceased at time of making of will and death of testatrix and will contained bequest of $1.00 to daughter, should she claim any interest in estate, parol evidence was proper to show to which daughter testatrix referred.

3. Descent and Distribution 🔑47(2)

Grandchild who takes his predeceased father's share under will, by virtue of statute providing that when any estate is divided or bequeathed, to any kindred of testator, and devisee or legatee is dead at time will is executed, but leaves lineal decendants surviving testator, such descendants take estate so given by will in same manner as devisee or legatee would have done had he survived testator, cannot be pretermitted heir under statute providing that pretermitted heir shall succeed to same share in estate of testator as if testator had died intestate. Probate Code, §§ 90, 92.

4. Wills 🔑439, 448, 449

Rule that constructions of wills which lead to intestacy, total or partial, especially where will evinces intention on part of testator to dispose of his whole estate, are not favored, does not control over construction which follows manifest intention of testator.

5. Descent and Distribution 🔑47(2)

Where daughter of testatrix was deceased at time of making of will and death of testatrix, but left three children surviving testatrix, and will, in addition to provision leaving entire estate to son, contained bequest of $1.00 to daughter, should she claim any interest in estate clause referring to daughter was one of disinheritance and not of bequest, and therefore statutory provision that when any estate is devised or bequeathed to any kindred of testator, and devisee or legatee is dead at time will is executed, but leaves lineal descendants surviving testator, such descendants take estate so given by will in same manner as devisee or legatee would have done had he survived testator, was not applicable to surviving grandchildren. Probate Code, § 92.

6. Descent and Distribution 🔑47(2)

Where daughter of testatrix was deceased at time of making of will and death of testatrix, but left three children surviving testatrix, and will, in addition to provision granting entire estate to surviving son, contained bequest of $1.00 to daughter, should she claim any interest in estate, clause referring to daughter was one of disinheritance and not of bequest, and therefore as it did not appear from will that omission of grandchildren was intentional, surviving grandchildren take under statute providing for pretermitted heirs as if testatrix had died intestate. Probate Code, § 90.

7. Descent and Distribution 🔑47(1)

If there is possibility of inheritance under statute providing that when estate is bequeathed to any kindred of testator, and legatee is dead at time will is executed, but leaves lineal descendants surviving testator, such descendants take estate so given by will in same manner as legatee would have done had he survived testator, surviving heir would be barred from sharing in estate of testator under statute providing for inheritance by pretermitted heirs. Probate Code, §§ 90, 92.

8. Descent and Distribution ⚷47(2)

Where daughter of testatrix was deceased at time of making of will and death of testatrix, but left three children surviving testatrix, and will, in addition to provision granting entire estate to surviving son of testatrix, contained bequest of $1.00 to daughter, should she claim any interest in estate, provision for $1.00 which was obviously a disinheritance rather than an inheritance, did not give grandchildren or daughter a possibility of inheritance destroying surviving grandchildren's right to take as pretermitted heirs. Probate Code, §§ 90, 92.

◆

George Devine, Jr., San Francisco, for appellant.

Albert Picard, San Francisco, Raymond N. Baker, San Francisco, of counsel, for respondents.

BRAY, Justice.

This appeal is from a "Decree Determining Heirship And Interests In Estate" which held that respondents were pretermitted heirs of the testatrix.

Questions Presented

1. Is parol evidence admissible to determine which of two deceased daughters testatrix intended to designate by the words "my daughter"? 2. Does section 90 of the Probate Code or section 92 apply where the daughter of testatrix was deceased at the time of both the making of the will and the death of the testatrix, but left three children surviving the testatrix, and where the will provides a bequest of one dollar "to my daughter, should she claim any interest in my estate"?

Facts

On April 30, 1948, Anna Frinchaboy executed her will in which after leaving her entire estate to appellant, her son Leon, she provided: "I hereby direct that the sum of One Dollar be given to my daughter, should she claim any interest in my estate." At that time testatrix' sole surviving child was her son, Leon. However, two daughters had theretofore died, one, Zilla, without issue. The other, Mary, left surviving three children, the respondents, all of whom survived the testatrix, who died November 17, 1948. Thus, both at the time of the making of the will and the death of testatrix, the only living heirs of testatrix were appellant, her son, and respondents, her grandchildren, the issue of her daughter Mary. The will was admitted to probate. On the hearing of petitions to determine interests in the estate appellant offered evidence tending to show that by the words "my daughter" testatrix was referring to her daughter Mary who died in 1946, and not to Zilla, who died in 1942. Respondents objected. The court reserved its ruling. Although the record fails to show any direct ruling, the court considered this evidence, for it stated at the conclusion of the case that it was evident that testatrix was referring to Mary. In its decree the court found that respondents are pretermitted heirs of testatrix and entitled to an undivided one-half of her estate.

1. Parol Evidence

[1, 2] It is well settled that extrinsic evidence may be resorted to where there is a latent ambiguity in a will due to the fact that there are two or more persons exactly measuring up to the designation or description of a person mentioned therein. Thus in Re Estate of Donnellan, 164 Cal. 14, 127 P. 166, the will bequeathed certain estate "to my niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary * * *." 164 Cal. at page 16, 127 P. at page 167. Parol evidence was held proper to show that testatrix' sister Mary and her children never left Ireland and that it was Anne, the daughter of testatrix' sister Anne, whom the testatrix intended to re-

ceive the bequest. See 28 R.C.L. 275 to the effect that parol evidence is admissible to show who was intended where the name or description fits with equal accuracy two different individuals. This rule does not violate the rule set forth in Re Estate of Trickett, 197 Cal. 20, 239 P. 406, to the effect that parol evidence may not be resorted to for the purpose of showing the intention of the testator to omit an heir from his will. The evidence which is admissible serves merely to point out the person the testatrix intended to include, not omit.

2. What Probate Code Section Applies

Assuming, then, that the testatrix was referring to Mary, does section 90 or section 92 apply? Section 90 provides: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator * * * unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate." Section 92 provides: "* * * when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee * * * is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

[3] In Re Estate of Todd, 17 Cal.2d 270, 109 P.2d 913, it was held in effect that a grandchild who takes his predeceased's father's share under a will by virtue of section 92 cannot be a pretermitted heir under section 90. See also In re Estate of Childs, 21 Cal.App.2d 103, 68 P.2d 306. Thus, if here, the direction that Mary be given $1 if she claims any interest in the estate, constitutes, in the language of section 92, estate devised or bequeathed to Mary, then respondents are not pretermitted heirs of testatrix but succeed as heirs of Mary to the estate given to her. In determining this question the language of the will is important. In leaving the whole of her estate to her son, testatrix used the words "I * * * give, devise and bequeath * * *." But in dealing with the daughter she does not, in so many words, give, devise or bequeath, but merely *directs* that *if* the daughter claims any interest in the estate, she be given $1. It is obvious, then, from the language of the will that she was intending, not to make a bequest, but to disinherit the daughter. If the daughter makes no claim, she gets nothing. If she does make a claim she gets practically nothing, merely the nominal sum of $1, and she gets that, not as a bequest, but as a token of disinheritance. While there are cases that hold that bequests of nominal sums to a predeceased child are sufficient to cause the application of anti-lapse statutes to their children, such an interpretation of those statutes is highly technical, unfair and unrealistic. It completely overlooks the fact that a bequest of only $1 to a child of the testatrix is never intended as a gift from the testatrix, but is merely another way of saying, "I leave nothing to my daughter." In the cases where the will contains such a statement, it is held that the testatrix did not have the children of her deceased child in mind, but if she did practically the same thing but in other words, by leaving the child $1, it is contended she did have the grandchildren in mind. The harshness of such a rule is well illustrated by this case. Here, at the time she made her will the testatrix had forgotten that her daughter was dead. She obviously did not want that daughter to get any part of her estate, not even $1, unless she made a claim. But it does not necessarily follow that had she known that her daughter whom she wanted to disinherit was dead, she would have remembered the fact that she had grandchildren and would have likewise disinherited them.

The situation in our case is not essentially different from that in Re Estate of Price, 56 Cal.App.2d 335, 132 P.2d 485. There the testatrix devised her property to her two sons, omitting two grandchildren, children of a predeceased son. She then added the usual no-contest clause in which she stated that she purposely refrained from leaving anything to any other person or persons, and giving $1 only to any person contesting the will. The court held that in spite of such a clause and the fact that the testatrix had specifically stated that she was purposely refraining from leaving anything to any person or persons other than her two sons, she could not be held to have had the grandchildren in mind and they must be considered pretermitted heirs. The court applied the rule of In re Estate of Trickett, supra, 197 Cal. 20, 239 P. 406, 408, in refusing to permit parol evidence of whom testatrix meant by "person or persons."

[4] In Re Estate of Lombard, 16 Cal. App.2d 526, 60 P.2d 1000, 1001, appears at first blush to be contrary to In re Estate of Price, supra, 56 Cal.App.2d 335, 132 P.2d 485, but actually is not. There the testator stated in his will that he had no sons or grandchildren; that except as otherwise specified in the will he had intentionally omitted to provide for his heirs. In a no-contest clause he gave to any person contesting $1. In holding that the testator's sons were not pretermitted, as it appeared from the face of the will that the testator expressly intended to omit them, the court pointed out that the will declared on its face that testator had "intentionally and with full knowledge omitted to provide for my heirs [children]". (This latter word was added by the court. Later it stated that the word "heirs" necessarily includes children of the testator.) It coupled the declaration in the will that the testator was intentionally omitting his heirs (children), with the provision of $1 for them if they should contest, and held that thereby they were expressly mentioned, and hence could not be considered pretermitted. The rule expressed in Le Breton v. Cook, 107 Cal. 410, 40 P. 552, that constructions of wills which lead to intestacy, total or partial, especially where the will evinces an intention on the part of the testator to dispose of his whole estate, are not favored, does not control over a construction which follows the manifest intention of the testator.

[5, 6] We can see no escape from the conclusion that the clause in question is one of disinheritance and not of bequest, and therefore section 92 does not apply. Therefore, as it does not appear from the will that the omission of the grandchildren was intentional (see In re Salmon's Estate, 107 Cal. 614, 40 P. 1030, to the effect that mention in the will of the mother of testatrix' grandchildren is not sufficient to show that the testatrix had the grandchildren in mind) they succeed under the provisions of section 90 as if the testatrix had died intestate.

[7, 8] In Re Estate of Carter, 49 Cal. App.2d 251, 121 P.2d 540, 541, is not applicable. There the will contained specific devises and bequests to the testatrix' daughter. It then gave "My other property I possess" to her three sons, one of whom died after the making of the will but prior to the death of testatrix, leaving a son. The record did not disclose what "other property I possess" may have existed at the time of making the will. At the time of her death her only estate consisted of that specifically devised and bequeathed to the daughter. The court held that the intention of the testatrix must be determined solely from the terms of the will, and that the intention must be determined as of the date of the will only. As of that date there was no requirement that testatrix provide for the grandson as she had provided for his father. Taking the terms of the will, it would appear from the fact that she also made bequests of $300 each to two clergymen, and $100 to anyone who might contest the will, that she believed she was bequeathing the three sons something substantial, but, assuming the bequests to be slight, in the sense that it may have been only personal effects, etc., it was still a bequest to the father of the appellant to which the latter, as his father's son, would be entitled under section 92. "If there was a possibility of inheritance under that section, appellant would be barred as a pretermitted heir from sharing in the estate under the provisions of section 90." 49 Cal.App.2d at pages 255–256, 121 P.2d at page 542. Applying that test to the will in our case, one cannot say that the provision for $1 (obviously as a disinheritance rather than an inheritance),

gave the grandchildren or even the mother a possibility of inheritance. In re Estate of Callaghan, 119 Cal. 571, 51 P. 860, 39 L.R.A. 689, likewise is not in point as it was decided on the fact that the testatrix had actually mentioned the complaining grandchildren in her will although the property she devised them was nonexistent. By her will, testatrix gave nearly all her property to her son, daughter and children of the latter. She then devised six acres of land in Alameda County to two grandchildren, the children of a deceased son. It developed that although at one time testatrix had owned land in that county, she owned none at the time of making the will nor at her death. The grandchildren claimed that because of this fact they were pretermitted heirs. In holding that they were not, the court pointed out that section 1307 of the Civil Code, the predecessor of section 90, in no way compels a testatrix to leave property to the heirs therein mentioned, but does require that if there is an omission to provide, such omission appear from the terms of the will to be intentional; that the will shows that the testatrix had the grandchildren in mind, as she expressly mentioned them, even though in so doing she appeared to give them something which did not exist.

In Re Estate of Ross, 140 Cal. 282, 73 P. 976, relied upon by both parties, is actually not in point. There, the testator bequeathed $10 each to his two sons, one of whom was dead at the time the will was executed, leaving surviving a daughter who also survived the testator. The court pointed out that section 1310 of the Civil Code, the former anti-lapse statute, applied only to *devises* and not to *bequests,* and as there was no devise in the will to her father and as he was dead and therefore could not take the bequest, his daughter was completely omitted from the will and was entitled to succeed as a pretermitted heir under section 1307 of the Civil Code, the predecessor of the present section 90, Probate Code. Appellant argues that had section 1310, Civil Code, then included *bequests* as well as *devises* as section 92 does now, the court in the Ross case would have held that the granddaughter was not pretermitted. It is idle to speculate what the court might have done had the circumstances been different than those upon which it passed.

Lawnick v. Schultz, 1930, 325 Mo. 294, 28 S.W.2d 658, supports appellant's position. The Missouri statutes were substantially similar to our sections 90 and 92. Testator gave most of his estate to his surviving wife, a substantial devise to a daughter by that wife, and then to a son and daughter by a prior wife $5 each. The latter daughter predeceased the testator. Her children contended that they were pretermitted. Although the court said, 28 S.W.2d at page 660: "While the amount of the legacy left his daughter was tantamount, had she been alive, to a *virtual disinheritance*" (emphasis added) it went on to hold that in spite of that fact the grandchildren would inherit through their deceased mother the $5, and hence could not be considered to have been omitted from the will. The court said, 28 S.W. at page 661: "The will shows an intention on the part of the testator to exclude his daughter and her descendants from the remainder of his estate. Thus the will shows that plaintiffs were not forgotten." We cannot go along with this statement, and we see no reason for applying the Missouri rule in California. It is illogical to state, as did the Missouri court, that where a will shows an intention of a testator to exclude a daughter it likewise shows an intention to exclude her children.

The decree is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

107 Cal.App.2d 799

In re MEYER'S ESTATE.

MARTIN et al. v. McGRATH, U. S. Atty. Gen.

Civ. 18296.

District Court of Appeal, Second District, Division 3, California.

Dec. 3, 1951.

Proceeding in the matter of the estate of Bertha Francisco Klamp Meyer, also known as Franciska Klamp Meyer, also known as Frau Max J. Meyer, wherein Irma Martin, administrator, filed a final account, report and petition for final distribution and J. Howard McGrath, Attorney General of the United States of America, filed objections. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered a decree finding that Emilie Bredehorst, daughter of decedent, was entitled to succeed to one-half of the estate of decedent and that Hans Jansen, Rolf Jansen, and Irma Martin, children of a predeceased daughter of decedent, were each entitled to succeed to one-sixth thereof, and that attorney general was entitled to receive distribution of the interest of Emilie Bredehorst and Hans Jansen by virtue of a vesting order, and Irma Martin and Rolf Jansen, appealed. The District Court of Appeal, Vallée, J., held inter alia, that portion of the treaty of Versailles which provided that only bilateral treaties and conventions which had been subject of notification shall be revived between Allied and Associate Powers and Germany was not applicable to the Treaty of 1827 with Bremen, Germany, so far as it related to rights of citizens of Bremen to inherit, and such 1827 treaty, in such regard was in force in 1924 when deceased resident of Bremen died intestate leaving property in the United States, notwithstanding there was no notification with regard to such treaty.

Affirmed.

1. Descent and Distribution 🔑6

Statutes governing right of inheritance in force at time of death control disposition of property left by an intestate.

2. Aliens 🔑12(4)

Probate court provisions relating to inheritance rights of aliens, which provisions were enacted in 1941, cannot be applied retroactively. Probate Code, §§ 259–259.2.

3. Treaties 🔑11

Provisions of treaty of 1827 with Bremen, Germany, if in force when national and resident of Bremen died intestate in Bremen, leaving property in California, were supreme law of the land and superseded all local laws inconsistent with its terms, and to extent that state statutes conflicted with treaty the state statutes would be superseded by treaty. Convention between the United States and Free Hanseatic Republic, art. 1 et seq., 8 Stat. 366.

4. Aliens 🔑14

Under laws in force in California in 1924 a nonresident alien under law unaffected by treaty did not enjoy same rights to succeed to personal property of intestate as citizens of the United States.

5. Treaties 🔑6

Whether stipulations of a treaty are annulled by war depends upon their intrinsic character.

6. Treaties 🔑6

There is nothing incompatible with policy of government, with safety of nation, or with maintenance of war, in enforcement of dispositive treaties or dispositive parts of treaties, and such provisions are not abrogated by a state of war.

7. Treaties 🔑6

Rights under treaty of 1827 with Bremen of residents and nationals of Bremen, Germany, to inherit personalty situated in United States as grandchildren of a national and resident of Bremen, who died intestate in 1924, were not cut off by declaration of war between United States and Germany in 1917. Convention between United States and Free Hanseatic Republic, art. 1 et seq., 8 Stat. 366.

8. Treaties 🔑6

Provision of the Treaty of Versailles that only bilateral treaties and conventions which had been subject of notification shall be revived between Allied and Associated Powers and Germany is to be interpreted as not applying to any treaty or part of treaty which was not abrogated by the War of 1917–18, and intention of provision was not to absolutely wipe out all former treaties between the United States and German states. Treaty of Peace between United States and Germany, Nov. 14, 1921, art. 1 et seq., 42 Stat. 1939.

9. Treaties ⚷6

The provision of Treaty of Versailles that only bilateral treaties and conventions which have been subject of notification shall be revived between Allied and Associated Powers and Germany was not applicable to treaty of 1827 with Bremen, Germany, so far as it related to right of citizens of Bremen to inherit, and such 1827 treaty, in such regard, was in force in 1924 when national and resident of Bremen, Germany, died intestate leaving property in the United States, notwithstanding there was no notification with regard to such treaty. Treaty of Peace between United States and Germany, Nov. 14, 1921, art. 1 et seq., 42 Stat. 1939.

10. Adverse Possession ⚷62
Descent and Distribution ⚷82, 86
Wills ⚷5

An heir may sell, assign, hypothecate, or otherwise transfer his inheritance, may make a testamentary disposition thereof, may contract with other heirs with reference thereto, and may lose it by adverse possession.

11. Descent and Distribution ⚷72

Heirs cannot prevent passage of title to themselves by a renunciation or disclaimer.

12. Wills ⚷717

A legatee or devisee, under a will, is not bound to accept, but may renounce or disclaim his right under it if he has not already accepted.

13. Wills ⚷717

If legatee or devisee under a will renounces or disclaims his right under will, renunciation or disclaimer relates back to time gift was made, and no estate vests in legatee or devisee.

14. Descent and Distribution ⚷74

In case of a succession by descent the estate vests in the heir eo instante upon death of ancestor and no act of heir is required to perfect title.

15. Descent and Distribution ⚷72, 74, 86

In case of a succession by descent the estate vests in the heir eo instante upon death of ancestor, and heir cannot, by renunciation or disclaimer, prevent passage of title to himself, nor can he, by renunciation or disclaimer, transfer estate to any other person as heir of ancestor, and he can only make a transfer by some instrument adapted to transfer of property.

16. War and National Defense ⚷12

Instruments purporting to waive right of heir of an alien who died intestate to participate in distribution of estate of alien which was situated in the United States were void under the Trading with the Enemy Act and rules and regulations issued, pursuant thereto. Trading with the Enemy Act, § 1 et seq., as amended, 50 U.S.C.A. Appendix, § 1 et seq.

◆

John Moore Robinson, Robert Morgan Himrod, Los Angeles, for appellants.

Harold I. Baynton, U. S. Asst. Atty. Gen., Director, Office of Alien Property, Ernest A. Tolin, U. S. Atty., Southern District of California, Clyde C. Downing, Asst. U. S. Atty., Southern District of California, Los Angeles, Valentine C. Hammack, Sp. Asst. to the Atty. Gen., James D. Hill, George B. Searls, Joseph Laufer, Attys., Department of Justice, Washington, D. C., for respondent.

VALLÉE, Justice.

Appeal by Irma Martin and Rolf Jansen, distributees of a portion of the above entitled estate, from that part of a decree of final distribution which distributed to respondent Attorney General of the United States two-thirds of the estate which descended to nonresident alien heirs.

Bertha Meyer, a national and resident of Germany, died intestate in Bremen, Germany, on August 2, 1924. Her heirs were a daughter, Emilie Bredehorst, and three grandchildren, Irma Martin and Hans and Rolf Jansen, children of a predeceased daughter, all of whom were residents and nationals of Bremen, Germany, at the time of her death. Rolf Jansen entered the United States in June, 1929, and became a citizen in 1941. Irma Martin entered the United States in 1939, and became a citizen in 1945. Emilie Bredehorst and Hans Jansen remained in, and at all times have been nationals and residents of, Bremen. Decedent left personal property in California, consisting of 300 shares of the stock of Honolulu Oil Corporation and cash representing dividends which had accumulated since 1941, when they were frozen by Executive Order No. 8785,[1] issued June 14, 1941, which extended freezing controls initiated by Executive Order No. 8389,[2] issued April 10, 1940, by the President, pursuant to the powers vested in him by section 5 (b) of the Trading with the Enemy Act,[3] to assets of German nationals.

Decedent's estate in California was not administered until October 22, 1948, when Irma Martin was appointed administratrix. On November 17, 1949, Irma Martin filed with the probate court two identical instruments executed in Bremen, Germany, on August 22, 1949, by Emilie Bredehorst and Hans Jansen, entitled "Waiver of Interest," by which they waived "all right to participate in the distribution" of the estate in California.

On January 20, 1950, respondent attorney general, as successor to the alien property custodian,[4] vested in himself all the right, title, interest, and claim of any kind of Emilie Bredehorst and Hans Jansen in the estate by virtue of vesting order No. 14276.

On December 1, 1950, Irma Martin filed her final account, report, and petition for final distribution, alleging that Emilie Bredehorst and Hans Jansen had waived "all claim, right, title or interest" in the estate, that she, Irma Martin, and Rolf Jansen were decedent's sole heirs, and prayed that the estate be distributed to them, share and share alike.

Objections to the petition were filed by respondent attorney general, in which it was alleged that Emilie Bredehorst and Hans Jansen were residents and nationals of Germany when decedent died on August 2, 1924, and "aliens not residing within the United States or its territories"; that the waivers executed by the German nationals were "in contravention of the provisions of the Trading with the Enemy Act, as amended, and Executive Order 8389, as amended (6 F.R. 2897) and the Rules and regulations issued thereunder," and were null and void and of no effect; and prayed that all the right, title, interest, and claim of the two German nationals be distributed to him, as successor to the alien property custodian.

The court made an order by which it found, among other matters, that Emilie Bredehorst was entitled to succeed to one-half of the estate, that Hans Jansen, Rolf Jansen and Irma Martin were each entitled to succeed to one-sixth thereof, and that respondent attorney general was entitled to receive distribution of the interests of Emilie Bredehorst and Hans Jansen by virtue of the vesting order.

[1, 2] Statutes governing the right of inheritance in force at the time of death control the disposition of property left by an intestate.[5] Under the statute in force on August 2, 1924, Emilie Bredehorst, as surviving daughter, succeeded to one-half of the estate, and Irma Martin and Hans and Rolf Jansen, children of a predeceased daughter, each succeeded to one-sixth of the estate. Civ.Code, § 1386, subd. 1, now Prob.Code, § 222. However, since these heirs were nonresident aliens at the time

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[1] 6 Fed.Reg. 2897, 12 U.S.C.A. § 95a note.

[2] 5 Fed.Reg. 1400, 12 U.S.C.A. § 95a note.

[3] 40 Stat. 411, 415, ch. 106, Oct. 6, 1917, as amended by Joint Resolution of May 7, 1940, 54 Stat. 179, ch. 185, and First War Powers Act of Dec. 18, 1941, § 301, 55 Stat. 838, 839, ch. 593, 50 U.S.C.A. Appendix, § 5.

[4] Executive Order No. 9788, 11 Fed.Reg. 11981, 50 U.S.C.A.Appendix, § 6 note.

[5] Probate Code sections 259–259.2 were enacted in 1941, Stat.1941, p. 2473, and are therefore not applicable. They cannot be applied retroactively. In re Estate of Giordano, 85 Cal.App.2d 588, 594, 193 P.2d 771; In re Nossen's Estate, 118 Mont. 40, 162 P.2d 216.

of decedent's death, they were required, under sections 672[6] and 1404[7] of the Civil Code, then in force, to appear and claim their succession within five years after decedent's death, or be barred from taking.

Appellants' position is that the nonresident heirs were barred from succeeding to the estate by virtue of former Civil Code sections 672 and 1404, that the entry of Rolf Jansen into the United States in 1929 "prevented the State of California from proceeding to declare an escheat of the estate," and that since no escheat proceedings were commenced by the State, appellants became entitled to the whole thereof.

Respondent contends that the Civil Code sections were suspended and controlled by the treaty of 1828 with Prussia.[8] Appellants say that the treaty was abrogated by World War I, was no longer in effect in 1924, and that the treaty with Germany of December 8, 1923,[9] was inapplicable, as it was not proclaimed until October 14, 1925, after decedent's death.

The treaty of 1828 with Prussia was not controlling. Bertha Meyer died a citizen of Bremen in 1924. Bremen was not a part of Prussia in 1828 or in 1924.[10] The controlling treaty was the treaty between the United States and the Free Hanseatic Republics of Lubeck, Bremen, and Hamburg, signed December 20, 1827.[11] Article VII of the Bremen treaty[12] clearly governs the right of succession to real and personal property, and protects the right of citizens of each of the contracting parties reciprocally to own, dispose of, and transmit personal property situated in the other country, free from provisions or restrictions which discriminate because of alienage. No limitation is placed on the right of citizens of Bremen.

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[6] "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure."

[7] "Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

[8] 8 Stat. 378–386.

[9] 44 Stat. 2132.

[10] In 1646 Emperor Frederick III created Bremen a free imperial city. See "Bremen," 4 Ency.Brit., 89; "Hanseatic League," 11 Ency.Brit., 162. Bremen was a free German state. 10 Ency.Brit., 280. In 1866 it became a part of the North German Union, id. 290, and in 1871 a part of the German Empire. Id. 293.

[11] 8 Stat. 366; 18 Stat. part 2, p. 400. The cause is argued by both sides on the assumption that the treaty of 1828 with Prussia was controlling. However, as the pertinent provisions of the treaty of 1827 with Bremen are substantially identical with the provisions of the treaty of 1828 with Prussia, the argument is relevant. 8 Stat. 384, art. XIV.

The government of the United States has recognized the treaty of 1827 with Bremen as applicable to Germany after the formation of the North German Union in 1866 and the German Empire in 1871, and accorded reciprocity accordingly. North German Lloyd S. S. Co. v. Hedden, D.C., 43 F. 17, 19; Terlinden v. Ames, 184 U.S. 270, 22 S.Ct. 484, 46 L. Ed. 534, 542–545. See, also, Flensburger Dampfercompagnie v. United States, 59 F.2d 464, 467, 73 Ct.Cl. 646, and authorities there cited.

[12] "The citizens of each of the contracting parties shall have power to dispose of their personal goods, within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their representatives being citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are, shall be subject to pay in like cases; and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same, as they may think proper, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective States." 8 Stat. 370.

[3] The provisions of the treaty of 1827 with Bremen, if in force in 1924, were the supreme law of the land and superseded all local laws inconsistent with its terms. To the extent that our statutes conflicted with the treaty, the former were superseded by the latter, which must control.[13]

[4] Under our laws in force in 1924, the date of death of decedent, the property of a person who died intestate vested in his heirs immediately upon the death of the ancestor. If the heirs were citizens of the United States, they became vested immediately with the entire estate of the ancestor by a title which was indefeasible except for the purposes of administration in the manner and for the purposes provided by law; but if such heirs were nonresident aliens, the estate which vested in them upon the death of the ancestor was not an absolute or indefeasible estate, but was a conditional estate, upon the condition subsequent that if they failed to appear and claim the same within five years, their right ceased. The nonresident alien, under our law unaffected by a treaty, did not enjoy the same right to succeed to personal property as citizens of the United States.[14] The nonresident alien heirs of Bertha Meyer did not appear and claim their succession within five years after her death. Therefore, unless their right to succeed was affected by a treaty, they were barred from taking under our law as it existed in 1924.

[5, 6] The effect of war upon existing treaties of belligerents has been the subject of much discussion. The old doctrine, sometimes asserted by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that whether the stipulations of a treaty are annulled by war depends upon their intrinsic character.[15] The authorities appear to be in accord that there is nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of war in the enforcement of dispositive treaties or dispositive parts of treaties. Such provisions are compatible with, and are not abrogated by, a state of war.[16]

[7] We therefore hold that the rights of Emilie Bredehorst and Hans Jansen to inherit from Bertha Meyer, under the treaty with Bremen, were not cut off by the

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[13] In re Estate of Turner, 51 Cal.App. 317, 322–323, 196 P. 807; Blythe v. Hinckley, 127 Cal. 431, 436, 59 P. 787; In re Estate of Romaris, 191 Cal. 740, 218 P. 421; In re Estate of Knutzen, 31 Cal.2d 573, 577, 191 P.2d 747; Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 1641, 170 A.L.R. 953; 52 Am. Jur. 816, § 18.

[14] In re Estate of Romaris, 191 Cal. 740, 744, 218 P.2d 421.

[15] Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 1641, 170 A.L.R. 953; Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 21 U.S. 464, 5 L.Ed. 662, 669; Karnuth v. United States, 279 U.S. 231, 49 S.Ct. 274, 73 L.Ed. 677; Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, certiorari denied 254 U.S. 643, 41 S.Ct. 14, 65 L.Ed. 454; State [ex rel. Miner] v. Reardon, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452; Goos v. Brocks, 117 Neb. 750, 223 N.W. 13; The Sophie Rickmers, D.C.S.D. N.Y., 45 F.2d 413, 418–421; Sutton v. Sutton, 39 Eng.Rep. 255; 5 Moore's Digest of International Law, 383, § 779.

[16] Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 1641, 170 A.L.R. 953; Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, certiorari denied 254 U.S. 643, 41 S.Ct. 14, 65 L.Ed. 454; State [ex rel. Miner] v. Reardon, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452; Goos v. Brocks, 117 Neb. 750, 223 N.W. 13; The Sophie Rickmers, D.C.S.D.N.Y., 45 F.2d 413, 418–421; 52 Am.Jur. 813, § 15; Anno.: 11 A.L.R. 180; V Hackworth, Digest of International Law, 377–390 (a publication of the Department of State).

In upholding the right of an Austro-Hungarian national, resident in the United States, to inherit land in New York after the outbreak of war between the United States and Austria-Hungary under the treaty of commerce and navigation with Austria of 1829, as extended by the convention of 1848, the Court of Appeals of New York in Techt v. Hughes, supra, speaking through Judge Cardozo, said, at page 191 of 128 N.E.: "The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older declaration of war between the United States and Germany. There remains the question whether the right of citizens of Bremen to inherit was affected by what occurred after the war of 1917–18.

[8] The treaty of peace between the United States and Germany, proclaimed November 14, 1921, referring to the Treaty of Versailles, provided: "(1) That the rights and advantages stipulated in that

writers sometimes said that treaties ended ipso facto when war came. 3 Phillimore, Int.L. 794. The writers of our own time reject these sweeping statements. 2 Oppenheim, Int.L. § 99; Hall, Int.L. 398, 401; Fiore, Int.L. [Borchard's Transl.] § 845. International law to-day does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice. 'The whole question remains as yet unsettled.' Oppenheim, supra. This does not mean, of course, that there are not some classes of treaties about which there is general agreement. Treaties of alliance fall. Treaties of boundary or cession, 'dispositive' or 'transitory' conventions, survive. Hall, Int.L. pp. 398, 401; 2 Westlake, Int.L. 34; Oppenheim, supra. So of course do treaties which regulate the conduct of hostilities. Hall, supra; 5 Moore Dig.Int.L. 372; Society for Propagation of the Gospel v. Town of New Haven, 8 Wheat, 464, 494, 5 L.Ed. 662. Intention in such circumstances is clear. These instances do not represent distinct and final principles. They are illustrations of the same principle. They are applications of a standard. When I ask what that principle or standard is, and endeavor to extract it from the long chapters in the books, I get this, and nothing more: That provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected. * * * I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty, so as to sustain the plaintiff's title."

In State [ex rel. Miner] v. Reardon, supra, 120 Kan. 614, 245 P. 158, 47 A.L.R. 452, a citizen of the United States died intestate October 15, 1924, owning real property and leaving nonresident alien heirs, citizens of Germany, residing in Prussia. The state brought action against the nonresident alien heirs asking to be adjudged the owner of the land on the ground that the aliens were incapable of inheriting, there being no statute qualifying them. The state contended that the treaty of 1828 with Prussia ceased to be effective by reason of the war between the United States and Germany. The court said 245 P. at page 159: "Upon the grounds indicated in the opinion in the Techt-Hughes Case we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should operate only in time of peace. Practically the only important question is which way the presumption lies, for, of course, either belligerent by affirmative action may use its own pleasure as to suffering the pre-war condition to continue."

In a like holding considering the provisions of treaties with the several German states which secured to citizens of the German states the right to inherit real estate in the United States, the Supreme Court of Nebraska in Goos v. Brocks, supra, 117 Neb. 750, 223 N.W. 13, at page 16, said: "[T]he treaty provision, involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war. This power has been exercised in the passage of the act providing for the appointment of a custodian of alien enemy property who by national legislation is authorized to seize and hold during the war all property situated in this country and owned by alien enemies. * * * We therefore hold that the right to inherit lands conferred by the treaties involved in a provision that is compatible with, and is not abrogated by, a state of war between this country and the German Empire."

Article XXIV of the treaty of 1799 between the United States and Prussia, 8 Stat. 162, dealing with treatment of prisoners of war, which was revived by the treaty of 1828, was regarded as in effect after the outbreak of war between the United States and Germany in 1917. (The Secretary of State (Lansing) to

Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in * * * Parts * * * X * * *." 42 Stat. 1939. Other pertinent clauses are set forth in the margin.[17] The Treaty of Versailles stipulated in Article 289 of Part X: "Each of the Allied or Associated Powers, being guided by the general principles or special provisions of the present Treaty, shall notify to Germany the bilateral treaties or conventions which such Allied or Associated Power wishes to revive with Germany * * *. A period of six months from the coming into force of the present Treaty is allowed to the Allied and Associated Powers within which to make the notification. Only those bilateral treaties and conventions which have been the subject of such a notification shall be revived between the Allied and Associated Powers and Germany; all the others are and shall remain abrogated." V Hackworth, Digest of International Law, 386, a publication of the Department of State. The United States did not make the notification with respect to any of the provisions of the treaty with Bremen of 1827.[18] We are of the opinion, in accord with the Supreme Court of Kansas,[19] that Article 289 is

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the Secretary of War (Baker), Apr. 17, 1918, MS. Department of State, file 763.-72114/3322. See also 1918 For.Rel., Supp. 2, pp. 55, 57, 59, 86, 169.)

[17] "Article I. Germany undertakes to accord to the United States, and the United States shall have, and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States. Article II. With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1 of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV. The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions. * * *" 42 Stat. 1939, 1942.

[18] V Hackworth, Digest of the International Law, 387–390 (a publication of the Department of State).

[19] State [ex rel. Miner] v. Reardon, supra, 120 Kan. 614, 245 P. 158, at page 160, in which the court, in considering the effect of the first World War on the treaty of 1828 between the United States and Prussia, said: "Considered by itself the provision that each of the Allied or Associated Powers shall notify to Germany the treaties which it wishes to revive may readily be interpreted as not applying to any treaty or part of a treaty which was not suspended or annulled by the war, since there is no occasion to revive a treaty or part of one which has remained continuously in force. But the fact of the regulations regarding revival being expressly made applicable to treaties with countries with which Germany had not been at war suggests that the treaties which were no longer in force were not the only ones to be revived. Moreover, the statement as to the effect of nonrevivor is not merely that treaties which have not been the subject of notification shall *remain* abrogated. The language is: 'All the others *are* and shall remain abrogated.' However, the treaty with Germany did not make the terms of article 289 of the Treaty of Versailles binding on the United States. It merely extended to the United States the rights and advantages stipulated in that article for its benefit. By that means this country was given the privilege of reviving any treaties (or parts of treaties) with Germany (or any of the German states) which had been annulled or suspended by the war, but it does not follow that a part of a treaty which remained unimpaired required revival in order to remain in force, even if that was the effect of the Treaty of Versailles as between the parties to it in a like situation. It seems obvious that there was no intention of absolutely wiping out all former treaties between the United States and Germany. There was necessarily an implied exception in favor of those entered into to establish a permanent status, such as

to be interpreted as not applying to any treaty or part of a treaty which was not abrogated by the war, since there was no occasion to revive a treaty or part of one which had been continuously in force, and that it was not the intention by the clause "all the others are and shall remain abrogated," to absolutely wipe out all former treaties between the United States and the German states. The language of Article 289 is equivocal and uncertain. It is not lightly to be supposed that it was the intention to revive by notice a provision of a treaty which had not been abrogated, or to abrogate a provision which was not incompatible with war and which was for the mutual benefit of the citizens of the parties to the treaty. In the absence of express words to that effect, it is difficult to infer that it was the purpose of the contracting parties to withdraw the privilege of individuals to inherit, which was not incompatible with hostilities, and which the war had not disturbed. We think that Article 289 means that a treaty which had been abrogated by the war could be revived only in the manner therein provided, and that all treaties which had been abrogated by the war and were not so revived "are and shall remain abrogated."

[9] We hold that the provision of the treaty of 1827 with Bremen, so far as it related to the right of citizens of Bremen to inherit, was in force on August 2, 1924, the date of death of Bertha Meyer.

The argument that "if no reciprocal rights of inheritance were in effect on August 2, 1924, then the estate vested in Rolf Jansen in June, 1929, on his entry into the United States and in Irma Martin on her entry [April, 1939]," is without merit. If a nonresident alien does not appear and claim his succession within five years after the death of his ancestor, the property does not go back to the estate nor is it inherited by the other heirs it vests in the state.[20]

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one settling a boundary dispute. Nor can it have been intended to divest property rights that had already vested under existing treaties. The question to be determined is whether the same considerations which are held to warrant classifying treaty provisions granting a reciprocal privilege of inheritance with those which are not affected by war may not also warrant classifying them with those that were not intended to be nullified by the failure to have them formally revived after the war. To hold in the affirmative requires some extension of the principle, but all the arguments in favor of its application in the one case tend, although with perhaps less force, to justify its application in the other. With respect to old treaties concerning, for instance, commerce, which became inoperative by reason of the war because inconsistent with it, this government may well have thought it better there should be no revival, leaving the matters affected to be adjusted by subsequent negotiations. But it is difficult to believe there was a purpose to withdraw the privilege of individuals to inherit, which is not incompatible with hostilities, and which the war itself had not disturbed. We hold that the provision of the treaty with Prussia, so far as it related to this subject, remained in force until it was replaced by a like provision of the treaty with Germany, signed December 8, 1923, and proclaimed October 14, 1925. The defendants suggest that the League of Nations clause of article 289 of the Treaty of Versailles, making the League the arbitrator of any difference of opinion in connection with the revival of treaties, prevents the application of any part of that article, because of the provision of the treaty of August 25, 1921 (article 2, subd. 2 [42 Stat. 1943]), that the United States shall not be bound by any part of the Versailles Treaty, relating to the League of Nations nor by any action of the League, unless expressly assented to. Possibly the ratification of the treaty containing the provision last referred to may imply an acceptance by this country of the services of the League to the extent indicated in article 289 of the Versailles Treaty. If not, we see no difficulty in rejecting the clause of that article relating to the League of Nations while giving effect to the rest of it."

In Hempel v. Weedin, D.C., 23 F.2d 949, the court held that certain stipulations in the treaty of 1828 with Prussia which provided that citizens of the respective states shall have the same security and protection as natives of the country wherein they reside, survived the war between the United States and Germany and were effective in 1927.

[20] In re Estate of Pendergast, 143 Cal. 135, 140, 76 P. 962; State v. Miller, 149

Appellants contend that whatever right or interest the nonresident heirs acquired in the estate "ceased" or was "extinguished" by the execution of their waivers, the effect of which was to renounce the inheritance to which they had succeeded; therefore, since they never had title, there was nothing which could vest in respondent.

[10] While the courts of this state have determined that an heir may sell, assign, hypothecate, or otherwise transfer his inheritance,[21] may make a testamentary disposition thereof,[22] may contract with other heirs with reference thereto,[23] and may lose it by adverse possession,[24] so far as we have been able to ascertain, the question of whether an heir succeeding by descent may renounce or disclaim his inheritance has not been determined in this state.

[11-16] The authorities are in harmony in declaring that heirs cannot prevent the passage of title to themselves by a renunciation or disclaimer. The object of the renunciation was to prevent any part of the estate from passing from the ancestor to the German heirs. A legatee or devisee, under a will, is not bound to accept, but may renounce or disclaim his right under it, if he has not already accepted; and the renunciation or disclaimer relates back to the time the gift was made and no estate vests in him. The rule is different as to a succession by descent. The estate vests in the heir *eo instante* upon the death of the ancestor; and no act of his is required to perfect title. The estate is cast on the heir by operation of law without regard to his wishes or election. No assent or acceptance is necessary. He cannot, by any act, cause the estate to remain in the ancestor, for the latter is incapable of holding it after his death. He cannot, by any renunciation or disclaimer, prevent the passage of title to himself. Nor can he, by a renunciation or disclaimer, transfer the estate to any other person as the heir of the ancestor, for the object of a renunciation or disclaimer is not to transfer, but to prevent a transfer. He can only make a transfer by some instrument adapted to the transfer of the property.[25] Further, the waivers dated August 22, 1949, were void under the Trading with the Enemy Act, as amended, and the rules and regulations issued pursuant thereto.[26]

We conclude that the so-called waivers were of no legal effect.

The legal result of our conclusions is that former Civil Code sections 672 and 1404 were suspended during the life of the treaty, and that Emilie Bredehorst and Hans Jansen succeeded to their respective portions of the estate of Bertha Meyer in the same manner and to the same extent as citizens of the United States. The in-

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Cal. 208, 210, 85 P. 609; In re Estate of Romaris, 191 Cal. 740, 744, 218 P. 421; In re Estate of Laurence, 84 Cal. App.2d 500, 505, 191 P.2d 109.

[21] United States F. & G. Co. v. Mathews, 207 Cal. 556, 559-560, 279 P. 655; In re Dobbel, 104 Cal. 432, 436, 38 P. 87; In re Estate of Michels, 18 Cal.App.2d 201, 204, 63 P.2d 333; Smith v. Barrick, 41 Cal.App. 28, 182 P. 56; Carrasco v. State of California, 67 Cal. 385, 386-387, 7 P. 766.

[22] In re Dobbel, supra.

[23] Baker v. Miller, 190 Cal. 263, 212 P. 11; In re Estate of Gregson, 96 Cal.App. 767, 274 P. 991.

[24] Smith v. Barrick, 41 Cal.App. 28, 32, 182 P. 56.

[25] Bostian v. Milens, 239 Mo.App. 555, 193 S.W.2d 797, 801, 170 A.L.R. 424; Coomes v. Finegan, 233 Iowa 448, 7 N.W.2d 729; Dueringer v. Klocke, 86 Misc. 404, 149 N.Y.S. 332, 335; In re Mahlstadt's Will, 140 Misc. 245, 250 N.Y.S. 628, 641; Watson v. Watson, 13 Conn. 83; McQuiddy Printing Co. v. Hirsig, 23 Tenn.App. 434, 134 S.W.2d 197, 202; Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588, 591; 4 Page on Wills (Lifetime ed.) 138, § 1401; Williams on Real Property, 1st Ed. (American Reprint; star paging) 66, 17th Ed. (International) 91, 18th Ed. pp. 83, 84, 21st Ed. p. 86, 23rd Ed. pp. 88, 89; Watkins on Descents (1st Ed.), pp. 25, 26, (4th Ed.) pp. 34, 230.

[26] 50 U.S.C.A.Appendix, § 1 et seq.; In re Muller's Estate, 199 Misc. 745, 104 N.Y. S.2d 133.

terests of Emilie Bredehorst and Hans Jansen vested in defendant by virtue of the vesting order of January 20, 1950, and were properly distributed to him.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

108 Cal.App.2d 294

AKAMINE v. MURPHY, Sheriff of the City and County of San Francisco.

No. 15212.

District Court of Appeal, First District, Division 1, California.

Dec. 20, 1951.

Proceeding by Richard Akamine, prisoner of San Francisco County Jail pending trial on charges of grand theft and conspiracy to commit grand theft, for writ of mandate commanding Daniel C. Murphy, Sheriff of the City and County of San Francisco, to permit petitioner's wife, who had been confined in the same jail on the same charges, but had been released on bail, to visit him in the normal manner of any visitor to any other prisoner. The District Court of Appeal, Bray, J., held that the jail rule to the effect that any person who has been released from the jail may not visit an inmate within 30 days of such release was reasonable and did not impose upon petitioner cruel and unusual punishment, even though it prevented petitioner's wife from visiting him.

Alternative writ discharged and petition denied.

1. Prisons 🔑4

Facts that rule of San Francisco County Jail, to effect that any person who has been released from such jail may not visit an inmate within 30 days of such release, has existed, apparently unchallenged, in San Francisco jails for many years, and that such rule prevails in most jails in the state, and is approved by Federal Bureau of Prisons, are some indications of the reasonableness of the rule.

2. Criminal Law 🔑1213
Prisons 🔑4

That San Francisco County Jail rule, to effect that any person who has been released from such jail may not visit an inmate within 30 days of such release, prevented wife from visiting husband, who was confined in the jail pending trial, did not to make the rule unreasonable or impose upon husband cruel and unusual punishment. Pen.Code, §§ 182, 487.

3. Prisons 🔑4

A jail regulation which prevents for a limited time a former inmate from returning and perhaps carrying messages to or from one or more prisoners cannot be said to be improper or to be an undue restraint on the prisoners.

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Arthur D. Klang, San Francisco, for petitioner.

Raymond D. Williamson, San Francisco, for respondent.

BRAY, Justice.

This petition for a writ of mandate raises the question: Is the rule of the San Francisco County Jail to the effect that any person who has been released from the county jail may not visit an inmate within thirty days of such release, reasonable as applied to husband and wife under the circumstances of this case?

Facts.

Petitioner and Shirley Akamine are alleged to be husband and wife. They, together with others, were indicted on charges of violating sections 182 and 487 of the Penal Code (conspiracy to commit grand theft and grand theft). A second indictment, apparently for the same offenses, included petitioner but did not include Shirley. Both petitioner and Shirley were confined in the San Francisco County Jail under the indictments affecting them respectively. On November 26, 1951, Shirley was released on bail. Petitioner is still confined there. Neither of said defendants has yet been tried. Respondent Murphy, as Sheriff, is charged with the responsibility of maintaining the county jail system of San Francisco. A rule of said jail provides that any person who has been released from the county jail may not visit an inmate thereof within thirty days of such release. Repeatedly, within the thirty days (which had not expired at the time of the hearing of this writ) Shirley has applied to the keeper of the jail for permission to visit her husband, and such permission has been denied solely because of said rule. Neither petitioner nor Shirley has yet been convicted of any charge, are serving any sentence, nor has petitioner or Shirley ever been accused of violating any portion of the state narcotic act. Petitioner contends that his detention is unlawful because by refusing to allow his wife to visit him respondent is imposing upon him cruel and unusual punishment and upon both of them cruel mental torture. Petitioner asks that a writ of mandate issue commanding respondent and his agents to permit Shirley to visit him in the normal manner of any visitor to any other prisoner.

Respondent's answer alleges that the jail in which petitioner is confined is a maximum security one; that among the persons awaiting trial therein are those accused of the most serious offenses; that in addition federal prisoners are confined there; that the conduct of such a jail requires very careful and specific rules; that the rule denying persons who have been inmates the right of visiting co-inmates for thirty days is a reasonable one for the conduct of a maximum security jail; that this rule has been in effect in the San Francisco city and county jails for more than thirty years; that such a rule, or a rule of similar import, has been and now is enforced in most, if not all, of the jails in California; that the respondent's rules have been approved by the United States Department of Justice. The above factual matters mentioned in the respondent's answer are not challenged by petitioner. He, of course, challenges the necessity for, or reasonableness of, such rules. The answer further alleges that such rule is necessary to prevent the fraternizing of those charged with crime by keeping them away from each other for at least thirty days; to avoid the exchange of knowledge while confined in jail that might lead to an attempted escape; to avoid the comparing of knowledge of the physical set-up of the jail, the particularities of the jail routine, and the promptings for an escape; to avoid the getting together of those who have become acquainted with others whom they will aid and abet in an escape, or an attempted escape; to avoid arranging smuggling contraband and narcotics into jail; to avoid the communing with other inmates for financial gain, one to the other; to avoid the contact of a runner for either an attorney or a bail bond broker; to avoid the carrying of messages between partners in crime or their transmission to or from others who are in hiding from the police, and are or may have been charged with the same offense.

[1–3] While perhaps not every one of the reasons given for the rule is sound, we are unable to find that the rule is an unreasonable one. The fact that it has existed, apparently unchallenged, in the San Francisco jails for many years, is the rule of most jails in the state, and is approved by the Federal Bureau of Prisons, while not conclusive, is some indication of its reasonableness. Perhaps, in the case of husband and wife, it may work somewhat of a hardship; still that fact alone does not make the rule unreasonable. It is true that after the thirty days have expired a former inmate may visit the jail and attempt to do any of the objectionable acts abovementioned, but that fact does not make unreasonable the rule limiting that possibility to a reasonable time after his discharge from the jail, and thirty days is a reasonable time. It is well known that, in spite of all restrictions, word passes by "grapevine" from prisoner to prisoner, and a regulation which prevents for a limited time a former inmate from returning and perhaps carrying messages to or from one or more prisoners cannot be said to be improper, nor to be an undue restraint upon the prisoners. Courts should, of course, exercise their power to prevent any inhuman or cruel treatment or undue restraint of those unfortunate enough to be confined in jails. But the courts should not hamper officials charged with the duty of maintaining jails and having the custody of those charged with crime, by interfering with long-established regulations which do not appear to be unreasonable.

The alternative writ is discharged and the petition is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

108 Cal.App.2d 185

GERLINGER FOUNDRY & MACHINE WORKS, Inc. v. CRESCENT GOLD DREDGING CO. et al.

Civ. 8039.

District Court of Appeal, Third District, California.

Dec. 12, 1951.

Rehearing Denied Dec. 27, 1951.

Hearing Denied Feb. 7, 1952.

Action by the Gerlinger Foundry and Machine Works, Inc., a corporation, against the Crescent Gold Dredging Company, a copartnership, Wallace R. Lynn and J. Stanley Rising, and others to recover upon an indebtedness. The Superior Court, Shasta County, Richard B. Eaton, J., rendered judgment for plaintiff and the named individual defendants appealed. The District Court of Appeal, Schottky, J., held that the evidence sustained finding of trial court that the appealing defendants invested their agents with apparent authority to buy upon credit of appellants and that plaintiff without negligence could properly rely, and did in fact rely, upon said appearance in extending credit to the copartnership.

Affirmed.

1. Appeal and Error 🔑989

When a judgment is attacked as being unsupported by the evidence, the power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by the trial judge.

2. Principal and Agent 🔑99, 123(1)

An agent's authority may be proved by circumstantial evidence and it may be implied from circumstances.

3. Principal and Agent 🔑99

Ordinarily a principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof. Civ.Code, § 2334.

4. Principal and Agent 🔑123(7)

In action against a copartnership and the members thereof to recover an indebtedness for goods and merchandise sold and delivered, the evidence sustained finding that appealing defendants invested their agents with apparent authority to buy upon credit of the appellants and that plaintiff without negligence could properly rely, and did in fact rely, upon said appearance in extending credit to the copartnership.

5. Evidence 🔑357

In action against a copartnership and the members thereof to recover an indebtedness, where two of the defendants had told an accountant for the copartnership to refer creditors to the bank as to their credit, no error occurred in admitting in evidence a letter written by the bank to the plaintiff in response to an inquiry as to the credit.

◆

John G. Evans, San Francisco, Hiram R. Baker, Redding, for appellants.

Matthew E. Marsh, Chico, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and respondent brought an action against Crescent Gold Dredging Company, a copartnership, Roy Mires, Joseph H. Garner, Wallace R. Lynn and J. Stanley Rising to recover the sum of $898.60, setting up six counts in its amended complaint.

In Count 1 it was alleged that defendant Crescent Gold Dredging Company was a copartnership; that the above-named defendants were copartners doing business under that name; that within four years last past said defendants became indebted to plaintiff in the sum of $898.60 upon an open book account for merchandise sold and delivered to defendants. Count 2 was the same as Count 1 except that it was alleged that the reasonable value of the merchandise was $898.60. Count 3 alleged that all four defendants were jointly associated in a common enterprise for profit, to-wit, certain gold dredging operations at or near Coffee Creek, Trinity County, and became indebted to plaintiff in said sum of $898.60 for goods, wares and merchandise sold and delivered as aforesaid, no part of which has been paid. Count 4 was the same as Count 3, except that it alleged the reasonable value to be $898.60. Count 5 alleged that appellants Lynn and Rising, "by words spoken by them and through their agents, represented themselves, and by their conduct consent to the defendants Roy Mires and Joseph H. Garner representing them * * * to plaintiff, as partners in an existing or apparent partnership, to-wit, Crescent Gold Dredging Company; and plaintiff, on the faith of such conduct and representations, gave credit to said Crescent Gold Dredging Company in the sum of Eight Hundred Ninety-eight and 60/100 ($898.60) Dollars * * * between the 19th of September, 1949, and the 8th day of November, 1949 * * *"; that defendants promised to pay plaintiff said $898.60, but no part thereof has been paid. Count 6 was the same as Count 5 and alleged that $898.60 was the reasonable value.

Defendants Mires and Garner filed no answer to the amended complaint, but defendants Lynn and Rising filed an answer denying all of the material allegations of the amended complaint and denying any indebtedness to plaintiff.

The trial court found:

"That in the months of October and November, 1949, defendants Roy Mires and Joseph H. Garner, copartners then doing business under the name of Crescent Gold Dredging Company, did through the words and acts of said Mires, of their general agent Thomas, and of their special agent Donaldson, order, purchase and take delivery of certain machinery and parts sold by plaintiff, which merchandise was of the reasonable value of $898.60.

"That at no time did defendants Wallace R. Lynn and J. Stanley Rising in fact become or ostensibly appear to be partners of defendants Mires and Garner.

"That defendants Lynn and Rising, as joint venturers between themselves, agreed to furnish money for the operations of Mires and Garner, as appears by their agreement of October 18, 1949; that defendants Lynn and Rising did in fact furnish the sum of $12,500, and established in the Wells Fargo Bank with that sum a fund from which they did in fact direct their agent Andrews to pay operating expenses of the Mires and Garner dredge; that some such expenses, including one earlier charge of plaintiff, were paid from this fund; that in mid-September, 1949, and in October 1949 defendants Lynn and Rising, by the words of one or the other of them, did in fact direct Donaldson (originally their duly authorized subagent for purposes of investigation) and defendant Mires, as their special agent, to purchase supplies needful for the dredge, charging said purchases to aforesaid fund; that defendants Lynn and Rising, by words of each of them, did in fact direct said special agents to refer sellers of said supplies to the Wells Fargo Bank for credit reference; that said bank, as special agent of defendants Lynn and Rising, reported to plaintiff that the credit of said defendants was good.

"That defendants Lynn and Rising did not in fact authorize the incurring of charges in excess of aforesaid fund, or against their general credit; that nevertheless said defendants, by establishing said fund, and directing purchases to be made against same, invested their special agents Donaldson (otherwise their sub-agent) and Mires with the apparent authority to buy upon the credit of said defendants; that said appearance was reinforced by the report of the Bank; that plaintiff, without negligence, could properly rely, and did in fact rely, upon said appearance in extending credit to Crescent Gold Dredging Company; that aforesaid appearance was dispelled on October 31, 1949, by a telephone call from the Bank; that in October, 1949, and prior to October 31, 1949, plaintiff had sold and delivered to Crescent Gold Dredging Company merchandise of the reasonable value of $859.12."

Judgment was entered against defendants Mires and Garner for $898.60, and against defendants Lynn and Rising for $859.12, said judgment providing that liability for the lease is joint and several as among all defendants but not cumulative.

This appeal is by defendants Lynn and Rising. Defendants Mires and Garner have not appealed.

[1] The principal contention of appellants is that the judgment is not supported by the evidence. We have read the record carefully and bearing in mind the rule that when a judgment is attacked as being unsupported by the evidence the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court, we are satisfied that the record amply supports the judgment.

It appears from the record that defendants Roy Mires and Joseph H. Garner owned and operated a dredge on Coffee Creek, in Trinity County. Appellants, Lynn and Rising, became interested and on October 18, 1949, took an option on the dredge for 45 days of operation but not to exceed 60 consecutive days. The option provided that Lynn and Rising would pay to or for the account of Mires and Garner $12,500 during the option period and could, at their option, pay such other sum or sums as they should desire.

Mires testified that appellants arranged for W. G. Donaldson to observe the operations and do other things. Mires, with the consent of appellants, employed one Thomas to manage dredge operations. Donaldson asked Lynn about opening or establishing credit and Lynn referred Donaldson and anyone inquiring to Wells Fargo Bank in San Francisco. Lynn told Donaldson to get whatever he needed. The dredge needed considerable repair and was idle when Lynn and Rising came in. Lynn authorized F. T. Andrews, an accountant, to draw checks on the $12,500 which appellants deposited in Wells Fargo Bank for operating expenses. Both appellants had visited the dredge. Appellants authorized Mires to procure parts for the dredge and to repair machinery and told him to get a new cable, the costs to be paid out of the $12,500 fund.

Appellant Rising testified that he gave the name of Crescent Gold Dredging Company; that Andrews signed the checks; that he twice told Donaldson to get equipment; that bills were sent to Andrews; that he told Mires to get a refrigerator because he had had trouble keeping meat for the workmen; and that the $12,500 fund was finally exhausted for labor and material that Mires, Donaldson and Thomas ordered.

E. P. Thomas testified that: He was engaged by Crescent Gold Dredging Company, hired by Mires, and was superintendent and worked in close touch with Donaldson; he was to repair and then operate the dredge; he purchased equipment and parts from respondent; all merchandise purchased from respondent was used on the dredge or in connection with its operations; he and Donaldson did the ordering; on one occasion Rising told Thomas to go to Redding and hire men for the dredge; he discussed with Rising straightening out the bow gantry on the dredge; Rising told him to refer doubtful creditors to Wells Fargo Bank as to appellants' credit; both Lynn and Rising gave orders or made suggestions as to operations.

Charles S. Wheaton, plaintiff's manager, testified that all invoices were made out to Crescent Gold Dredging Company.

E. E. Gerlinger, secretary-treasurer of plaintiff, testified that Donaldson told him he represented appellants; that he received one check from Crescent Gold Dredging Company which was signed by Andres; that Donaldson told him to charge the purchases to that company; and that he talked with Lynn on the telephone after charges were made.

Appellant Wallace R. Lynn testified that: He and Rising put up the $12,500 in Wells

Fargo Bank; Andrews was to draw checks for bills authorized by Mires; he procured Donaldson through the engineering firm of Gould and Company in San Francisco and paid Gould for Donaldson's services; he had heard of Thomas through Mires; Donaldson told him Mires and Garner had no credit for food for the men and Lynn gave him $300 in cash for food; he did tell the men reference could be made to Wells Fargo Bank for appellants' credit; the $12,500 put in the fund was paid out to creditors for labor and bills that were approved by Mires.

[2] As this court said in Gaine v. Austin, 58 Cal.App.2d 250, at page 261, 136 P.2d 584, at page 590:

"An agent's authority may be proved by circumstantial evidence (MacDonnell v. California Lands, Inc., 15 Cal.2d 344, 347, 101 P.2d 479; Sweet v. Watson's Nursery, 33 Cal.App.2d 699, 704, 92 P.2d 812; Smith v. Schuttpelz, 1 Cal.2d 158, 161, 33 P.2d 836); and it may likewise be implied from circumstances. Robinson v. American Fish, etc., Co., 17 Cal.App. 212, 217–219, 119 P. 388; Anglo-California Bank v. Cerf, 147 Cal. 393, 399, 81 P. 1081.

"As to the ostensible agency of Torp, section 2300 of the Civil Code provides that 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him'; and under section 2317, 'Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.'"

And in Ford v. Lou Kum Shu, 26 Cal. App. 203, at page 208, 146 P. 199, at page 201, this court said:

"While it is a well-settled rule that agency cannot be established by the extrajudicial statements or declarations in pais of one pretending to act as agent and that such statements or declarations are incompetent, and therefore inadmissible as in proof of agency, it is equally well established that the fact of agency, when it rests in parol, may be established on the trial by the testimony of the agent himself. In other words, 'the testimony of an agent sworn as a witness in a case, when the question of his agency is involved, is competent to establish it and its extent and nature' [Numerous cases cited.]

"And 'it cannot be doubted that, where the authority of an agent is unwritten, and express oral authority is not satisfactorily shown, such authority may be implied from acts and circumstances shown.' [Cases cited.]" See, also, Dunlap v. Dean, 109 Cal.App. 300, 292 P. 991.

[3, 4] While it is true, as stated in Section 2334 of the Civil Code that "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof", we are satisfied that under the evidence the court was fully justified in finding, as it did find, that appellants invested their agents Donaldson and Mires with apparent authority to buy upon the credit of said appellants and respondent without negligence could properly rely, and did in fact rely, upon said appearance in extending credit to Crescent Gold Dredging Company.

[5] Appellants also contend that the court erred in admitting in evidence over appellants' objection a letter written by Wells Fargo Bank to respondent. The record shows that appellants had told Thomas to refer creditors to the bank as to appellants' credit and the letter from the bank was in response to respondent's inquiry. There was no error in its admission, and, in any event, upon the record here no possible prejudice could have resulted to appellants by reason of its being admitted in evidence.

No other points raised require discussion.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

108 Cal.App.2d 143

COPPLE v. LAZZAREVICH et al.

LAZZAREVICH v. LAZZAREVICH et al.

Civ. 18423.

District Court of Appeal, Second District,
Division 2, California.
Dec. 11, 1951.

Emma Copple brought an action against Catherine E. Lazzarevich and others for partition of realty and an accounting of the proceeds from the property, and Catherine E. Lazzarevich brought an action against John Lazzarevich and others to set aside the conveyance of John Lazzarevich's undivided interest in the property to Emma Copple on the ground that the conveyance was fraudulent. The actions were consolidated for trial. The Superior Court, Los Angeles County, Walter R. Evans, J., gave judgment denying relief to Emma Copple and setting aside the conveyance as fraudulent, and Emma Copple, and John Lazzarevich and others, appealed. The District Court of Appeal, McComb, J., held that the evidence sustained the finding that the conveyance was fraudulent, and held that since the conveyance was fraudulent, Emma Copple was not entitled to an accounting.

Affirmed.

See also 238 P.2d 614.

1. Fraudulent Conveyances 🔑295(1), 300(1)

A finding of fraud and want of consideration frequently depends on inferences drawn from circumstances surrounding the transaction.

2. Fraudulent Conveyances 🔑299(8), 300(1)

In action to set aside fraudulent conveyance, evidence sustained findings that there had been no consideration for the conveyance and that grantee held the property in trust for grantor.

3. Fraudulent Conveyances 🔑299(8)

In action to set aside fraudulent conveyance, evidence sustained finding that person who had active management of property conveyed had accounted to grantor for all moneys pertaining to the property which came into such person's hands after the conveyance.

4. Divorce 🔑276(4, 5)

In action by divorced wife to set aside husband's fraudulent conveyance of his undivided one-half interest in their joint property, evidence was insufficient to support finding that husband had not advanced major portion of consideration paid for the premises, but such finding was immaterial in view of fact that there was no material issue before court relative to who paid original consideration for the property.

5. Divorce 🔑276(5)

Omnibus finding of trial court that except as otherwise specifically found all allegations of divorced wife, who had brought action to set aside fraudulent conveyance, were true and all allegations in answer untrue, supported judgment, in view of fact that there were specific findings that grantee had given no consideration for deed and that deed was made fraudulently for purpose of defeating divorced wife in her endeavor to enforce judgment against former husband.

6. Fraudulent Conveyances 🔑178

Where deed of undivided one-half interest was fraudulent, assignment contained therein was tainted with the same fraud and could not be the basis of a cause of action for an accounting.

Eugene L. Wolver, Los Angeles, for appellants.

Henshey & Beeman, Hollywood, for respondents.

McCOMB, Justice.

Catherine E. Lazzarevich recovered a judgment against John Lazzarevich and an appeal was taken therefrom. The District Court of Appeal on November 19, 1948, modified the judgment by increasing the amount thereof to the sum of $10,277.50. (Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 200 P.2d 49.) The Supreme Court on January 17, 1949, denied a petition for hearing and on January 24, 1949, the remittitur was duly filed in the office of the county clerk.

After the Supreme Court had denied a hearing and prior to the date of the filing of the remittitur, John Lazzarevich executed and recorded a deed by which he purported to convey an undivided one-half interest in certain real property to his sister, Emma Copple. Catherine Lazzarevich was the owner of the other half.

Thereafter Catherine Lazzarevich filed an action against John Lazzarevich, Emma Copple and James Copple seeking to set aside the conveyance upon the ground that it was fraudulent. Emma Copple filed the present action for a partition of the same property and for an accounting of the proceeds thereof.

The actions were tried together and the trial court gave judgment (1) in the action brought by Emma Copple denying her any relief; (2) in the action of Catherine Lazzarevich in favor of plaintiff upon the ground that the purported conveyance by John Lazzarevich of one-half interest in the property to Emma Copple, his sister, was a fraudulent conveyance.

From each judgment the unsuccessful party appeals.

Facts: Bearing in mind the rules set forth in Re Estate of Isenberg, 63 Cal. App.2d 214, 216, 146 P.2d 424, the record discloses these facts:

John Lazzarevich and Catherine Lazzarevich were married on March 18, 1921. On March 18, 1932, he obtained an interlocutory decree of divorce from his wife. In July, 1935, they became reconciled, but, though a final decree of divorce had been entered prior thereto, they were never remarried during the period of reconciliation.

Mr. Lazzarevich as a veteran purchased the real property here in question and later assigned a one-half interest in such property to Mrs. Lazzarevich.

Thereafter the parties again separated and he went to live with his sister, Emma Copple, and her husband for the period from April 1, 1946 to the end of 1948.

Questions: First: *Was there substantial evidence to sustain the trial court's findings that (a) the conveyance from John Lazzarevich to Emma Copple was without consideration, (b) Emma Copple held one-half interest in the real property in question as a secret trust for Mr. Lazzarevich, and (c) Leva DeMerce who had the active management of the property had accounted to Mr. Lazzarevich for all moneys pertaining thereto coming into her hands?*

Yes. (a) and (b). The record discloses that, subsequent to the entry by the Supreme Court of the order denying a hearing on the judgment obtained by Mrs. Lazzarevich against Mr. Lazzarevich, and the issuance of the remittitur, he had conveyed to his sister his undivided one-half interest in the property which he owned jointly with his wife. The claimed consideration for the conveyance was the fact that he was living with his sister and she was providing his meals as well as doing laundry service for him.

Catherine Lazzarevich testified that during the time she had lived with Mr. Lazzarevich he never ate anything for breakfast but toast and coffee, and just prior to their separation he stopped drinking coffee and started drinking postum. This testimony was corroborated by Lois Rufer, the daughter of the couple.

Emma Copple testified that she had no agreement with her brother as to what he would pay for his board, and later testified that he agreed to pay $3.50 a day for his meals at the time he started living with her.

The testimony further disclosed that though Mrs. Copple said she did laundry work for Mr. Lazzarevich, the record also disclosed that she did not do the laundry work for her husband.

Clearly it was a question for the trial court to determine from this and other evidence introduced whether there was a valid consideration for the conveyance.

[1, 2] A finding of fraud and want of consideration frequently depends on inferences drawn from the circumstances surrounding a transaction. (Moore v. McDonald, 122 Cal.App. 61, 69, 9 P.2d 556; Taylor v. Osborne-Fitzpatrick Finance Co., 57 Cal.App.2d 656, 661, 135 P.2d 598; Dyke v. Zaiser, 80 Cal.App.2d 639, 654, 182 P. 2d 344.) The trial court was justified in

view of the above facts in determining that there was no consideration for the deed which Mr. Lazzarevich had executed and that Mrs. Copple held the one-half interest in trust for him.

[3] (c) Leva DeMarce testified that she fully accounted for all moneys collected by her to Mr. and Mrs. Lazzarevich. This supports the questioned finding.

[4] Second: *Was there substantial evidence to sustain the trial court's finding that it was not true that Mr. Lazzarevich had advanced the major portion of the consideration paid for the premises?*

No. However such finding was immaterial in view of the fact that there was no material issue before the trial court relative to who paid the original consideration for the deed by which the property was conveyed to the Lazzareviches.

[5] Neither is there any merit in the contention that the omnibus finding of the trial court "that except as otherwise hereinabove specifically found" all the allegations of respondents' pleadings are true and all the allegations of appellants' pleadings are untrue did not support the judgment, for the reason that as hereinabove mentioned the trial court made specific findings holding that Mrs. Copple gave no consideration for the deed to her, and that it was made fraudulently for the purpose of defeating Mrs. Lazzarevich in her endeavor to enforce the judgment which she had obtained against her former husband.

Third: *Did the trial court err in not taking an accounting as prayed by Mrs. Copple in her action?*

No. Since the trial court found that the deed to her was fraudulent and executed with a fraudulent intent on the part of Mr. Lazzarevich, she had no right to an accounting from the assignment in the deed which read as follows:

"Grantor, John L. Lazzarevich, further assigns, transfers, conveys and sets over, to and unto grantee, Emma Copple, as her sole and separate property, any and all rights, claims, demands, interests or choses in action, either in law or in equity, of all types and descriptions, which grantor may have against any and all persons, firms, corporations or organizations concerning or arising out of said property, the obtaining of rents, monies, profits or interests therefrom, or therein, and the accounting or accountings therefor."

[6] The deed having been found to be fraudulent, the assignment contained therein was tainted with the same fraud and could not be the basis for a cause of action for an accounting. The trial court thus in fact disposed of all the issues raised in the pleadings.

Affirmed.

MOORE, P. J., concurs.

LAZZAREVICH v. LAZZAREVICH et al.*

Civ. 18568.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1951.

Hearing Granted Feb. 7, 1952.

John L. Lazzarevich brought an action against Catherine E. Lazzarevich and others to set aside plaintiff's conveyance of a one-half interest in realty to named defendant, or, in the event such relief should be denied, plaintiff sought to have the property partitioned. The Superior Court, Los Angeles County, Thurmond Clarke, J., denied relief, and plaintiff appealed. The District Court of Appeal, McComb, J., held, inter alia, that since the mistake upon which plaintiff based his action to set aside the deed had been discovered by plaintiff in 1945, this action in 1949 was barred by the statute of limitations.

Affirmed.

1. Limitation of Actions 🔑95(1)

Where former husband learned in 1945 that decree divorcing him and former wife had become final prior to his execution of deed conveying undivided one-half interest in realty to former wife, action in 1949 to set aside the deed on ground of lack of consideration was barred by statute of limitations. Code Civ.Proc. § 338, subd. 4.

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* Subsequent opinion 244 P.2d 1.

2. Equity ⚷66
Partition ⚷34

An action for partition is essentially an action in equity and a court of equity will not decree partition and an accounting where evidence discloses that the one who seeks equity has not done equity.

3. Partition ⚷26

Where joint tenant owed judgment debt to other joint tenant, the judgment debtor was estopped from maintaining action for partition of the property held in joint tenancy.

◆

Eugene L. Wolver, Los Angeles, for appellant.

Henshey & Beeman, Hollywood, for respondent Catherine E. Lazzarevich.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action seeking to set aside a conveyance of a one-half interest in real property on the ground of failure of consideration and denying plaintiff partition of real property held as a joint tenant with defendant Catherine E. Lazzarevich (hereinafter referred to as defendant), plaintiff appeals.

Facts: The factual background of the action is contained in Copple v. Lazzarevich, Cal.App., 238 P.2d 612.

After learning that the final decree of divorce had been entered, litigation ensued between plaintiff and defendant resulting in a final decision in Lazzarevich v. Lazzarevich, 88 Cal.App.2d 708, 200 P.2d 49. On March 24, 1949, plaintiff filed the present action, (1) seeking to set aside the conveyance of the one-half interest he had conveyed to defendant on the ground of a failure of consideration, and (2) in the event such relief should be denied, asking that the property be partitioned, and he be afforded an accounting of the proceeds of the property as a cotenant.

The trial court denied plaintiff relief, finding that the first cause of action was barred by the statute of limitations (Section 338, subd. 4, Code of Civ.Proc.) * and that plaintiff was estopped from maintaining the second cause of action.

[1] *Questions*: First: *Was plaintiff's cause of action barred by the provisions of section 338, Subdivision 4 of the Code of Civil Procedure?*

Yes. Plaintiff alleged in paragraph III of his complaint that he learned on August 10, 1945, that a final decree of divorce from defendant had been entered on September 6, 1933. The present action was filed March 24, 1949. Therefore more than three years elapsed between the time plaintiff admits he knew of the facts constituting the mistake upon which his first cause of action was predicated and the date he instituted the instant suit. Therefore his first cause of action was barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure.

Second: *Was plaintiff estopped to maintain his second cause of action for a partition of the property which he held in joint tenancy with defendant?*

Yes. The evidence discloses and the trial court found that at the time of the present action plaintiff was indebted to defendant in the sum of $11,325.03 with interest.

[2] An action for partition is essentially an action in equity and a court of equity will not decree partition and an accounting where the evidence discloses that the one who seeks equity has not done equity. (Ventre v. Tiscornia, 23 Cal.App. 598, 604 et seq., 138 P. 954.)

[3] In this case the record discloses that plaintiff was indebted to defendant on account of a judgment obtained by her against

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* Section 338, Subdivision 4 of the Code of Civil Procedure reads: "Within three years: * * * 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

him in the sum of $11,325.03, together with interest from March 3, 1949, and that only about $200 had been paid by plaintiff to defendant on account thereof. Such finding was sufficient ground for denying a partition of the real property which plaintiff held in joint tenancy with his former wife.

Affirmed.

MOORE, P. J., concurs.

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108 Cal.App.2d 136

PEOPLE v. GREENE.

Cr. 4685.

District Court of Appeal, Second District, Division 1, California.

Dec. 11, 1951.

Frank Porter Greene was convicted in the Superior Court of Los Angeles County, Harry J. Borde, J., of robbery and the defendant appealed. The District Court of Appeal, White, P. J., held that under the circumstances of the case the defendant was not deprived of any substantial right by reason of the fact that he was not represented by counsel at the preliminary hearing.

Affirmed.

1. Criminal Law 🔑576(5)

The right to a speedy trial to which an accused is entitled under the Constitution and the fact that a trial must be had within a certain time as provided by the Penal Code, is a right which may be waived. Pen.Code, § 1382, subd. 2; Const. art. 1.

2. Criminal Law 🔑576(4)

Where trial was originally set for 46 days after the information was filed and thereafter six continuances were had until matter was finally disposed of and each of the continuances was had at the request of the accused or his counsel, and no objection was made in the trial court to the postponements and no motion was made to dismiss, accused was not entitled to a dismissal for failure to be brought to trial within 60 days after filing of information. Pen.Code, § 1382, subd. 2; Const. art. 1.

3. Criminal Law 🔑1144(4)

Where accused made no claim that at his arraignment he was not informed of his legal rights, it would be presumed that the magistrate informed accused of his legal rights at the arraignment and also advised him of his right to aid of counsel in every stage of the proceedings. Pen. Code, § 858.

4. Criminal Law 🔑232

Where no claim was made that at accused's arraignment that he was not informed of his legal rights, and the accused had ample opportunity to secure the aid of counsel, it was not necessary that accused be represented by an attorney at the preliminary examination, since it would be presumed that the magistrate advised accused of his right to aid of counsel in every stage of proceeding. Pen.Code, § 858.

5. Criminal Law 🔑245

Where defendant in robbery prosecution, through his counsel in trial court, failed to make a motion to set aside the information and failed to address himself to the discretion of the court but chose to submit the case on the transcript of the preliminary examination, the defendant was foreclosed from raising the objections that he was denied the right to secure counsel and was not represented by counsel at preliminary examination. Pen.Code, §§ 995, 996; Const. art. 1.

6. Criminal Law 🔑232

Where no plea of guilty or waiver of preliminary examination was had, presence of counsel representing the accused at preliminary hearing was not mandatory after reasonable time had been afforded accused to secure legal aid. Pen.Code, §§ 859a, 860.

7. Criminal Law 🔑245

An accused, who made no motion to set aside the information on the grounds that he had not been legally committed by a magistrate, was precluded thereafter from challenging the legality of his commitment by the magistrate.

8. Criminal Law ⚿=255

In robbery prosecution, where the cause was submitted to the trial court without a jury upon the transcript of testimony taken at preliminary examination, the record established that the trial judge not only read the preliminary examination transcript but was fully conversant with its contents, and therefore no error occurred for failure to read the transcript in court. Code Civ.Proc. § 1963, subd. 15.

9. Criminal Law ⚿=317

In robbery prosecution, where the defendant at trial did not take the stand to deny his guilt, it could be inferred that defendant gave no explanation of the evidence produced against him because he had none, and that he uttered no denial because such evidence against him was not false.

◆

Frank Porter Greene, Pro. Per.

Edmund G. Brown, Atty. Gen., Stanford D. Herlick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in four counts with the crime of robbery and in a fifth count with the offense of kidnapping for the purpose of robbery while armed with a deadly weapon. It was further alleged in each count that defendant had suffered a prior conviction of the crime of robbery as well as a prior conviction for violation of section 503 of the Vehicle Code of the State of California, both felonies. Defendant pleaded not guilty to all counts of the information, not guilty by reason of insanity, and denied the alleged prior convictions. Subsequently however, the prior convictions were admitted. Trial by jury being waived the cause was submitted to the court resulting in a decision finding defendant not guilty of kidnapping as charged in Count V and guilty of robbery as charged in Counts I, II, III and IV. Defendant was also found to have been sane at the time of the commission of the offenses and sane at the time of trial. From the judgments of conviction defendant prosecutes this appeal.

Since defendant first challenges the validity of his convictions on the ground that he was not afforded a speedy trial, we here set forth the proceedings in chronological order as reflected by the Clerk's Transcript:

"June 22, 1950—Information filed.

"June 26, 1950—Defendant arraigned; Public Defender appointed as defendant's counsel; case continued until July 10 at defendant's request.

"July 10, 1950—Defendant entered a plea of not guilty as charged in the information and denied the prior conviction and cause set for trial for August 7, 1950.

"August 7, 1950—W. W. Larsen was substituted as attorney for defendant. At this time a copy of the preliminary transcript and a copy of the information had already been delivered to defendant personally. On motion of defendant, the case was continued to September 11, 1950.

"August 21, 1950—Plea of not guilty by reason of insanity entered by defendant and psychiatrists appointed.

"September 11, 1950—Jury trial was waived; defendant offered a stipulation to submit matter on preliminary transcript and requested a continuance to October 2, 1950. The case was then continued to October 9, 1950. It was stipulated that the cause could be submitted on the testimony contained in the transcript of the proceedings had at the preliminary examination. Jury was waived as to the issue of insanity and it was stipulated that the court might determine that matter from the reports of the psychiatrists.

"October 9, 1950—At defendant's request, the matter was continued to November 13, 1950.

"November 13, 1950—At defendant's request the case was continued to January 8, 1951.

"January 8, 1951—At defendant's request case continued to January 15, 1951.

"January 15, 1951—It was stipulated that the issue of insanity could be submitted upon the reports of the three court-appointed psychiatrists and that said reports could be considered as evidence upon the merits of the case. Appellant was re-arraigned and admitted the prior convictions as alleged. The court stated that he had read the transcript and that it was clear that appellant had pointed a gun at each of the victims. He found, however, that there was no evidence that the gun was loaded; that it was a dangerous but not a deadly weapon. Defendant was found sane at the time of the commission of the offenses and, pursuant to stipulation, also presently sane. Leave to file application for probation was granted.

"February 13, 1951—Application for probation was denied and defendant was sentenced to the state prison for the term prescribed by law, sentences to run concurrently."

We deem it unnecessary to here set forth a statement of the facts which gave rise to this prosecution, as disclosed by the record, because it is not contended that the evidence is insufficient to justify defendant's conviction on the four counts of robbery charged against him, or that he was not sane at the time of the commission of said offenses and at the time of his trial.

Appellant's first contention is that the judgments should be reversed and the cause ordered dismissed on the ground that the action was not brought to trial within 60 days after the filing of the information. Penal Code, sec. 1382, subd. 2.

[1] The right to a speedy trial to which an accused is entitled under Article I, sec. 13, of our state constitution, and that a trial must be had within the time provided by subdivision 2 of section 1382 of the Penal Code, is a right which may be waived. Appellant herein, not only failed to claim this right in the trial court and acquiesced in the continuances granted therein, but, as reflected by the record, he sought such postponements. In fact, on the 60th day after the filing of the information, that is on August 21, 1950, appellant entered a plea of not guilty by reason of insanity and psychiatrists were appointed.

[2] The trial was originally set for August 7, 1950, 46 days after the information was filed. Thereafter, six continuances were had until the matter was finally disposed of on January 15, 1951. Each of these continuances was had at the request of appellant or his counsel. No objection having been made in the trial court to postponements, and no motion having been made under section 1382 of the Penal Code to dismiss, such a motion cannot now be made. People v. Scott, 74 Cal.App.2d 782, 783, 784, 169 P.2d 970; People v. Dale, 79 Cal.App.2d 370, 378, 179 P.2d 870. The factual situation here present is much different from that presented in the case of People v. Fegelman, 66 Cal.App.2d 950, 153 P.2d 436. In that case the accused very strenuously objected to the continuance beyond the 60-day period, while in the case at bar, appellant not only did not object, but himself sought the continuances. While it is true that appellant was not personally present on October 9, 1950 when, at the request of his counsel, the cause was continued to November 13, he was present on the last-mentioned date when, at his request, the cause was continued to January 8, 1951, on which date, with him present, a further continuance was ordered at his request until January 15, 1951.

It is next contended by appellant that at the preliminary examination he "was denied the right to secure counsel and was severely rebuked by the presiding magistrate for seeking counsel".

[3, 4] An examination of the proceedings had at the preliminary examination does not support appellant in this contention. He makes no claim that at his arraignment he was not informed of his legal rights. It must therefore, be presumed that when the magistrate advised him of his "legal rights" at the arraignment, that he also advised appellant of his right to the aid of counsel in every stage of the proceedings. Penal Code, sec. 858. Having been advised of his legal right to the aid of counsel and having been given ample opportunity to secure legal aid, it was not necessary that appellant be represented by an attorney at such preliminary hearing.

People v. Rebolledo, 93 Cal.App.2d 261, 263, 264, 209 P.2d 16. In the instant case the record reflects that after appellant was given some three weeks within which to procure counsel and had failed to do so, the court refused to continue the preliminary examination. The futility of any further extension of time is indicated by the fact that when appellant was arraigned in the Superior Court some two weeks after the preliminary examination he had not then obtained counsel and the public defender was appointed.

Appellant's contention that he was "severely rebuked by the magistrate for seeking counsel" is not borne out by the record. An examination of the transcript of the preliminary examination shows that appellant admitted he did not have the means to secure counsel and was depending upon a former employer to "take care of that". In refusing a continuance, the magistrate advised appellant of the purpose of the preliminary examination and suggested to him that he do not testify. And when appellant indicated a desire to waive preliminary examination the magistrate advised against it saying, "There is a procedure for doing that. However, it does not save time, and if you are later represented by the Public Defender's office, or by private counsel, he would rather you had not, so it is better for the People's evidence to be in writing. He will get a copy of it before a plea is entered, and he can weigh it and evaluate it and see what they have. It will be there in writing for him, and that is the best way to proceed, sir."

Furthermore, when appellant secured counsel at the time of arraignment in the superior court, no motion was made questioning the validity of the proceedings in the court of the committing magistrate. Section 995 of the Penal Code provides a remedy for setting aside, upon defendant's motion, an information, when it appears that before the filing thereof, the accused had not been legally committed by a magistrate. Section 996 of the same code provides that if the motion to set aside the information is not made in the trial court, the defendant is thereafter precluded from taking the objections mentioned.

[5, 6] Since appellant, through his counsel in the trial court, failed to make such a motion, and failed to address himself to the discretion of the court in this respect, but on the contrary, chose to submit the case on the transcript of the preliminary examination, he is foreclosed from raising the objections suggested herein. People v. Greene, 80 Cal.App.2d 745, 748, 749, 182 P.2d 576. Since the proceeding here in question was a preliminary examination and there was no plea of guilty or a waiver of preliminary examination, Penal Code, sections 859a, 860, the presence of counsel representing appellant was not mandatory after reasonable time had been afforded him to secure legal aid.

[7] Appellant relies strongly on the case of People v. Napthaly, 105 Cal. 641, 39 P. 29, but it does not aid him. In the cited case, the accused, before pleading, moved to set aside the information on the grounds that he had not been legally committed by a magistrate. Because the defendant in that case had not been advised of his right to counsel at the preliminary hearing the judgment of conviction was reversed and the trial court was directed to set aside the information. In the case at bar, appellant made no such motion in the trial court and, as heretofore pointed out, is precluded thereafter from challenging the legality of his commitment by the magistrate.

[8] In the case now engaging our attention no error is claimed to have occurred during the proceedings had at the trial save and except that appellant contends that the trial judge did not read the transcript of testimony taken at the preliminary examination and upon which transcript the cause was submitted. This contention is totally devoid of merit. The remarks of the trial judge at the time he found appellant guilty and at the time of the pronouncing of judgment clearly indicate that the court not only read the preliminary examination transcript but was fully conversant with its contents. There is also a rebuttable presumption "That official duty has been regularly performed", Code Civ.Proc., sec. 1963, subd. 15, which in

this case was not controverted by other evidence.

[9] It does not appear that appellant was deprived of any substantial right by reason of the fact that he was not represented by counsel at the preliminary hearing where he was afforded and exercised the opportunity of cross-examining the prosecution's witness. Appellant does not now contend that the evidence is insufficient to sustain the convictions. Neither does he contend he is innocent, and at the trial he did not take the stand to deny his guilt, from which it may be inferred that he gave no explanation of the evidence produced against him because he had none, and that he uttered no denial because such evidence was not false. People v. Adamson, 27 Cal.2d 478, 488, 489, 165 P.2d 3; People v. Platnick, 71 Cal.App.2d 767, 770, 771, 163 P.2d 766.

The judgments appealed from are and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

HANSEN v. CRAMER et al.*

Civ. 18422.

District Court of Appeal, Second District, Division 1, California.

Dec. 19, 1951.

Rehearing Denied Jan. 7, 1952.

Hearing Granted Feb. 14, 1952.

Action by E. C. Hansen against Carole Cramer, and others, to have a deed made by one of the defendants to another, declared fraudulent and void as to the plaintiff, who was a judgment creditor of the grantor. From a judgment of nonsuit rendered by the Superior Court of Los Angeles County, Percy Hight, J., plaintiff appealed. The District Court of Appeal, Drapeau, J., held that there was no proof of fraud on the part of the grantor when she deeded the property prior to rendition of the former judgment.

Affirmed.

1. Judgment 🔑779(2)

Where judgment debtor deeded her realty to another before judgment was rendered against her, judgment did not become a lien upon the property. Code Civ.Proc. § 674.

2. Fraudulent Conveyances 🔑87(1)

If realty conveyed by wife in settlement of her husband's debt was community property, conveyance was for valuable consideration.

3. Husband and Wife 🔑267

Whether realty, conveyed by wife in settlement of a debt of her husband, was community or separate property of the wife, wife had a right, in absence of fraud, to deed it. Civ.Code, § 1040.

4. Deeds 🔑15, 17(2)

Neither consideration or adequacy of consideration is essential to validity of a deed. Civ.Code, § 1040.

5. Fraudulent Conveyances 🔑295(1)

Where debtor conveys his property, the deed will not be set aside in absence of clear and convincing evidence of fraud.

6. Fraudulent Conveyances 🔑299(1)

In action by judgment creditor to set aside, as fraudulent, a conveyance of property by judgment debtor made, before judgment was rendered, to settle the indebtedness of debtor's husband, evidence was insufficient to prove a fraud.

Marshall & Farnham, Theodore G. Lee and J. F. Marshall, Long Beach, for appellant.

Parker, Stanbury, Reese & McGee and John Henry Peckham, Jr., Los Angeles, for respondents.

The complaint in this case alleges that on October 27, 1948 a judgment was rendered in the Superior Court in favor of plaintiff's assignor and against Carole Cramer for $1,500; that the judgment was entered and an abstract thereof duly recorded; that said judgment was assigned to plaintiff; that a certain lot in Los

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* Subsequent opinion 245 P.2d 1059.

Angeles county described in the complaint was listed on the official records of the county in the name of Carole Cramer; that the lot was deeded by Carole Cramer and her husband Paul C. Cramer to the defendant Sam Coury; that said Carole Cramer owns no other property and that the conveyance was made to defraud her creditors and in particular plaintiff and plaintiff's assignee. Plaintiff prays that the deed be declared fraudulent and void, and that defendants be required to account for all money received by them as consideration for the deed.

On the trial of the action defendant Sam Coury was examined as a witness under Section 2055 of the Code of Civil Procedure. He testified that in 1945 he leased a dry cleaning plant and business in Hawthorne to Paul Cramer, husband of Carole Cramer; that the lease required Mr. Cramer to pay $300 a month and 5% of the gross profits of the business to Mr. Coury; that October 1, 1948 Mr. Cramer and his wife, said Carole Cramer, deeded the real property described in the complaint and paid some cash to him in settlement of a balance due him from Mr. Cramer under the covenant to pay him 5% of the gross profits of the business; that at the time he recorded this deed Mr. Coury did not know of any outstanding judgment against Mrs. Cramer.

This was all of the testimony presented to the court, except that plaintiff testified to the assignment to him.

Judgment of nonsuit was granted, with prejudice as to the rights of Mr. Coury, and without prejudice as to the rights of Mr. and Mrs. Cramer. Plaintiff appeals from the judgment.

[1] Comparing the date of the judgment sued upon, October 27, 1948, and the date of the Cramers' deed, October 1, 1948, it is apparent that the judgment did not become a lien upon the real property. Code Civ.Proc. sec. 674; Wolfe v. Langford, 14 Cal.App. 359, 112 P. 203.

[2] The record does not show whether the property was the community or separate property of the wife, except for the inference which may be drawn from the fact that she joined with her husband in deeding it. If it was community property, cancellation of the indebtedness of husband and wife was valuable consideration. United States Fidelity & Guaranty Co. v. Postel, 64 Cal.App.2d 567, 149 P.2d 183.

[3–6] Whether the lot was community or separate property, Mrs. Cramer had the undoubted right, in the absence of fraud, to deed it. Neither consideration nor adequacy of consideration is essential to the validity of a deed. Civ.Code sec. 1040; Odone v. Marzocchi, 34 Cal.2d 431, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109. In the absence of clear and convincing evidence of fraud, such a deed will not be set aside. United States Fidelity & Guaranty Co. v. Postel, supra. No proof of fraud is to be found in the testimony of Mr. Coury, standing alone as it does.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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108 Cal.App.2d 172

HUBBARD et al. v. DELTA COMPANY, Ltd., et al.

Civ. 18519.

District Court of Appeal, Second District, Division 3, California.

Dec. 11, 1951.

Rehearing Denied Dec. 27, 1951.

Hearing Denied Feb. 7, 1952.

Suit by Hugh L. Hubbard, Jr., and another against Delta Company, Limited, a limited partnership, and others to quiet title to real estate. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., entered a judgment for the plaintiffs, and defendants Frank M. Salisbury, sued as One Doe, and another appealed. The District Court of Appeal, Vallée, J., held that in view of the named appellant's failure to make further payments on delinquent taxes in accordance with statutory requirements, the property

was legally sold pursuant to statute and appellant's right of redemption was terminated.

Affirmed.

1. Appeal and Error ⚷843(2)

Upon appeal by defendant from adverse judgment rendered in suit to quiet title to realty, where defendant, who had allegedly made a payment under statute permitting persons entitled to redeem property to pay delinquent taxes on installment plan, did not offer to prove that he at any time offered to reinstate installment plan, or to redeem property from delinquent taxes, or that he made any tender to tax collector with respect to delinquent taxes, and admitted making no payments after single payment claimed, constitutionality of amendment to statute made subsequent to the single payment, could not be questioned. Revenue and Taxation Code, §§ 4216–4226.

2. Taxation ⚷710

Where alleged property owner who claimed to have made single payment under statutory installment plan to pay delinquent taxes on realty, which payment merely amounted to compensation to state for use of property for one year, admitted making no more payments after one alleged, property was legally sold pursuant to statute, and alleged property owner's right of redemption was terminated. Revenue and Taxation Code, §§ 3691–3712, 4216–4226.

3. Taxation ⚷710

Mere election on part of party entitled to redeem property to pay delinquent taxes on statutory installment plan does not give redemptioner any right unless he complies with statutory requirement regulating installment payment plan. Revenue and Taxation Code, §§ 4216–4226.

4. Constitutional Law ⚷42

One assailing a law as unconstitutional must show it deprived him of some constitutional right.

5. Taxation ⚷696

Amendment of statute, which permitted party entitled to redeem realty from tax sale to pay delinquent taxes in installments, changing time in which payments could not be started again under statute following default in payment of amount due in any fiscal year from fiscal year of default to July 1 of second succeeding fiscal year after that in which default occurred, did not deprive party, who had elected to pay delinquent taxes in installments and had made one payment prior to, and was in default at time of, amendment, of any constitutional rights. Revenue and Taxation Code, § 4217.

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Robert L. Moore, John C. Goff, Los Angeles, for appellants.

W. N. Macadam, John F. Bender, Los Angeles, for respondents.

VALLÉE, Justice.

Defendants Salisbury appeal from an adverse judgment in an action to quiet title.

On June 30, 1932, the real property involved was sold to the state for nonpayment of taxes levied for the fiscal year 1931–2. On July 1, 1937, the property was deeded to the state. On January 24, 1949, the state sold and deeded the property to plaintiffs. (Rev. & Tax. Code, Div. I, Pt. 6, Ch. 7.)

At the conclusion of plaintiffs' case defendants offered to prove that: the property was acquired by a sister of defendant Frank M. Salisbury in 1940; he paid the consideration therefor; he acquired the property July 7, 1947; in January of 1947 he applied for and was given permission to place the property on a partial payment plan of redemption under section 4217 of the Revenue and Taxation Code; on January 25, 1947, he paid $2630.12, which represented the 1946 taxes, a penalty, and 20% of the delinquent taxes; such payment paid the taxes to April 20, 1948; he made no further payment of taxes on the property after January 25, 1947.

Plaintiffs' objection to the offer of proof was sustained.

Defendants' assignment of error is that the Legislature in amending section 4217 of the Revenue and Taxation Code unconstitutionally discriminated against defendants as persons within a class of taxpayers whose land had been deeded to the state for delinquent taxes.

Prior to September 19, 1947, section 4217 read: "Any person entitled to redeem real estate from tax sale may elect to pay delinquent taxes in installments under this article at any time before the right of redemption is terminated, except that if payment of delinquent taxes in installments is started under this article and the amount required to be paid in any fiscal year is not paid as required by this article, payments may not again be started under this article during the fiscal year in which such default occurs." In 1947 the clause "payments may not again be started under this article during the fiscal year in which such default occurs" was amended to read, "payments may not again be started under this article until July 1st of the second succeeding fiscal year after that in which such default occurs." (Stat. 1947, Ch. 851, § 9.)

The argument seems to be that the 1947 amendment unconstitutionally discriminates against defendants and taxpayers in their class in favor of taxpayers who had not sought the protection of the installment payment plan provided by sections 4216–4226 (Article 2, Div. I, Pt. 7, Ch. 3) of the Revenue and Taxation Code.

[1] Defendants may not question the constitutionality of the 1947 amendment of section 4217. They did not offer to prove that they at any time offered to reinstate the installment plan or to redeem the property from delinquent taxes or that they made any tender to the tax collector with respect to the delinquent taxes. In fact, they expressly stated that they made no payments after January 25, 1947.

Section 4220 of the Revenue and Taxation Code provides: "In each succeeding fiscal year [after the fiscal year in which election to pay in installments is made] the redemptioner shall pay: (a) All current taxes, penalties, and costs coming due in that fiscal year. (b) Twenty per cent, or more, of the redemption amount, plus interest on the balance of the redemption amount of one-half per cent accruing on the first day of each month following the preceding payment of a part of the redemption amount. Payments under this subdivision shall be computed and paid in the same manner as a redemption, and the receipts for such payments shall show that the payments are for the use of the real estate under this plan for payment of delinquent taxes in installments." Section 4221 provides that the payments required in each fiscal year after the first payment shall be made not later than April 20 of the fiscal year succeeding the fiscal year when the last payment was made. Section 4222 provides: "If all payments are not made on or before the dates prescribed, the property may be deeded to the State or the right of redemption may be terminated in the same manner as if no election to pay delinquent taxes in installments had been made." Section 4223 provides: "Payments under this article are not a redemption or partial redemption and do not affect the State's interest in the real estate. The payments are compensation for the use of the real estate."

[2–5] It is patent that as defendants did not make any payment after January 25, 1947, the property was legally sold pursuant to the provisions of sections 3691–3712 of the Revenue and Taxation Code, and their right of redemption was terminated. Merely electing to pay the delinquent taxes on the installment plan did not give the defendants any right unless they complied with the statutory requirements to which we have referred. See Mercury Herald Co. v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111. All defendants did by the payment of January 25, 1947, was to compensate the state for the use of the property for one year. Operation of the amendment of 1947 did not injure nor is it being applied to the disadvantage of defendants. One assailing a law as unconstitutional must show it deprives him of some constitutional right. Aikins v. Kingsbury, 247 U.S. 484, 38 S.Ct. 558, 62 L.Ed. 1226, 1229; Rindge Co. v. Los Angeles County, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186, 1194; American Fruit Growers v. Parker, 22 Cal.2d 513, 515, 140 P.2d 23. The 1947 amendment of section 4217 did not deprive defendants of any constitutional right.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

108 Cal.App.2d 180

LYONS v. LYONS.

Civ. 18509.

District Court of Appeal, Second District, Division 1, California.

Dec. 12, 1951.

Hearing Denied Feb. 7, 1952.

Action by Maurice L. Lyons against Ruth L. Lyons for a divorce on the ground of extreme cruelty. The Superior Court of Los Angeles County, J. O. Moncur, J., gave judgment of divorce for plaintiff and divided certain real and personal property found to be community property, and the defendant appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to support the trial court's finding that the plaintiff was entitled to a divorce.

Judgment affirmed.

See, also, Cal.App., 234 P.2d 64.

1. Appeal and Error 🔑1010(1)

Appellate tribunal is obliged to sustain finding of trial judge where record discloses substantial evidence in support thereof.

2. Divorce 🔑130

Evidence sustained finding that husband was entitled to divorce on ground of extreme cruelty.

3. Husband and Wife 🔑249

A conveyance of property to a husband and wife as joint tenants does not necessarily, and under all circumstances, preclude the idea of their holding the same as community property. Civ.Code, § 164.

4. Husband and Wife 🔑264

In action by husband against wife for divorce on ground of extreme cruelty, evidence sustained finding that the property of the parties was community in nature regardless of the technical form in which it was held. Civ.Code, § 164.

5. Divorce 🔑253

In action by husband against wife for divorce on ground of extreme cruelty, evidence was insufficient to establish that trial court abused its discretion in the division of community property of parties. Civ.Code, § 146.

6. Witnesses 🔑240(2)

Trial court has broad discretion in allowing leading questions.

7. Witnesses 🔑240(2)

In action by husband against wife for divorce on ground of extreme cruelty, permitting of alleged leading or suggestive question by husband's counsel did not constitute an abuse of trial court's discretion, especially in absence of objection thereto by wife's counsel.

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John F. Poole, Henry F. Poyet, Los Angeles, for appellant.

Harry E. Sokolov, Beverly Hills, Philip Feldman, Santa Monica, for respondent.

DORAN, Justice.

This is an appeal from an interlocutory judgment of divorce granted to the plaintiff on the ground of extreme cruelty, and dividing certain real and personal property found by the trial court to be community property. The judgment assigned to plaintiff a one-half interest in community homestead, furnishings and automobiles; but assigned to plaintiff absolutely, restaurant property known as the "Toby Jug", life insurance, and stocks and bonds.

It is appellant's contention that the judgment should be reversed because, (I) "The divorce should have been denied by reason of recriminatory acts committed by the respondent"; (II) "The trial court erred in finding that" the "Toby Jug", held in joint tenancy, was community property; (III) "The trial court grossly abused its discretion in the division of the community property", and (IV) "The trial court committed prejudicial error by the admission of evidence over the objection of counsel".

The trial court found that "especially during the last several months preceding the filing of this action", the defendant wife had entered the Toby Jug restaurant conducted by the plaintiff husband, and "on numerous occasions drank to excess, and * * * created disturbances by shouting, both at the plaintiff and at the patrons of the restaurant, by using threats and profanity". The wife was also found to have "frequently and without cause or provocation, accused plaintiff (husband) of association with other women and of infidelity". These acts were found to have "caused plaintiff great harm and injury mentally and physically and caused plaintiff to suffer irreparable financial loss in the conduct of his business, and caused plaintiff to lose considerable patronage". The court found that the allegations of cruelty on the part of the plaintiff husband were untrue.

Appellant's contention that "The divorce should have been denied by reason of recriminatory acts committed by the respondent", is in effect nothing more than an attack on the sufficiency of the evidence. Certain items of evidence are set forth in appellant's brief in support of this point. However, as said in respondent's brief, the trial court "chose to believe the respondent's witnesses and after weighing the weight and sufficiency of the evidence rendered a just decision in accordance with its discretionary powers".

[1, 2] The trial judge might conceivably have found that the plaintiff was entitled to a divorce; that the defendant-cross complainant was entitled to a divorce; or that neither party was entitled to such relief. And, under the well established rule, an appellate tribunal would be obliged to sustain such a finding where the record disclosed substantial evidence in support thereof. In the instant case, as in most litigation of this type, there was a direct conflict in the evidence. Each party made serious accusations against the other and offered evidence to sustain such allegations. There can be no doubt that the present record reveals substantial evidence in support of the trial court's finding that the husband was entitled to a divorce.

Appellant's argument that the trial court erred in finding that the Toby Jug restaurant property held under a joint tenancy deed, was actually community property, is answered by the respondent's statement that "The Court may look behind the common law form of joint tenancy and find that the 'Toby Jug' was community property".

[3] As said in Cummins v. Cummins, 7 Cal.App.2d 294, 304, 46 P.2d 284, 289, "Moreover, a conveyance of property to a husband and wife as joint tenants does not necessarily, and under all circumstances, precude the idea of their holding the same as community property". And in Tomaier v. Tomaier, 23 Cal.2d 754, 757, 146 P.2d 905, 906, the court said: "It is the general rule that evidence may be admitted to establish that real property is community property even though title has been acquired under a deed executed in a form which ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property". The Tomaier case further says: "It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property".

There was testimony which, if believed, would indicate that the property in question was acquired as a result of the commingling of community funds, the husband's separate property, and profits derived from investment and business enterprises. Appellant relies upon the presumption created by Section 164 of the Civil Code that property "acquired by a married woman by an instrument in writing", is presumed to be "her separate property", but concedes that "this presumption is rebuttable".

[4] The trial court in a memorandum opinion states that "Under the circumstances shown by the evidence in this case it would seem almost an impossibility to separate the earnings of the community from what might be determined to be separate property of the plaintiff". The question therefore was merely one of fact which the trial court resolved in favor of the respondent by finding that the property was community in nature regardless of the technical form in which it was held. Since there is substantial evidence to support such conclusion, no appellate interference is warranted.

[5] There is nothing in the record to indicate that the trial court "abused its discretion in the division of the com-

munity property". Under Section 146 of the Civil Code, the community property is to be divided "in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just". Appellant's present complaint of abuse of discretion is apparently predicated upon the argument that the evidence was in conflict and that the trial court should have believed appellant's version rather than accepting that of respondent. This, again, amounts to a mere attack on the sufficiency of the evidence, and for reasons previously given, does not warrant a reversal.

[6, 7] It is claimed that "The trial court committed prejudicial error by the admission of evidence over the objection of counsel for appellant". The "most glaring" error, according to appellant's brief, occurred in permitting respondent's counsel to ask respondent: "Will you explain why * * * the Toby Jug property, was put in the name of yourself and your wife in joint tenancy? Was it on your own volition". It is submitted that the question is leading or suggestive, but it is conceded that "counsel for appellant did not object to this question at the trial but his objections to leading questions * * * being overruled previously, it would constitute a continuing objection". Balcom v. Growers' Warehouse Co., 55 Cal.App. 474, 204 P. 39, does not support appellant's contention that no objection was required, but merely holds that when an objection has been overruled, and the identical question is repeated and answered by the witness, it is not necessary to renew the objection or move to strike the answer. Moreover, as pointed out in respondent's brief, the trial court has a broad discretion in allowing leading questions. No clear abuse of this discretion has been pointed out in the instant case.

Other alleged errors in the admission of evidence have been pointed out. These assignments relate to questions said to call for inferences and conclusions of the witness, to alleged hearsay evidence, cross examination, testing a witness's memory, and other matters. An examination of the record in reference to such matters, fails to disclose any error of a prejudicial nature. There is, in fact, nothing to indicate that appellant had other than a fair trial, and as hereinbefore indicated, there is substantial evidence in support of the decision rendered by the trial court. There is no merit in the claim that "the appellant was denied the opportunity to present her case and to be heard".

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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108 Cal.App.2d 274

HORTON v. JOHNSTON et al.

Civ. 4437.

District Court of Appeal, Fourth District, California.

Dec. 18, 1951.

Rehearing Denied Jan. 14, 1952

Hearing Denied Feb. 14, 1952.

Action by Addie B. Horton against Merkle C. Johnston and others wherein plaintiff sought to secure a judgment determining that a trust deed held by Carrie A. Horton was not a lien against plaintiff's one-half interest in certain land. The Superior Court, Riverside County, O. K. Morton, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Mussell, J., held that the evidence would not sustain the trial court's finding that plaintiff was the owner of an undivided one-half interest in the property free and clear of the lien of the trustee.

Reversed in part and affirmed in part.

1. Mortgages 🔑186(5)

In action brought by wife to determine whether trust deed held by husband's mother on land acquired during coverture was lien against one-half interest in land given to wife by divorce decree, evidence would not sustain trial court's finding that wife held her undivided one-half interest in property free and clear of such lien.

2. Vendor and Purchaser 🔑87

Where wife was unable to fulfill her agreement to purchase land and her husband agreed to purchase such land, utilizing in transaction one thousand dollars already deposited by wife on purchase price, subsequent action of wife in accepting return of her one thousand dollar deposit on purchase price and executing and delivering quitclaim deed waived any claim she might have had as purchaser.

3. Mortgages ⚿186(5)

In action brought by wife to determine whether trust deed held by husband's mother was lien against undivided one-half interest in land awarded wife by divorce decree, evidence showed that husband's mother had become encumbrancer in good faith and that she had not known at the time she loaned money to her son that wife had or claimed any interest in property.

4. Mortgages ⚿151(5)

Where property was subject to lien of trust deed prior to divorce action, decree in such action, awarding wife one-half interest in property, could not affect trust deed.

◆

C. W. Byrer, Los Angeles, for appellants.

Meserve, Mumper & Hughes, Los Angeles, for respondent.

MUSSELL, Justice.

In this action to foreclose a lien, plaintiff sought to recover sums paid by her for taxes, assessments and maintenance charges on certain real property in Riverside county described as Lot 11, Block "A" of Idyllwild Mountain Park Company's Subdivision No. 12. This property is owned by appellants Merkle C. Johnston, Donna M. Johnston and plaintiff as tenants in common. While the action is to foreclose a lien, the main purpose in filing it was to secure a judgment determining that a trust deed in the sum of $4,000 was and is not a lien against plaintiff's one-half interest in the land. Carrie A. Horton (the owner of the trust deed) and the Johnstons (who filed a cross-complaint) appeal from the judgment entered for plaintiff. The question involved is whether the evidence is sufficient to support the findings and judgment.

Relationship of Parties

Plaintiff Addie B. Horton and Kenneth E. Horton are husband and wife, and on August 3, 1948, an interlocutory decree was entered in a divorce action between them. Carrie A. Horton is the mother of Kenneth E. Horton and appellant Donna M. Johnston. Merkle C. Johnston and Donna M. Johnston are husband and wife.

Facts

On August 6, 1946, plaintiff Addie B. Horton agreed through a real estate broker to purchase the property here involved as her separate property. She signed a real estate broker's receipt and deposited with the broker a check in the sum of $400, payable to Farmers and Merchants Bank of Hemet. The receipt provided, among other things, that the purchase price of the property was $8,750; that the "balance was to be paid in cash inside of ninety days, possession close escrow." On October 4th plaintiff gave the real estate broker another check in the sum of $600, payable to the same bank, to apply on the purchase price of the property. Plaintiff testified that she bought the property with the proviso of selling her home in East Los Angeles and it was understood that the payment of the balance of the purchase price was contingent upon such sale; that the purchasers were not able to go through with the sale and the property was again placed in escrow for a second sale.

The record shows that on November 8, 1946, the Farmers and Merchants Bank demanded the deposit of the balance of the purchase price and that plaintiff was unable to obtain it. Kenneth E. Horton testified that he agreed to purchase the property when the plaintiff lost the sale of her home in Los Angeles. On December 10th he wrote to the bank advising it that within a few days he would be in to give instructions, and on December 26th escrow instructions were executed at the said bank by R. T. O'Donnell and Delta A. O'Donnell, as sellers, and Kenneth E. Horton, as purchaser, of the Idyllwild property. The purchase price was stated to be the sum of $8,750. This sum was to be paid as follows: The $1,000 then on deposit with the bank to be credited on the purchase price; $4,000 from loan secured by trust deed from Kenneth E. Horton to Carrie A. Horton, and $3,759 in cash. The title to the property was to be vested in Kenneth E. Horton as his separate property. Apparently plaintiff was not present at the time these escrow instructions were executed and her signature to them was not obtained.

On January 2, 1947, while Kenneth E. Horton and plaintiff were visiting the home of Carrie A. Horton, Kenneth Horton obtained the sum of $4,000 from his mother to apply on the purchase price of the property. He executed a promissory note and trust deed in which his mother was beneficiary. This trust deed was deposited in the bank escrow and was notarized on January 9, 1947. On February 5th Kenneth E. Horton deposited the sum of $3,900 in the escrow. This money was received by him from the sale of his separate property. The bank then advised Horton that it would be necessary to obtain a quitclaim deed from Addie B. Horton before the escrow could be closed and on February 26th, plaintiff signed and acknowledged a quitclaim deed to the property to Kenneth E. Horton and deposited it in escrow with instructions that it be used when the sum of $1,000 was paid to her from the escrow. The bank then advised Horton of the deposit of the quitclaim deed and asked for further instructions as sufficient money was not in escrow to close the deal if and after the $1,000 was paid to plaintiff in accordance with her demand. Kenneth E. Horton then procured an additional $1,000 from Carrie A. Horton and gave her a note and second trust deed therefor. These papers, together with the sum of $1,000 were deposited in escrow March 11, 1947. The bank then gave an order to a title company to file the papers and issue a certificate of title. On March 13th a deed from the O'Donnells to Kenneth E. Horton, as his separate property, of the Idyllwild property, the quitclaim deed of Addie B. Horton to Kenneth E. Horton, the $4,000 first trust deed and the $1,000 second trust deed from Kenneth E. Horton to Carrie A. Horton were recorded and the escrow closed. On the same date a certificate of title was issued by the Security Title Insurance and Trust Company of Riverside showing title to the property to be vested in Kenneth E. Horton as his sole and separate property, subject to a first trust deed of $4,000 and a second trust deed for $1,000. The following day Addie B. Horton received from the bank the $1,000 previously deposited by her and which she had demanded from the bank.

On March 11, 1947, Kenneth E. Horton filed a divorce action in Los Angeles county against Addie B. Horton, in which he alleged that there was no community property belonging to the parties. Addie B. Horton, on March 23, 1948, filed a cross-complaint in that action alleging, among other things, that the parties were the owners of the property here in question, as community property, and asked that all of the community property of the parties be awarded to her. The action was heard on July 9, 1948, and the court awarded each of the parties an undivided one-half interest in and to the real property herein. The $4,000 trust deed was not referred to in the findings and judgment entered in the divorce action and appellant Carrie A. Horton was not named therein as party defendant.

On April 23, 1949, Kenneth E. Horton executed a deed of his one-half interest of the Idyllwild property to appellants Merkle C. Johnston and Donna M. Johnston. This deed was recorded May 5, 1949, in Riverside county.

[1] The trial court correctly found that defendant Carrie A. Horton loaned Kenneth E. Horton the sum of $4,000 in cash and he executed the promissory note and trust deed therefor. However, the court further found that the trust deed was only a lien upon the undivided one-half interest of appellants Merkle C. Johnston and Donna M. Johnston and that plaintiff Addie B. Horton is the owner of an undivided one-half interest in the property involved as her separate property, free and clear of any claims of appellants Carrie

A. Horton or the Johnstons. These findings are not supported by substantial evidence. The trust deed is a lien on the entire property. The policy of title insurance issued to Kenneth Horton shows that the property is subject to the trust deed in question. The $4,000 was deposited in escrow and applied to the purchase price of the entire property. On February 26, 1947, plaintiff went to the bank handling the escrow and there authorized the vice-president in writing to use a quitclaim deed in favor of Kenneth Horton upon payment to her of the $1,000 which she had paid the real estate broker. According to her own testimony she knew that "they were having trouble with the escrow because some of the parties needed some of the money." She stated that "she inquired about the money she had up in the bank" and that the vice-president said "Well, why don't you go do this. Give him a deed allowing him to go ahead with the escrow so he could relieve whoever it was who needed some money—a loan, I think, or something, and he would reimburse me for the money I had up there in the bank until I could get back home." Plaintiff made no deposit in the escrow other than the $1,000 which she had delivered to the real estate broker and the evidence clearly shows that she was interested only in securing the return of her deposit.

[2] Plaintiff testified that on January 20, 1947, she executed a deed to the property here involved to Kenneth Horton; that the deed was not notarized and "the purpose of that deed was so that he could show the bank that he had—that he could handle my real estate or look after it in whatever manner he had to until I would get back home." This testimony clearly indicates that authority was given to Kenneth Horton to take whatever steps he considered necessary to protect plaintiff's deposit. By executing and delivering a new deed and accepting her deposit, plaintiff waived any claim as purchaser under the terms of the escrow.

Kenneth Horton testified that he agreed to purchase the property in question when plaintiff lost the sale of her Los Angeles home and the conversation in which the agreement was reached took place at plaintiff's home early in October of 1946; that plaintiff then agreed to let him use the $1,000 deposit made by her until he could reimburse her or the property was sold.

[3, 4] Plaintiff argues that Carrie Horton was not an encumbrancer in good faith. This argument is apparently based upon the theory that Carrie Horton knew at the time she loaned the money to her son that plaintiff had or claimed an interest in the property. The evidence is that plaintiff claimed no interest at the time the loan was made and that Carrie Horton advanced the money upon her son's statement to her that plaintiff had nothing to do with the transaction. While Carrie Horton knew that her son and his wife were having marital trouble, the divorce action was not filed until March 11, 1947. The transaction by which the $4,000 was to be obtained was set forth in the escrow instructions and if plaintiff desired to object to the terms of the escrow, she had ample opportunity to do so. As noted, Carrie Horton was not a party to the divorce action and the trust deed was not referred to in the decree. Plaintiff was awarded a one-half interest in the property by the judgment in the divorce action but that decree did not affect the Carrie Horton trust deed.

The trial court's findings and judgment as to the sums paid by plaintiff for taxes, assessments and maintenance of the property are sufficiently supported by the evidence and no serious question is raised as to the liability of the Johnstons for one-half of such sum. The judgment, in so far as it purports to decree that the deed of trust is not a lien on plaintiff's interest in the property; that it is only a lien on the interests of the Johnstons and that the lien of plaintiff is prior to the trust deed is reversed. The remaining portion of the judgment is affirmed. Plaintiff to pay costs.

BARNARD, P. J., and GRIFFIN, J., concur.

108 Cal.App.2d 175

DINKINS v. LAMB et al.

Civ. 18531.

District Court of Appeal, Second District,
Division 3, California.
Dec. 11, 1951.

John H. Dinkins sued Mamie B. Lamb and another to quiet title and for damages for encroachment of a foundation on land. The Superior Court of Los Angeles County, Walter H. Odemar, Judge assigned, rendered judgment for plaintiff and defendants appealed on the judgment roll. The Court of Appeal, Vallée, J., held that defendants, who took a deed from plaintiff's predecessor while the deed to plaintiff was of record, were affected with constructive notice and hence laches and unclean hands were not to be imputed to plaintiff for permitting defendants to pay taxes.

Judgment affirmed.

1. Appeal and Error ⚷907(3)

On defendants' appeal on the judgment roll in quiet title suit, in absence of transcript of the oral proceedings, record did not permit consideration of assignment of error on failure to find as to adverse holding of defendants' predecessor, and it must be conclusively presumed that there was no evidence that such predecessor was in possession.

2. Quieting Title ⚷47(2)

Findings in quiet title suit that property had been sold for taxes and that defendants had paid all delinquent taxes and penalties raised inference that defendants' predecessor did not pay taxes as alleged in answer claiming adverse possession.

3. Appeal and Error ⚷907(3)

On defendants' appeal on the judgment roll in quiet title suit, finding that value of the four inches of land involved was $100 and that plaintiff should recover $100 damages must be construed, in absence of evidence, as finding that plaintiff suffered $100 damage by reason of construction of party wall, and court must assume that there was evidence that damage suffered equaled the value of the four inches covered by the party wall.

4. Equity ⚷65(2)
Quieting Title ⚷29
Vendor and Purchaser ⚷231(1)

Where deed to plaintiff in quiet title suit was of record when defendants acquired the property by deed from plaintiff's predecessor, defendants had constructive notice of plaintiff's ownership and defendants' payment of taxes could not be laid to plaintiff so as to impute laches and unclean hands to plaintiff in suit to quiet title. Civ. Code, § 1213.

5. Appeal and Error ⚷173(10)

The question of laches in bringing quiet title suit could not be raised for the first time on appeal.

6. Quieting Title ⚷51

Where deed to plaintiff in quiet title suit was of record when defendants acquired the property from plaintiff's predecessor who no longer had title, court did not err in quieting title in plaintiff without requiring him as a condition precedent to pay taxes and delinquencies paid by defendants in reliance on their invalid deed.

7. Taxation ⚷531(2)

One charged with knowledge that deed under which he holds is void and who pays taxes is a volunteer and not entitled to a lien therefor.

8. Taxation ⚷531(1)

One who pays taxes under belief that he is owner of property is not entitled to judgment for taxes if he is adjudged not to be the owner, since he was a volunteer.

9. Appeal and Error ⚷1029

Defendant in quiet title suit who was given a lien for amount expended for taxes and delinquencies, and it was doubtful whether in law she was entitled thereto, could not complain of trial court's failure to require plaintiff to pay such amount as a condition precedent to quieting title.

10. Quieting Title ⚷54

Plaintiff in quiet title suit was entitled to judgment for costs against defendants who paid taxes in reliance on invalid deed from plaintiff's predecessor, executed when deed to plaintiff was of record. Code Civ. Proc. § 1032.

Halverson & Halverson, Charles L. Farr and George Halverson, all of Los Angeles, for appellants.

Donald J. Dunne, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants on the judgment roll from an adverse judgment in a suit to quiet plaintiff's title to lot 8, tract 9639, and for damages for encroachment of a foundation thereon.

On October 28, 1936, Hattie Wilbur was the owner and in possession of lot 8, subject to a sale made to the state in 1932 for unpaid taxes. On that date plaintiff was the owner of a street improvement bond held in the name of Trompeter & Co., which was a lien on lot 8. On that date Hattie Wilbur executed a grant deed of lot 8 to Trompeter & Co., which was recorded February 16, 1937. On February 11, 1937, Trompeter & Co. executed a grant deed of lot 8 to plaintiff, subject to the taxes. This deed was recorded February 16, 1937. Plaintiff did not pay any taxes levied on the property at any time.

On January 24, 1945, Hattie Wilbur executed a quitclaim deed to lot 8 to defendant Mamie B. Lamb and her husband, now deceased, subject to the taxes thereon. Thereupon the Lambs went into possession, paid all delinquent taxes and penalties, have been in possession ever since, and have paid all taxes and assessments thereon until the commencement of this action. The amount paid by the Lambs on account of taxes, penalties, delinquencies, and for the removal of trees is $453.22.

About January 1, 1946, the Lambs and defendant Johnson made an oral agreement whereby the Lambs gave Johnson "the right" to erect a party wall along the side of lot 8 extending four inches onto the lot and whereby it was agreed that when the Lambs should use the wall they would pay Johnson $375 therefor. Thereupon Johnson erected a cement wall, as agreed, at an expense of $750. The value of the four inches of land is $100.

The court found the foregoing facts and therefrom concluded and decreed that 1) plaintiff's title to lot 8 be quieted, 2) Mamie B. Lamb has a lien thereon for $453.22, and 3) plaintiff recover damages in the sum of $100 from Johnson.

Defendants' assignments of error are that the court erred: 1) in failing to find on the issue of adverse possession; 2) in failing to find on the question of damages; 3) in failing to find that plaintiff was barred by laches; 4) "in its conclusions of law and judgment (a) in coming into court with unclean hands and failing to do, or offering to do equity"; 5) in awarding costs.

[1, 2] As an affirmative defense the answer of Mamie Lamb alleged that she "and her predessor in interest in the ownership of said lot have been in the possession of said lot openly, notoriously and adversely to the plaintiff and all the world for the period of more than five years prior to the commencement" of this action, and have paid all taxes levied and assessed thereon. The court found that ever since January 24, 1945, the Lambs held lot 8 "adversely to the plaintiff and all the world, openly, notoriously and adversely under a claim of right, harvesting the fruit trees thereon, of nominal value, and paying all taxes and assessments thereon, until the commencement of this action on the 16th day of May, 1949." It is argued that the court should have made a finding as to the "holding" of the Lambs' predecessor in interest. Defendants have not given us a proper record on appeal that will permit us to consider this assignment of error. In the absence of a transcript of the oral proceedings, it must conclusively be presumed that there was no evidence that Mrs. Lamb's predecessor in interest was in possession. Hunt v. Plavsa, 103 Cal.App.2d 222, 224, 229 P.2d 482. Further, the inference from the findings that the property had been sold to the state for taxes and that the Lambs had paid all delinquent taxes and penalties is that the predecessor of the Lambs did not pay any taxes levied on and assessed against the property as alleged in the answer.

[3] In support of the claim that the court erred in failing to find on the question of damages it is asserted that the court

should have found whether the building of the party wall was a damage or betterment to plaintiff's property. The court found that the value of the four inches of land is $100, and concluded that plaintiff recover from Johnson "the sum of $100 damages." In the absence of the evidence, we construe this finding as one that plaintiff suffered damage to the amount of $100 by reason of the construction of the party wall. On the record presented we must assume that there was evidence that the damage suffered equaled the value of the four inches.

[4, 5] We cannot say, as a matter of law, that plaintiff was guilty of laches. The deed to plaintiff was of record at the time the Lambs acquired the property and was constructive notice to them that plaintiff was the owner of the property. Civ.Code, § 1213. Their payment of taxes cannot be laid to plaintiff. So far as appears, the question of laches was not raised in the trial court. It cannot be raised for the first time on appeal. Ellis v. Union Trust Co., 219 Cal. 50, 53, 25 P.2d 1; Sanchez v. Torquemada, 96 Cal.App.2d 26–27, 214 P.2d 48. For the same reasons we cannot say that plaintiff came into court with unclean hands because of his failure to pay the taxes.

[6–9] Neither can we say that title should not have been quieted in plaintiff without requiring him, as a condition precedent thereto, to pay all taxes and delinquencies paid by the Lambs. Defendants rely on the principle that if the owner of an estate stands by and suffers another person, who is ignorant of his title, or supposes himself to be entitled, to expend money upon the estate, a court of equity will compel such owner, where he afterwards comes into court to assert his title, to indemnify the one who made the expenditure. 2 Pomeroy Eq.Jur. (5th Ed.) 65, § 390. The principle is not applicable for the reason that it cannot be said, in view of the fact that the deed to plaintiff was of record at the time Hattie Wilbur quitclaimed to the Lambs, that the Lambs were ignorant of plaintiff's title or that in a legal sense they supposed themselves to be entitled to expend money on the property. Hattie Wilbur did not have title at the time she deeded to the Lambs. The deed was void. The Lambs are charged with knowledge of that fact. One charged with knowledge that the deed under which he holds is void and who pays taxes is a volunteer and is not entitled to a lien therefor. Toler v. Fertitta, Tex.Com.App., 67 S.W.2d 229, 231. One who pays taxes under the belief that he is the owner of the property is not entitled to a judgment for the taxes in the event he is adjudged not to be the owner since he was a volunteer. McMillan v. O'Brien, 219 Cal. 775, 780, 29 P.2d 183, 91 A.L.R. 383. See, also, Atkins Guardian v. McCoy, 225 Ky. 117, 120 S.W.2d 1019, 1021; Adams v. Taylor, 149 Miss. 750, 115 So. 878; Burkhardt v. Lieberman, 138 Tex. 409, 159 S.W.2d 847, 853–854. The court gave Mrs. Lamb a lien on the property for the amount expended by her and her husband for taxes and delinquencies. It is doubtful whether in law she was entitled to the lien. McMillan v. O'Brien, supra. In any event she cannot complain.

Dool v. First National Bank, 207 Cal. 347, 278 P. 233, and District Bond Co. v. Pollack, 19 Cal.2d 304, 121 P.2d 7, cited by defendants, are not in point. In each of those cases the party making the advances had an interest in the property and, therefore, was not a volunteer. Mrs. Lamb had no interest in the property. In the Pollack case it was said, 19 Cal.2d at page 307, 121 P.2d 7, 9: "The trial court therefore properly adjudged respondent to have a lien against the property for the full amount of his expenditures." Mrs. Lamb's interests, if any, were protected by the lien.

[10] The court awarded plaintiff judgment for costs against defendants Lamb and Johnson. Without the citation of any authority, defendants claim that "On no equitable principle can such a judgment be sustained." There was no error in awarding plaintiff judgment for costs. Code Civ. Proc. § 1032.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

PEOPLE v. COAKLEY et al.

Cr. 4683.

District Court of Appeal, Second District,
Division 2, California.

Dec. 14, 1951.

Rehearing Denied Dec. 26, 1951.

Paul W. Coakley and Golden Adams were convicted in the Superior Court, Los Angeles County, Joseph M. Maltby, J., of having received stolen property and they appealed. The District Court of Appeal, Moore, P. J., held that the failure to instruct on the necessity of having the testimony of accomplices corroborated was error but not prejudicial in view of the abundance of corroboration.

Affirmed.

1. Criminal Law ⇒511(1), 780(1)

When testimony of an accomplice is relied upon for a conviction, court must instruct jury that a conviction cannot be had unless such testimony is corroborated by other evidence which, in itself and without aid of testimony of accomplice, tends to connect defendant with commission of offense, and corroboration is not sufficient if it merely shows the commission of offense or the circumstances thereof. Pen. Code, § 1111.

2. Criminal Law ⇒507(5)

In the ordinary case of a thief selling his loot, he is not an "accomplice" of the purchaser. Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

3. Criminal Law ⇒507(5)

Where thieves entered into a conspiracy for themselves to steal and for defendant to receive the stolen goods, the thieves became liable for the identical offense committed by defendant and were "accomplices". Pen.Code, § 1111.

4. Criminal Law ⇒1173(2)

In prosecution for receiving stolen goods, the error of failure to instruct on the necessity of corroboration for the testimony of an accomplice was not prejudicial where there was an abundance of corroborating evidence. Pen.Code, § 1111; Const. art. 6, § 4½.

5. Criminal Law ⇒511(6)

In prosecution for receiving stolen goods, possession of the stolen goods was itself sufficient corroboration for the testimony of an accomplice. Pen.Code, § 1111.

6. Criminal Law ⇒511(1)

Corroborating evidence need not go so far as to establish guilt without the aid of testimony of accomplice. Pen.Code, § 1111.

7. Criminal Law ⇒511(4)

Contradictory statements by one accused, or his silence or his lies are independent corroborative evidence of testimony of an accomplice. Pen.Code § 1111.

8. Criminal Law ⇒1163(1)

Error does not give rise to a presumption of prejudice.

9. Criminal Law ⇒1186(4)

Before error may suffice to require a reversal it must be shown that accused was substantially injured by the error. Const. art. 6, § 4½.

10. Criminal Law ⇒1186(4)

Where guilt of defendants is established, case will not be remanded for a new trial because of court's error as to any matter of procedure or because of its misdirection of jury. Const. art. 6, § 4½.

11. Indictment and Information ⇒130

Each count in a pleading charges a separate and distinct offense and stands upon its own merits. Pen.Code, § 954.

12. Criminal Law ⇒878(3)

A verdict of acquittal of one count is not an acquittal on any other count. Pen. Code, § 954.

13. Criminal Law ⇒407(1)

An accusatory statement properly becomes a part of the record when accused responds with an evasive reply.

14. Criminal Law ⇒1023(10)

Where, after defendant's conviction, proceedings had been suspended and probation granted, on appeal from the judgment and from an order denying a new trial, the appeal from the judgment would be dismissed for want of a judgment.

Clifton A. Hix, San Pedro, for appellants.

Edmund G. Brown, Atty. Gen., Charles M. Hughes, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellants were jointly accused on two counts of having received stolen property. Paul Coakley having been convicted of both charges appeals from the judgment and the order denying his motion for a new trial. "Goldie" Adams was convicted on the first count only and proceedings having been suspended she was placed on probation. She has appealed from the judgment as well as from the order denying her motion for a new trial. Since there is no judgment against her, that appeal will be dismissed. All her rights to a reversal of the order will be considered jointly with those of appellant Coakley.

At the time of the crimes, December, 1950, appellants resided in illicit relationship in San Pedro and were planning to enter their new home in Compton. They were both narcotic addicts and sold to others. Two of their fellow narcotists were Vincent and Imogene Reyes. On a day in July, 1950, Coakley in the presence of Goldie told Vincent of his buying a new home and of his desire that Vincent assist him to furnish it with household appliances. Vincent agreed that he could obtain the requisite articles by stealing them. Coakley approved of the plan and promised to trade Vincent capsules of heroin for such merchandise as he might deliver. Goldie asked Vincent to get her a mixmaster, an iron and other household articles. In late July, 1950, Imogene told Goldie the deal of Paul and Vincent was very good and at the same time paid Goldie $8 for two capsules of heroin. She accompanied her husband on several occasions when he called to purchase heroin from Coakley. She obtained money from various persons for "certain services." After his arrest, Coakley told Officer Howsley that he had handled narcotics until two weeks prior to his disclosures of his erstwhile vocation.

Facts of Count I

The witness Aparici was a friend of and resided near, the Reyes couple. He was a worker in a sardine cannery. When he left his apartment at 4 a. m. of November 4, 1950, he left his typewriter in place. Soon after his departure, Vincent Reyes broke off the screen, burglariously entered through the bathroom window and removed the Corona machine. He took it to Coakley to whom "everybody took all their hot stuff to purchase heroin."

Facts of Count II

November 5, 1950, Earl Eaton operated a service station in Wilmington about three miles from the Reyes home. He owned and kept there a mixmaster and bowls, and other movables for sale. On that day, Imogene Reyes, a stranger to Mr. Bridges, the attendant in charge, announced to the latter that she had lost her wedding ring down the washbowl in the rest room. While Bridges worked two minutes in assisting Imogene, Vincent stole the mixer and bowls, immediately delivered them to Coakley and received six capsules of heroin. Miss Adams told Vincent they were exactly what she desired. On the same day Vincent purloined two steam irons and received from Coakley two capsules of heroin for each one of them. About the same time Vincent burglarized a hardware store and removed a radio for which he received from Coakley two capsules of heroin.

On December 1, 1950, the police found the mixer and bowls in a closet in Coakley's apartment, the typewriter in the attic above and the radio in a bedroom. Both appellants were present. In answer to the police inquiries, Coakley at first stated that Goldie had purchased the mixer and steam iron in Los Angeles. Later on the same day, Coakley in the presence of Vincent and Imogene, admitted to the officers that he had given Vincent two capsules for the mixer, "some stuff" for the iron, and had "bought" the typewriter from Vincent. He denied knowledge of the theft of the articles but Vincent stated that the mixmaster is the one he stole and took to Coakley who said: "That is true." He made the same admission with reference to receiving the steam iron. Later he told the officers that he had received the mixer, the iron and the typewriter from Reyes and had given him only heroin for them, but claimed that he held the typewriter for $15 owed him by Vincent.

No Error

[1] Appellants contend that prejudicial error was committed by the court's refusal to instruct the jury on the law of accomplice testimony. Four instructions were offered.[1] Such portions of them should have been given as would have effectively advised the jury of the necessity of having the testimony of accomplices corroborated. There is no contradiction of the evidence that Vincent Reyes offered to steal such articles as Coakley would require for the home of himself and Miss Adams and that Coakley agreed to, and did, purchase the stolen articles. The rule is that when the testimony of an accomplice is relied upon for a conviction, the court must instruct the jury that a conviction cannot be had on the testimony of an accomplice, unless it is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. Penal Code, sec. 1111; People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L.R.A.,N.S., 704; People v. Wallin, 32 Cal.2d 803, 807, 197 P.2d 734; People v. Rankin, 10 Cal.2d 198, 74 P.2d 71; People v. Gilbert, 30 Cal.App.2d 321, 86 P. 2d 135; People v. Shofstall, 56 Cal.App.2d 121, 132 P.2d 48.

[2, 3] In the ordinary case of a thief's selling his loot no claim could be successfully asserted that the vendor is an accomplice of the purchaser. In re Morton, 179 Cal. 510, 513, 177 P. 453; People v. Burness, 53 Cal.App.2d 214, 219, 127 P.2d 623. But in the instant action the thieves were actual accomplices of the appellants. This is established by the evidence of their entering into a conspiracy for themselves to steal and for Coakley to receive the stolen goods. By virtue of such conspiracy they became liable for the identical offense committed by him. People v. Lima, 25 Cal.2d 573, 154 P.2d 698.

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[1] "821. * * * A conviction may not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.

"An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial. Whether or not any witness in this case was an accomplice as defined in these instructions is for the jury to determine from all the testimony and the circumstances as shown by the evidence.

"To render a person an accomplice, he or she must in some manner knowingly and with criminal intent aid, abet, assist or participate in the criminal act. If you should find that any witness in this case so conducted himself in respect to the crime charged, you must find that he was an accomplice (as to that crime) * * *.

"823. * * * The corroboration of the testimony of an accomplice required by law may not be supplied by the testimony of one or more other accomplices, but must come from other evidence of circumstances or from the testimony of one or more witnesses who were not accomplices * * *.

"829. * * * It is the law that the testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case * * *.

"830. * * * In determining whether or not the testimony of an accomplice has been corroborated as required by law, you must, for the purpose only of your consideration of that question, assume to be removed from the case the testimony of the accomplice(s), and then examine all other evidence with a view to determining if there be any inculpatory evidence, that is, evidence tending to connect the defendant with the commission of the offense. If such other evidence does do that, then the testimony of the accomplice is corroborated; if it does not, then there is no corroboration, although the accomplice may be corroborated in regard to any number of facts sworn to by him * * *."

[4–7] While it was error to refuse the instructions, how could appellants have been prejudiced? There was abundant corroboration aside from the Reyes' testimony to connect appellants with the crime charged. The articles stolen from the home and the service station were found in appellants' apartment. Access to the typewriter was made difficult by their placing it in the attic. No consent was given by either victim to the removal of the items taken. Neither appellant denied they had possession of the stolen property. Possession was itself sufficient corroboration. People v. Rice, 29 Cal.App.2d 614, 620, 85 P.2d 215. It is not required that corroborating evidence itself go so far as to establish guilt without the aid of the testimony of the accomplice. People v. Miller, 54 Cal.App.2d 384, 386, 128 P.2d 785. In addition to the possession of the stolen articles and the confession of appellants, they are now confronted by the falsehoods they told the officers in their efforts to exculpate themselves, and Goldie's subsequent refusal to answer questions of the officers. Such contradictions by one accused, or his silence or his lies are independent corroborative evidence. People v. Willmurth, 77 Cal.App.2d 605, 612, 176 P.2d 102; See People v. Sandelin, 105 Cal.App. 2d 179, 233 P.2d 147; People v. West, 4 Cal.2d 367, 371, 49 P.2d 276.

[8, 9] In view of such strong corroboration it is a reasonable deduction that the refusal of the court to give the requested instructions was not prejudicial. No presumption of prejudice arises from error. Before an error may suffice to require a reversal, it must be shown that the accused was substantially injured by the error. People v. Lawlor, 21 Cal.App. 63, 71, 131 P. 63; People v. Thompson, 68 Cal.App. 487, 493, 229 P. 896; People v. McEvers, 53 Cal.App.2d 448, 453, 128 P.2d 93. Where the testimony of an accomplice is disregarded and the remaining evidence is inculpatory and tends to connect the defendant with the offense charged, then the accomplice is corroborated, People v. White, 35 Cal.App.2d 61, 94, 94 P.2d 617; People v. Morton, 139 Cal. 719, 724, 73 P. 609. But his testimony "is required to give to the 'corroboration' direction to the alleged crime, before such corroborative testimony can be said to connect the defendant with the commission of such crime." People v. Sawaya, 46 Cal.App.2d 466, 470, 115 P.2d 1001, 1003.

In People v. Solomon, 6 Cal.Unrep.Cas. 305, 58 P. 55, it was held that the testimony of the accomplice was sufficiently corroborated by proof that the accused placed the stolen goods in the back room of a saloon, saying that he had loaned money on them and not explaining why he put them there.

Finally, appellants were both morphine addicts and Coakley had been a heroin dealer prior to his transaction with Reyes. He had evidently accumulated no household appliances. He desired them for his prospective home. Add these facts to the fact of his possession of the stolen goods and his admission that he figured Vincent had "heisted" the typewriter because he was not "a member of the intelligentsia" and the corroboration is abundant.

Golden Adams was no innocent babe. She was living with Coakley and was a friend of Vincent and Imogene. While she at first denied knowledge of the thieving of the couple, she made no protest when, in her presence, Vincent told the officer of having sold her a "regular iron" for two capsules, the usual price "Paul has been giving me."

[10] With such proof adopted by both court and jury, could there be a reasonable doubt as to the guilt of appellants? If they are guilty, it would be preposterous to discharge them or to remand the case for a new trial because of the court's "error as to any matter of procedure" or of its "misdirection of the jury". Constitution, Art. VI, sec. 4½. The adoption of that section must have and hold its significance in the corpus juris of California. It spelled the end of meaningless reversals and of maintaining courts for the amusement of professional criminals.

The Verdicts

[11, 12] Miss Adams contends that the verdict of guilty on Count I vitiated the verdict of not guilty on Count II. She ar-

gues that the evidence against her shows only one conspiracy by means of which the Reyes couple were to obtain specific personal property for appellants, citing Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764; In re Johnston, 3 Cal.2d 32, 43 P.2d 541; People v. Bales, 74 Cal.App.2d 732, 734, 169 P.2d 262. Such contention is contrary to the clear letter of section 954 of the Penal Code, to wit, "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." Each count in a pleading charges a separate and distinct offense and stands upon its own merits. If one falls its failure does not affect the course taken upon the remaining counts and their strength and the force of the evidence produced as proof of them cannot give support to one whose proof is lacking. A verdict of acquittal of one count is not acquittal of any other count. People v. Van Os, 96 Cal. App.2d 204, 206, 214 P.2d 554. The cases cited by appellants do not avail them. On their facts they are clearly distinguished. For instance, in the Oliver decision, the defendants were acquitted of the overt acts. The court properly prohibited a retrial of the conspiracy. Because Johnston was convicted of a conspiracy and acquitted of the overt acts, he was discharged on the strength of the Oliver holding.

Accusatory Statement

[13] Miss Adams claims prejudicial error in the court's allowing Officer Mascillo to testify to her refusal to answer when he said, "You knew that these articles were stolen when Paul bought them." She contends that her reply was not an admission of guilt, citing People v. Simmons, 28 Cal. 2d 699, 712, 172 P.2d 18. The cited decision is adverse to the contention. It holds that an accusatory statement properly becomes a part of the record when the accused responds with an evasive reply.

[14] The appeal of defendant Adams from the judgment is dismissed; the judgment against Coakley and the order denying both motions for a new trial are affirmed.

McCOMB, J., concurs.

CHAS. L. HARNEY, Inc. v. CONTRACTORS' STATE LICENSE BOARD, etc. et al.*

Civ. 14703.

District Court of Appeal, First District, Division 2, California.

Dec. 14, 1951.

Hearing Granted Feb. 7, 1952.

Chas. L. Harney, Inc., sued the Contractors' State License Board and others for declaratory relief as to plaintiff's right to engage in specialty construction without obtaining a specialty license. The Superior Court of the City & County of San Francisco, Franklin A. Griffin, J., rendered a judgment on the pleadings in favor of defendants, and plaintiff appealed. The Court of Appeals, Patterson, J. pro tem., held that the complaint, not indicating actual intent to engage in specialty construction, was insufficient.

Judgment affirmed.

1. Appeal and Error 🔑863

On appeal from judgment on the pleadings, granted on ground that complaint failed to state cause of action, the only issue is whether complaint is sufficient to state cause of action for declaratory relief and its sufficiency must be determined upon same principles as if it had been attacked by general demurrer.

2. Declaratory Judgment 🔑62

"Actual controversy" as basis for declaratory relief means more than disagreement upon some abstract or academic question of law, and it must be justiciable. Code Civ.Proc. § 1060.

See publication Words and Phrases, for other judicial constructions and definitions of "Actual Controversy".

3. Declaratory Judgment 🔑64

As basis for declaratory relief, controversy must not only be justiciable but must be definite and concrete, touching the legal relations of parties having adverse legal interests. Code Civ.Proc. § 1060.

4. Declaratory Judgment 🔑66

As basis for declaratory relief, controversy must admit of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. Code Civ. Proc. § 1060.

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* Subsequent opinion 247 P.2d 913.

5. Declaratory Judgment ⚷383

Declaratory judgment must decree, and not suggest, what parties may or may not do. Code Civ.Proc. § 1060.

6. Declaratory Judgment ⚷319

A complaint seeking declaratory relief that plaintiff would in future have right to engage in specialty construction without obtaining a special license, but not indicating that plaintiff intended to engage in one of the classified phases of specialty construction was insufficient. Code Civ. Proc. § 1060.

7. Declaratory Judgment ⚷23

The statute authorizing judicial declaration as to validity of a regulation does not dispense with the requisite of justiciability or change controlling principles of declaratory relief. Government Code, § 11440.

8. Declaratory Judgment ⚷389

Even where there is a justiciable controversy, court may refuse to exercise statutory power to grant declaratory relief if in its discretion it appears that the determination is not necessary or proper at the time under all circumstances. Code Civ.Proc. § 1060.

9. Declaratory Judgment ⚷394

In absence of abuse of discretion, determination that declaratory relief is not necessary or proper at the time under all circumstances will not be reviewed upon appeal. Code Civ.Proc. § 1060.

10. Declaratory Judgment ⚷68

Ordinarily, court will not decide future rights in anticipation of an event which may never happen. Code Civ.Proc. § 1060.

11. Declaratory Judgment ⚷341

Plaintiff seeking declaratory relief must show that conditions exist which would justify court in exercising its discretion to grant the relief sought. Code Civ.Proc. § 1060.

Gardiner Johnson, Roy D. Reese and Thomas E. Stanton, Jr., all of San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

PATTERSON, Justice pro tem.

The plaintiff in an action for declaratory relief appeals from a judgment on the pleadings in favor of the defendants.

Plaintiff filed a complaint for declaratory relief against the Contractors' State License Board, the members of the Board, and its Registrar. It alleges in substance that the plaintiff is a corporation duly licensed by the respondent board as a general engineering contractor and is fully qualified to perform all types and classification of construction work defined in Section 7058 of the Business and Professions Code as "Specialty Contractor" work; that appellant has neither applied for nor been issued any of the specialty contracting licenses referred to in Section 732 of the Rules and Regulations of the Contractors' State License Board; that by established usage and custom in the construction industry general engineering contractors necessarily perform all classifications of specialty work referred to in Section 732 of the Rules and Regulations of the defendant Board; that appellant asserts the right to bid for, contract for and perform all types and classifications of specialty work referred to in Section 732 of the Rules and Regulations of the respondent Board without the necessity of being licensed by the Board as a specialty contractor; that respondent Board asserts that appellant must obtain the respective specialty licenses required by Section 732 of said rules prior to bidding for, contracting for or performing any of the specialty work classified by said section; that respondent Board has advised and threatens to continue advising all State and local governmental officers, divisions, departments and agencies having to do with public work that the appellant has no legal right or authority to bid for any specialty construction work referred to in said Section 732 unless it is the holder of specialty licenses required by said section; that an actual controversy exists between appellant and respondent Board with respect to appellant's right to bid for, contract for and perform the specialty work above referred to without first obtaining any specialty licenses required by Section 732; and finally that appellant desires a declaration of its legal right and authority with relation to the power of the respondent Board to require appellant to obtain the aforementioned specialty licenses prior to engaging in any of the specialty work referred to.

After plaintiff's opening statement the defendants moved for a judgment on the pleadings which, after the submission of briefs, was granted. The trial court held that the complaint failed to state a cause of action on any justiciable controversy. The court further held that the issues presented by the complaint were abstract in character and the receipt of evidence in support of such issues would serve no useful purpose.

[1] The only issue upon appeal is whether or not the complaint is sufficient to state a cause of action for declaratory relief and its sufficiency must be determined upon the same principles as if it had been attacked by a general demurrer. Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1. In this connection it should be noted that the complaint contains no allegations that the plaintiff desired to bid for, had any opportunity to bid for, or had attempted to bid for any construction project which involved work in any of the specialty classifications as enumerated in Section 732 of the Rules and Regulations of respondent Board. Respondent takes the position first, that the complaint did not present any justiciable issue, and secondly, that there was no abuse of discretion on the part of the trial court in denying declaratory relief.

[2-5] Code of Civil Procedure, Section 1060, provides for the bringing of an action for declaratory relief "in cases of actual controversy relating to the legal rights and duties of the respective parties". "Actual controversy" has been construed as meaning something more than a disagreement upon some abstract or academic question of law. It must be justiciable. The fact that plaintiff and defendants disagreed as to the law raised no justiciable controversy between them. The rule as announced in Monahan v. Dept. of Water & Power, 48 Cal.App.2d 746, 751, 120 P.2d 730, 732, is as follows: "In that connection we may well observe that not only must the controversy be a justiciable controversy, as distinguished from 'a difference or dispute of a hypothetical or abstract character; from one that is academic or moot', but it must be 'definite and concrete, touching the legal relations of parties having adverse legal interests.' Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 464, 81 L.Ed. 617, 108 A.L.R. 1000. In short, the controversy must be of a character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, and not suggest, what the parties may or may not do."

The principles controlling declaratory relief are again set forth and the cases are reviewed in Conroy v. Civil Service Commission, 75 Cal.App.2d 450, 171 P.2d 500. In the latter case this court quoted with approval the following statement from Borchard on Declaratory Judgments, Second Edition, 1941, as follows, 75 Cal.App.2d at pages 455-456, 171 P.2d at page 503: "'It has already been observed that an action for declaratory judgment must exhibit all the usual conditions of an ordinary action, except that accomplished physical injury need not necessarily be alleged. It is sufficient if a dispute or controversy as to legal rights is shown, which, in the court's opinion, requires judicial determination—that is, in which the court is convinced that by adjudication a useful purpose will be served. The requisites of justiciability must be present.

"'Not only must the plaintiff prove his tangible interest in obtaining a judgment, but the action must be adversary in character, that is, there must be a controversy between the plaintiff and a defendant, subject to the court's jurisdiction, having an interest in opposing his claim. Unless the parties have such conflicting interest, the case is likely to be characterized as one for an advisory opinion, and the controversy as academic, a mere difference of opinion or disagreement not involving their legal relations, and hence not justiciable.'"

[6] In Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 241, 57 S.Ct. 461, 464, the court said: "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." In the instant case there is nothing in the complaint to indicate that the plaintiff intended to engage in one of the classified phases of specialty construction. In effect he is seeking a declaration that in the event he should decide to do so some time in the future he would have such a right without obtaining a specialty license. Tested by the rule as set forth in the cases, this is not a justiciable controversy but is one that calls for the court to pass upon a mere academic question. There are no legal relations between the parties upon which a decree could operate.

Plaintiff urges that under the provisions of the Government Code, Section 11440, it is an interested person and entitled to the relief sought. That section reads as follows: "Any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure and, in addition to any other ground which may exist, such regulation may be declared to be invalid for a substantial failure to comply with the provisions of this chapter or, in the case of an emergency regulation or order of repeal, upon the ground that the findings and statement do not constitute an emergency within the provisions of Section 11421 (b)."

[7] There is nothing in this section to indicate that the Legislature intended to dispense with the requisite of justiciability. In fact it plainly provides that an action for declaratory relief may be brought under the provisions of the Code of Civil Procedure. Under those provisions the courts, as we have seen, require a justiciable controversy. Plaintiff has discussed at length the history of the Administrative Practice Act but we find nothing there which evidences any intention on the part of the Legislature to change the controlling principles of declaratory relief when applied to administrative regulations.

[8–10] Even where there is a justiciable controversy the court may refuse to exercise the power granted by the Code of Civil Procedure, Section 1060, if in its discretion it appears that the determination is not necessary or proper at the time under all the circumstances. In the absence of abuse its determination will not be reviewed upon appeal. C.C.P. § 1061, Hannula v. Hacienda Homes, Inc., 34 Cal.2d 442, 211 P.2d 302, 19 A.L.R.2d 1268; California Physicians' Service v. Garrison, 28 Cal.2d 790, 172 P.2d 4, 167 A.L.R. 306; Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422; Cutting v. Bryan, 206 Cal. 254, 274 P. 326. Ordinarily the court will not decide future rights in anticipation of an event which may never happen.

[11] Plaintiff must show that the conditions exist which would justify the court in exercising its discretion to grant the relief sought. Merkley v. Merkley, 12 Cal.2d 543, 86 P.2d 89. No such showing has been made. We find no abuse of discretion.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

108 Cal.App.2d 168

OAKES et al. v. FERNANDEZ et al.

Civ. 18512.

District Court of Appeal, Second District, Division 3, California.

Dec. 11, 1951.

Hearing Denied Feb. 7, 1952.

Louise Oakes and another sued Tomasa M. Fernandez and others to quiet title to land and to recover on notes. The Superior Court of Los Angeles County, Gregory F. Naushart, Judge assigned, rendered judgment for plaintiffs and defendants appealed. The Court of Appeal, Vallée, J., held that the evidence supported the findings and judgments.

Judgment affirmed.

1. Bills and Notes ⚷516
Quieting Title ⚷44(3)

In action to quiet title to land and to recover on notes, evidence supported findings for plaintiff.

2. Evidence ⚷383(3)

A recorded deed from marshal of municipal court pursuant to execution sale was prima facie evidence that premises described therein were conveyed to grantee. Code Civ.Proc. § 1928.

3. Mortgages ⚷38(1)

Record supported findings contrary to contention that plaintiffs' deeds and sheriff's deed were held only as security for money loaned to defendants, in view of contradiction in testimony and trial court's disbelief of defendant.

4. Quieting Title ⚷47(2)

Findings that plaintiffs were owners of described realty and that defendants had no right, title or interest therein were sufficient to support judgment for plaintiffs without finding specifically with respect to allegations of answer that deeds to plaintiffs were made during negotiations regarding loan, that plaintiffs deeded one lot back to defendants, and that defendants had lot in possession thereafter.

5. Usury ⚷18

Where there was evidence that plaintiffs loaned defendants at least $26,460.68, it was not improper as usurious to quiet title to plaintiffs in lots conveyed by defendants while rendering judgment for plaintiffs on notes representing $10,328.91 of the loans.

6. Appeal and Error ⚷1170(12)

No judgment and no part of a judgment may be set aside for any error as to pleading or procedure unless, after examination of the entire cause, including evidence, reviewing court is of opinion that the error complained of resulted in miscarriage of justice. Const. art. 6, § 4½.

7. Appeal and Error ⚷1170(3, 10)

Where notes sued on provided for attorney's fees to be fixed by court and complaint sought to recover fees, and defendant did not object to introduction of notes in evidence, to findings or to judgment that defendant should pay $1,000 attorney fees, failure to plead and find that specified sum was reasonable sum for attorney's fees did not result in miscarriage of justice. Const. art. 6, § 4½.

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Benjamin D. Brown, Los Angeles, for appellants.

Barry Sullivan, Los Angeles, for respondents.

VALLÉE, Justice.

The judgment in this action quieted plaintiffs' title to lots 234 and 235 of tract 4949, and awarded them $11,800 with interest against defendant Tomasa M. Fernandez. The $11,800 consisted of $4300 and $6500 unpaid on two promissory notes, and $1000 attorney's fees as provided in the notes. Defendants appeal.

[1, 2] Defendants apparently contend that the findings are not supported by the evidence. The point is untenable. On September 12, 1949, the marshal of the municipal court of the city of Los Angeles conveyed lot 234 to plaintiff J. A. Oakes, pursuant to a sale on execution in an action by one Matchett v. Tomasa M. Fernandez. This deed was recorded September 13, 1949, and is prima facie evidence that lot 234 was thereby conveyed to plaintiff J. A. Oakes. Code Civ.Proc., § 1928. On June 13, 1946, defendant Tomasa M. Fernandez

conveyed lot 235 to plaintiffs. This deed was recorded September 6, 1946. On February 7, 1947, Tomasa M. Fernandez conveyed lot 234 to plaintiffs. This deed was recorded February 10, 1947. On January 8, 1948, Tomasa M. Fernandez executed a promissory note in favor of plaintiffs in the amount of $4300, with interest at 4%, principal and interest payable in installments of $43 on the first of each month beginning February 1, 1948. On January 8, 1948, Tomasa M. Fernandez executed a promissory note in favor of plaintiffs in the amount of $6500, with interest at 4%, principal and interest payable in installments of $65 on the first of each month beginning February 1, 1948. There was evidence that default had been made in the payment of these notes and that the amounts found to be unpaid had in fact not been paid. The foregoing evidence amply supports the findings.

[3] Defendants say that plaintiffs "held the deeds to lots 234 and 235 and the Sheriff's deed only as security for repayment of money loaned and the findings of the court contrary were an abuse of discretion as a matter of law." The point is without merit. There was testimony by Tomasa Fernandez to the effect that the deeds were given as security for money loaned. The testimony of plaintiff Louise Oakes was to the contrary. The trial judge said: "This Court disbelieves the testimony of Tomasa M. Fernandez in every particular in which it contradicts the testimony of the plaintiff, Louise Oakes * * *."

[4] The answer alleged that defendants had deeded the property to plaintiffs "during negotiations regarding a loan," and that plaintiffs deeded lot 234 back to defendants after the deed of February 7, 1947, and that defendants have been in possession of the lot since 1943. Defendants say that the court did not find on this issue and that its failure to do so is fatal to the judgment. The court found that plaintiffs are the owners of lots 234 and 235 and that defendants have no right, title, or interest therein. These findings are sufficient to support the judgment and it was not necessary to find specifically with respect to these allegations of the answer. Meyer v. O'Rourke, 150 Cal. 177, 178, 88 P. 706.

[5] Defendants say that plaintiffs "loaned defendants $10,328.91 in sums at various times over a period from 1946 to 1949. * * * Yet plaintiffs obtained two improved income-producing parcels of land and a judgment for the amount of the loan as well. This was a usurious transaction." The premise is erroneous. There was evidence that plaintiffs loaned defendants at least $26,460.68. There was no evidence from which it could be concluded that the loans were usurious.

[6, 7] The complaint did not plead the promissory notes in *haec verba*. It alleged the making of each note, the interest rate, the default in payment, and the amount unpaid. It prayed for judgment against the defendants, for attorney's fees as provided in the note. The notes were introduced in evidence without objection. Each note provided, "If action be instituted on this note I promise to pay such sum as the Court may fix as attorney's fees." The findings do not make any reference to attorney's fees. The conclusions of law say that defendant Tomasa M. Fernandez "should pay to plaintiffs * * * the sum of one thousand dollars ($1,000.00) as and for attorney fees as provided for in the promissory notes." As we have said, the judgment decreed that plaintiffs recover $1000 "as and for Attorney's fees, as provided for in the Promissory Notes" against defendant Tomasa M. Fernandez. Defendants assert that the judgment for attorney's fees is unwarranted because, we assume, plaintiffs did not plead, and the court did not find, that $1000, or some other sum, was a reasonable sum to be allowed as attorney's fees. No judgment, and this includes no part of a judgment, may be set aside for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the reviewing court is of the opinion that the error complained of resulted in a miscarriage of justice. Const. art. VI, § 4½. We are of the opinion that a miscarriage of justice did not result. The notes provided for attorney's fees. Tomasa

M. Fernandez signed the notes and knew that fact. She knew that plaintiffs were asking for attorney's fees. The court in its memorandum opinion filed before the findings and judgment were prepared stated that an award of $1000 attorney's fees would be made as provided in the notes. No objection to the findings or judgment was made. It is obvious that if a finding had been made on the subject it would have been adverse to defendant Tomasa Fernandez. No motion for a new trial was made. It made no difference in the actual result that plaintiffs did not allege that the sum of $1000, or some other sum, was a reasonable sum to be allowed as attorney's fees. Defendant Tomasa M. Fernandez, by her silence, signified her assent to the rendition of the judgment as prayed for and her willingness, if the court found for plaintiffs, that the court determine a reasonable amount which she had agreed to pay. Cf. Richee v. Gillette Realty Co., 97 Cal.App. 365–366, 275 P. 477.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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108 Cal.App.2d 242

FREDERICKS v. FREDERICKS et al.

Civ. 7974.

Sac. 6161.

District Court of Appeal, Third District, California.

Dec. 17, 1951.

Barbara C. Stevenson Fredericks sued Harry L. Fredericks and others to enjoin defendants from causing the flow and seepage of water from their land onto the land of plaintiff. The Superior Court, Yolo County, C. C. McDonald, J., rendered a judgment in favor of plaintiff, and defendants appealed. The District Court of Appeal, Adams, P. J., held that the findings supported the decree.

Affirmed.

1. Waters and Water Courses 🔑262

Mere grant of right-of-way for canal to adjoining landowner did not give adjoining landowner or his successors the right to flood their lands to extent that seepage therefrom would cause irreparable injury to lands of grantor of easement or his successors.

2. Waters and Water Courses 🔑263

In adjoining landowner's suit to enjoin defendants from flooding their lands to extent that seepage therefrom would cause irreparable injury to adjoining lands of plaintiff, where allegation in complaint to effect that defendants would, unless restrained, continue to divert water from a canal and other sources onto defendants' lands and cause it to flow and seep onto plaintiff's lands to her great and irreparable injury and damage was not denied in defendants' answer and was found by trial court to be true, such finding was sufficient to support decree enjoining defendants from diverting water to their land either through canal or elsewhere at rate greater than specified in decree.

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Percy Napton, Arthur C. Huston, Jr., Woodland, for appellants.

E. L. Means, Woodland, for respondent.

ADAMS, Presiding Justice.

This is an appeal on the judgment roll alone, from a judgment in favor of plaintiff in an action to enjoin defendants from causing the flow and seepage of water from their land onto the land of plaintiff.

The findings of the trial court show that prior to June 2, 1936, the lands of both plaintiff and defendants were owned by one George S. Fredericks and his brother, defendant Harry L. Fredericks, as tenants in common. The land was partitioned, George retaining title to the portion subsequently acquired by plaintiff, and Harry taking the portion now held by defendants. George, at the time of the partition, granted to Harry a "right of way for an irrigating ditch" across George's land. In 1949 plaintiff had growing on her land 20 acres of almond trees approximately nine years old, and 20 acres of zinfandel grape vines. Defendants in that year planted their land to rice and, in order to irrigate same, diverted through the canal across plaintiff's land large quantities of water which were then held on said land by means of levees so that it stood several inches above the natural level of plaintiff's lands. A large portion of said waters seeped onto plaintiff's land and raised the water level thereunder to such an extent as to injure plaintiff's almond trees and grape vines, a continuance of which condition would cause said trees and vines to die, and would cause plaintiff irreparable damage. Crops of rice had previously been grown on defendants' land in 1919 and 1929, but for the most part said land had been dry farmed for the past 30 years. At the time of the granting of the right-of-way to defendants there was no understanding that the ditch was to be used for irrigation of rice crops, or that the soil of plaintiff's land was of such a loose texture that water stored on defendants' land would seep onto plaintiff's land. Defendants, without injury to plaintiff's land, can irrigate their land for all normal agricultural purposes except rice culture, if they do not use a flow of more than 4 cubic feet per second, for more than three days in any thirty day period. The seepage which caused damage to plaintiff's land was not from the canal but directly from defendants' rice field.

The trial court further found that defendants would, unless restrained, continue to flood their rice land to an extent that would cause damage to plaintiff's land; and it entered judgment enjoining defendants from diverting water to their land either through the canal "or elsewhere * * * at a rate greater than four (4) cubic feet per second and such rate of flow may only be continued for three (3) days in any thirty day period, and the said defendants will be permanently enjoined from applying water for irrigation, regulation, storage or other purposes to any area of said tract in excess of six (6) acre inches depth for more than three (3) days in any thirty (30) day period; an acre inch being defined as the quantity of water which would cover one acre one inch in depth, and equals 27,150 gallons."

[1] Appellants contend that the general rule that an injunction will lie to prevent injury to adjoining land by the escape of water brought onto their own land for irrigation purposes is not applicable here because of the easement for the irrigation canal. However, the mere grant of the right-of-way for the canal cannot be said to have granted to defendants a right to flood their lands to the extent that seepage therefrom will cause irreparable injury to the lands of the grantor of the easement. Here the court found that the seepage which caused the damage to plaintiff's land was not seepage from the canal itself, but seepage from defendants' land; that water diverted through the canal stood on defendants' land in such quantity as to seep therefrom onto plaintiff's land, to its great injury.

In Kall v. Carruthers, 59 Cal.App. 555, 211 P. 43, this court held that a property owner who by artificial means brings water upon his lands for purposes of irrigation and allows a portion of such water to escape by percolation or otherwise so as to injure the land of the adjoining owner is liable to the latter in damages for the injury caused; and an injunction will lie to prevent the continuation of such injury.

In Nelson v. Robinson, 47 Cal.App.2d 520 at page 526, 118 P.2d 350, 354, hearing by the Supreme Court denied, while the seepage which caused the injury was from the irrigation canal, the court said: "* * * The courts of this state have repeatedly held that one who permits water to percolate from his artificial canal to the property of his adjoining neighbor commits an invasion of the latter's rights for which redress is obtainable in damages, by injunction or through the abatement of a nuisance. Parker v. Larsen, 86 Cal. 236, 24 P. 989, 21 Am.St.Rep. 30; Stoops v. Pistachio, 70 Cal.App. 772, 234 P. 423; Kall v. Carruthers, 59 Cal.App. 555, 211 P. 43; Massetti v. Madera Canal & Irr. Co., 20 Cal.App.2d 708, 68 P.2d 260."

[2] Appellants finally assert that the judgment is not supported by the findings

because of the language of the injunction in using the words "or elsewhere," stating that the complaint did not charge defendants with use of water other than that diverted through the canal. But the complaint alleged "That defendants threaten to, and will, unless restrained by this Court, continue to divert said water from said main canal *and other sources,* on to said lands, and cause it to flow and seep on to the land of plaintiff, to her great irreparable injury and damage." (Italics added.) Said allegation was not denied in defendants' answer, and it was found by the court to be true.

The judgment is affirmed.

PEEK and VAN DYKE, JJ., concur.

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108 Cal.App.2d 161

TONEY v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 18478.

District Court of Appeal, Second District, Division 3, California.
Dec. 11, 1951.

Action by Roberta K. Toney against Security First National Bank of Los Angeles and another as co-administrators of the estate of Charles Stuart Taylor on a creditor's claim. From a judgment of the Superior Court of Los Angeles County, William B. McKesson, J., dismissing the action, the plaintiff appealed. The District Court of Appeal, Second Appellate District, Division three, Vallée, J., held that the complaint was sufficient although the creditor's claim was based on express promise to pay during decedent's lifetime and complaint alleged cause of action based on implied agreement arising from breach of agreement to compensate for services by will.

Reversed with directions.

1. Executors and Administrators 🔑449

Complaint which alleged that creditor's claim for medical, nursing and housekeeping care and for money due under agreement to put the children of claimant through college was rejected, and that decedent had promised to make a will in claimant's favor in consideration of care but had failed to fulfill promise did not vary materially from claim in that claim was based on express agreement while complaint was based upon implied agreement, so as to fail to state cause of action.

2. Limitation of Actions 🔑28(1)

An action upon a contract, obligation, or liability not evidenced by an instrument in writing is barred two years after the cause of action accrues. Code Civ.Proc. § 339, subd. 1.

3. Frauds, Statute of 🔑138(4)

Where oral agreement to leave property by will is to compensate for services rendered or to be rendered, and hence is unenforceable under the statute of frauds, the remedy is in qauntum meruit for the value of the services rendered.

4. Executors and Administrators 🔑210

Where express oral agreement to compensate for services by will is not fulfilled, the law implies a promise to pay their reasonable value, and recovery is not on oral agreement but on agreement which law implies upon failure to perform the oral agreement.

5. Limitation of Actions 🔑46(5)

Where express oral agreement to compensate for services by will is not fulfilled, the agreement implied by law to pay their reasonable value does not arise until day of decedent's death so that cause of action accrues at that time and statute of limitations does not begin to run until then.

6. Limitation of Actions 🔑27

Cause of action set out in complaint which was filed some time prior to December, 5, 1950, and which alleged that decedent who died August 27, 1949, failed to fulfill oral agreement to compensate for services by will, was governed by two-year statute and was not barred by limitations. Code Civ.Proc. § 339, subd.1.

7. Executors and Administrators 🔑202(1)

Where it was alleged that services performed were for nursing and care of crippled minor son of decedent during son's illness, recovery on creditor's claim could not be denied on ground that an obligation to pay reasonable value of services rendered would not be implied by law because the services were not performed for direct benefit of decedent or for any person whom he owed a legal duty to support. Civ.Code, § 196.

8. Executors and Administrators 🔑210

Elements of cause of action on creditor's claim for services rendered in consideration of promise to compensate by will are: the services performed, an oral promise to compensate by will, the failure to perform the promise, the reasonable value of the services, and the failure to pay.

9. Pleading 🔑225(2)

Complaint which alleged that creditor's claim for medical, nursing and housekeeping care rendered under agreement to pay therefor prior to death was rejected, and alleging promise to compensate for such services by will, but that decedent died intestate, stated cause of action, and denial of leave to amend was abuse of discretion even if demurrer on the ground of uncertainty was well taken.

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Eugene V. McPherson, Los Angeles, for appellant.

Church, Church & Howard, Charles F. Howard, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered pursuant to an order sustaining defendants' demurrer to plaintiff's third amended complaint (called the complaint) without leave to amend. The action is on a creditor's claim.

The complaint alleges that plaintiff duly presented a claim for $13,400 to defendants, as administrators of the estate of Charles Taylor, which was rejected. The claim, in pertinent part, reads:

"Medical, nursing and housekeeping care provided for Charles Stuart Taylor during years 1940, 1941 and 1942 under agreement by said Charles Stuart Taylor to pay for saic care prior to death $5,400.00

"Agreement by Charles Stuart Taylor to put children of Roberta K. Toney and John Toney through college when they were ready to go; said agreement made during the years 1941 and 1942 ....$8,000.00"

The complaint also alleged that: about May 1, 1940, while plaintiff was gainfully employed, decedent Taylor promised her that if she would take care of the crippled minor son of decedent and render to him (the son) the nursing care required during his then illness, and continue such nursing and care until such time as the son recovered, he (Taylor) would make a will leaving plaintiff a sufficient sum to compensate her for her work and labor, and that decedent also promised plaintiff he would make a will leaving to plaintiff, for the education of her two minor children, sufficient sums to educate them through college; plaintiff quit her employment and rendered the services as required during 1940–1941 and parts of 1942 until the son no longer required nursing and care; about July 15, 1942, decedent told plaintiff he had made a will, under the terms of which she would receive $13,400 for the services; the reasonable value of the services is $13,400.

It was also alleged that: about July 15, 1942, decedent falsely and fraudulently represented to plaintiff that he had prepared a will leaving her $13,400; decedent knew the representation was untrue; plaintiff relied on it; she had no method of knowing or discovering that it was false; she continued to rely on the representation; on the death of Taylor August 27, 1949, she discovered for the first time that he had not made a will but had died intestate.

Respondents first assert that the cause of action alleged varies materially from that set forth in the claim. They say that the claim is based on an express agreement and that the complaint is based upon an implied-in-law agreement. The claim and the cause of action alleged in the complaint are based on the assertion that decedent when he died was indebted to plaintiff in the sum of $13,400.

As said in Tabata v. Murane, 24 Cal.2d 221, 229, 148 P.2d 605, 610, "The claim and each of the three causes of action alleged in the complaint are based upon the assertion that decedent when he died was indebted to plaintiff in the sum of $21,115.62, and the claim reasonably apprised defendant of the fact that plaintiff claimed that the decedent, at the time of his death, held money in trust for, or was indebted to, plaintiff in the sum of $21,115.62. If defendant wished further details to enable him better to determine the justice or accuracy of the claim or what, if any, portion thereof was barred by the statute of limitations, it was for him to demand a more complete statement and proof. The statute contemplates such procedure. (See Prob. Code, § 705; Syler v. Katzer (1938), 12 Cal.2d 348, 350, 84 P.2d 137, 119 A.L.R. 422; Reeves v. Vallow (1940), 16 Cal.2d 95, 98, 104 P.2d 1017.) In Davis v. Mitchell (1930), 108 Cal.App. 43, 50, 290 P. 887, it was held that there was 'no sufficient variance between the cause of action alleging a book account, and the claim based upon the reasonable value of the services rendered, to defeat' the action of plaintiff there. And as stated by the court in Lundberg v. Katz (1941), 44 Cal.App.2d 38, 42, 111 P.2d 917, 918, in upholding a recovery upon quantum meruit although the claim asked compensation in an assertedly agreed sum, 'if the cause of action is substantially based upon the claim, and the estate has not been placed in a position of disadvantage as by lack of opportunity without additional expense, to pay or compromise the claim, the action may be maintained. The strict rule * * that a claimant may recover only when the cause of action specifically follows the claim, has been modified.' (See, also, Warder v. Hutchison (1924), 69 Cal.App. 291, 231 P. 563; Colwell v. Gardner (1932), 126 Cal.App. 403, 405, 14 P.2d 825; Gardiner v. Burket (1935), 3 Cal.App.2d 666, 668, 40 P.2d 279.)" See, also, Reeves v. Vallow, 16 Cal.2d 95, 104 P.2d 1017, and particularly the concurring opinion of Mr. Justice Edmonds in which the claim and the complaint are stated, and Leoni v. Delaney, 83 Cal.App.2d 303, 309, 188 P.2d 765, 189 P.2d 517.

[1] Etchas v. Orena, 127 Cal. 588, 60 P. 45, which held that inasmuch as the claim made no reference to the decedent's promise to make payments for the services in her will, the plaintiff could not rely on such promise, and like cases were expressly overruled in the Tabata case. We are of the opinion that the cause of action alleged in the complaint is not so widely divergent from the claim that it can be said the complaint does not state a cause of action for that reason.

[2–6] The cause of action alleged is not barred by the statute of limitations as asserted by respondents. An action upon a contract, obligation, or liability, not evidenced by an instrument in writing, is barred two years after the cause of action accrues. Code Civ.Proc. § 339, subd. 1. Where an oral agreement to leave property by will is in compensation for services rendered, or to be rendered, and hence unenforcible under the statute of frauds, the remedy is in *quantum meruit* for the value of the services rendered. See cases cited 23 West's Cal.Dig., Frauds, Statute of, 628, 🔑138(4). When an express oral agreement to compensate for services by will is not fulfilled, the law implies a promise to pay their reasonable value. Manford v. Coats, 6 Cal.App.2d 743, 748, 45 P.2d 395. The recovery is not on the oral agreement but on the agreement which the law implies upon the failure to perform the oral agreement. The agreement implied by law does not arise until the day of death of decedent. The cause of action accrues at that time and the statute of limitations does not begin to run until that time. Warder v. Hutchison, 69 Cal.App. 291, 296, 231 P. 563. Taylor died on August 27, 1949. As the third amended complaint (the original complaint is not in the record) was filed December 5, 1950, the original complaint was filed within the statutory period.

De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522, and Murdock v. Swanson, 85 Cal.App.2d 380, 193 P.2d 81, cited by respondents, are not in point. De Mattos was a suit in equity for specific performance. The court expressly stated that the remedy for breach of an oral agreement to make a will is one in *quantum meruit* for the value of the services rendered. In Murdock v. Swanson the court held that the causes of action attempted to be alleged were equitable and not for the reasonable value of services rendered.

[7] It is argued that an obligation to pay the reasonable value of services rendered will not be implied by law because the services alleged to have been rendered were not performed for the direct benefit of decedent or for any person whom he owed a legal duty to support. The allegations are that the services performed were nursing and care of the crippled minor son of decedent during his (the son's) illness. Decedent owed a legal duty to support his minor son. Civ.Code, § 196; 20 Cal.Jur. 415, § 14.

"On appeal from a judgment sustaining a demurrer to a complaint the allegations of the complaint must be regarded as true. The court must, in every stage of an action, disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ.Proc., Sec. 475. 'Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears.' Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867, 872. All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. Tristam v. Marques, 117 Cal.App. 393, 397, 3 P.2d 947. 'In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged.' Matteson v. Wagoner, 147 Cal. 739, 742, 82 P. 436, 438. In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties. Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305; Gerritt v. Fullerton U. H. School Dist., 24 Cal.App.2d 482, 486, 75 P.2d 627. 'While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms.' Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305, 308." Hardy v. San Fernando Valley C. of C., 99 Cal.App.2d 572, 577–581, 222 P.2d 314, 317.

[8, 9] In an action of this character to recover for services rendered, the vital elements of the cause of action are: the services performed, an oral promise to compensate by will, the failure to perform the promise, the reasonable value of the services, and failure to pay. Leoni v. Delaney, 83 Cal.App.2d 303, 309, 188 P.2d 765, 189 P.2d 517. While the complaint is inartificially drawn and is far from a model pleading, it contains these vital elements and under the rules set forth states facts sufficient to constitute a cause of action.

Denial of leave to amend was an abuse of discretion even if the demurrer on the ground of uncertainty was well taken. Hancock Oil Co. v. Hopkins, 24 Cal.2d 497, 510, 150 P.2d 463. While the complaint contains surplusage, it is not uncertain in the respect set forth in the demurrer—whether plaintiff relies on a specific contract for a stipulated compensation or an implied contract for the reasonable value of services rendered. Obviously she relies on the latter.

The judgment is reversed with directions to overrule the demurrer and permit defendants to answer.

SHINN, P. J., and WOOD, J., concur.

108 Cal.App.2d 245

PEOPLE v. GARDNER.

Cr. 2302.

District Court of Appeal, Third District, California.

Dec. 17, 1951.

Don Gardner and another were convicted in the Superior Court, Sonoma County, Donald Geary, J., of burglary in the first degree, and the named defendant appealed. The District Court of Appeal, Peek, J., held, inter alia, that the Trial Court properly admitted the confession of the co-defendant into evidence.

Judgment affirmed.

1. Criminal Law ⚷1159(2, 4)

Questions as to weight of evidence and credibility of witnesses are matters primarily within province of triers of facts, and their conclusions in that regard, when predicated upon substantial evidence, will not be disturbed by reviewing court.

2. Burglary ⚷41(1)

Conviction of burglary in first degree was sustained by evidence. Pen.Code, § 459.

3. Criminal Law ⚷531(3)

In burglary prosecution, evidence established that confession of co-defendant was free and voluntary. Pen.Code, § 459.

4. Criminal Law ⚷528

In burglary prosecution, free and voluntary confession of co-defendant was properly admitted in evidence solely against co-defendant. Pen.Code, § 459.

5. Criminal Law ⚷528

It is not necessarily true that a confession of one co-defendant is never admissible against the other defendant in a criminal prosecution.

6. Criminal Law ⚷781(2)

In burglary prosecution, evidence substantiated trial court's instruction that both defendants had made statements tending to prove their guilt of the alleged crime. Pen.Code, § 459.

7. Criminal Law ⚷781(4)

In burglary prosecution, trial court properly instructed jury that rule defining confessions applied to confession of one defendant, made outside presence of other defendant, and was not to be considered by jury as against such co-defendant unless other evidence in case convinced jury of his guilt. Pen.Code, § 459.

8. Criminal Law ⚷829(1)

Where, from examination of entire charge in burglary prosecution, it appeared that trial court fully and fairly instructed jury on all issues in case, defendant could not complain on appeal from conviction of failure of court to give specific instruction proposed by him. Pen.Code, § 459.

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L. G. Hitchcock, Santa Rosa, for appellant.

Doris H. Maier, Deputy Atty. Gen., Wallace Colthurst, Deputy Atty. Gen. for respondent.

PEEK, Justice.

Appellant and one Burke were charged jointly with violation of Section 459 of the Penal Code. Following their pleas of not guilty the matter proceeded to trial before a jury which returned a verdict finding defendants guilty of burglary in the first degree. Gardner's application for probation was denied and he was thereupon sentenced for the term prescribed by law. He alone now appeals, contending (1) that the judgment is not supported by the evidence, (2) that the court erred in admitting in evidence the confession of his co-defendant Burke in that it was not free and voluntary, and (3) that the trial court committed prejudicial error in its instructions as to the evidentiary effect of Burke's confession. None of said contentions appear to be well founded.

The evidence, viewed as we must in the light most favorable to respondent, shows that some time between the hours of 8 o'clock p. m. and 4:30 o'clock a. m. on the night of January 27, 1951, a room occupied by one Carminati in the city of Santa Rosa was entered feloniously and various articles of personal wearing apparel as well as two pocket lighters and $50.00 in cash were taken therefrom. Two days after the alleged burglary some of the stolen articles were observed in the possession of Gardner in his room in a San Francisco hotel. Appellant had been on friendly terms with Carminati for approximately two years and was acquainted with the premises occupied by him in Santa Rosa. On February 28, Gardner was apprehended at his place of employment in San Francisco and taken to the county jail for questioning, and on the following day was released at the request of Sonoma county officers. Following his release he checked out of the San Francisco hotel where he had been staying immediately following his first questioning by the police and was not apprehended until approximately one month later when he was identified in a routine police "show up" following his arrest on a charge of vagrancy. At that time he was using an assumed name. He was then wearing a pair of shoes which were identified by Carminati as similar to those stolen from his room. Gardner admitted to one Wilson, a witness for the prosecution (who was then being held in the Sonoma county jail on a different charge) that he and Burke, his co-defendant, had driven to Santa Rosa on the evening of the alleged crime and that they had gone to Carminati's residence at approximately midnight and taken the clothing. Appellant also stated to officer Reeves of the Sonoma county sheriff's office that he had participated in the burglary; that if his bail could be reduced thereby enabling him to be released he could recover some of the stolen articles; that Carminati would be paid for what he could not recover, and that he would make a statement concerning the burglary to Reeves. The officer further testified that he obtained a reduction of Gardner's bail but that appellant, after talking to his father, informed Reeves he would make no statement, that he wanted to plead not guilty and talk to an attorney. At the time of the trial appellant, testifying in his own behalf, sought to establish an alibi that at the time of the theft he was at his father-in-law's home in Oakland. Although his father-in-law corroborated his testimony in this regard the testimony of his sister-in-law and his mother-in-law was directly to the contrary and to the effect that he was not at their home that weekend.

Appellant's first contention attacks the sufficiency of the evidence upon the ground that the only testimony linking him with the burglary which, because of the reasons stated was no evidence, was (1) that given by the witness Wilson, a felon, whose testimony at the preliminary hearing was contradicted by his testimony at the trial, and (2) that given by Reeves, the police officer whose conduct indicated bias and prejudice. Thus he argues the only evidence remaining was his unexplained possession of the stolen property and therefore insufficient to sustain the conviction.

It is true that the witness Wilson was then being held in the Sonoma county jail awaiting action on his application for probation and a psychiatric report; that at the preliminary hearing he stated that when he saw Gardner and Burke in the latter's hotel room in San Francisco neither offered an explanation as to how the clothes had come into their possession but at the trial he testified that both Burke and Gardner related to him the details of the burglary. It is also true that it was officer Reeves who obtained the confession from Burke and who informed Gardner that he would assist in getting Gardner's bail reduced, which he did, and that when, as he testified, Gardner refused to "cooperate" in helping to recover some of the stolen articles or make a statement as Reeves stated he had agreed to, Reeves had the bail restored to the original amount.

[1] However, it is also true that questions as to the weight of the evidence and credibility of the witnesses are matters primarily within the province of the triers of the facts, and their conclusions in that regard, when predicated upon substantial evidence, will not be disturbed by a reviewing court. People v. Parry, Cal.App., 232 P.2d 899.

[2] It necessarily follows that since it is apparent that the jury chose to accept the testimony of Wilson and Reeves and chose to reject the alibi offered by appellant, and since we have concluded that the evidence so relied upon was sufficient to

support the verdict of the jury, such verdict is conclusive upon appeal.

[3, 4] The appellant next attacks the confession of his co-defendant Burke on the ground that it was not free and voluntary, hence was improperly admitted. The record shows that officer Reeves and Burke were extensively questioned concerning the confession. The testimony they gave was conflicting, Reeves testifying that upon his first conversation with Burke at the San Francisco county jail he informed Burke of his constitutional rights, that Burke then dictated the statement to Reeves who wrote it down and at the conclusion read it aloud to Burke who, before signing each page thereof, also read it. Burke, however, testified that Reeves did not advise him of his rights, that Reeves dictated the statement and that when he (Burke) attempted to read the same before signing, Reeves shielded the paper from him.

Following their examination the confession was admitted in evidence over appellant's objection that it was hearsay as to him and Burke's objection that it was not free and voluntary. Under the facts and circumstances as shown this court cannot say that the trial court erred in the admission in evidence of the confession. People v. Mehaffey, 32 Cal.2d 535, 197 P.2d 12. Nor do we find any error in the order of the court in overruling Burke's objection and sustaining appellant's objection when it stated: "Overruled as regards the defendant Burke. And the Court holds it is a voluntary statement under the facts established here and as such is admissible at this time solely against the defendant Burke, it being hearsay testimony as regards the defendant Gardner and is not to be considered by the jury in any respect as regards the defendant Gardner. You understand that, do you, members of the jury? If the rule should change by reason of operation of law hereafter, the Court will so advise you of the change as regards application to the defendant Gardner, but you are not to consider it until advised by the Court against the defendant Gardner in any respect whatsoever."

Appellant's final contention is directed at the instructions of the trial court relative to the evidentiary effect to be given by the jury to said confession. In the two instructions so attacked the jury was told:

"Evidence has been received in this case tending to show that on an occasion other than this trial the defendants themselves made statements tending to prove their guilt of the alleged crime for which they are on trial.

"A confession is a statement made by one who is a defendant in a criminal trial, at a time when he was not testifying in that trial, by which he or they acknowledged certain conduct of his or their own in which he or they expressly admit every essential element constituting the crime for which he is on trial; a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary. And the same rule obtains, ladies and gentlemen, as regards the confession of defendant Burke in this case that is made outside of the presence of the co-defendant and is not to be considered by you as against the co-defendant unless other evidence in the case convinces you of the guilt of the other defendant."

Appellant's argument is that it is the rule in this state that "under no circumstances" are such extrajudicial statements "admissible or available against an accused."

It appears that his attack is particularly directed against that portion of the order admitting the confession wherein the court instructed the jury that said confession "is not to be considered by you as against the co-defendant unless other evidence in the case convinces you of the guilt of the other defendant." It further appears that his attack is likewise directed against that portion of the quoted instruction wherein the court stated: "And the same rule obtains, ladies and gentlemen, as regards the confession of defendant Burke in this case that is made outside of the presence of the co-defendant and is not to be considered by you as against the co-defendant unless other evidence in the case convinces you of the guilt of the other defendant."

[5-7] We cannot agree with appellant that a confession of one co-defendant is never admissible against the other defend-

ant. By way of illustration Gardner might well have personally read the confession or heard it read and by his conduct have acquiesced in or approved of the statements therein contained making it admissible against him. Should such occasion have arisen an instruction to that effect would have been proper. Furthermore the record substantiates the court's instruction that both defendants had made statements tending "to prove their guilt of the alleged crime." Both Wilson and Reeves so testified. While it may be said that the last sentence of the attacked instruction is not as clear as it might have been and that an instruction proposed by defendant might have stated the rule more succinctly, nevertheless we cannot say after an examination of the entire charge that the trial court committed prejudicial error in so instructing the jury. People v. Sanchez, 30 Cal.2d 560, 184 P.2d 673.

[8] From an examination of the entire charge it appears that the trial court fully and fairly instructed the jury on all issues in the case. Under such circumstances appellant cannot complain of the failure of the court to give the specific instruction proposed by him.

The judgment is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

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108 Cal.App.2d 207

SASS et al. v. HANK et al.

Civ. 18565.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1951.

Rehearing Denied Jan. 2, 1952.

Hearing Denied Feb. 7, 1952.

Bill Sass and Maxwell Dorne, doing business as Sass-Dorne Studio, brought action against Wilbur John Hank and Virginia Dixon Hank, individually, and as co-partners doing business as the California Greeting Card Company, a co-partnership, also known as the California Card Co., to recover minimum royalties under contract whereby plaintiffs agreed to loan to defendants certain negatives to be used to manufacture greeting cards. The Superior Court of Los Angeles County, William R. McKay, J., entered a judgment adverse to plaintiffs and an order denying motion for new trial, and the plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that contract was not ambiguous and that resort could not be had to parol proof to show intention of the parties, and that under the contract defendants were liable for guaranteed minimum royalties.

Judgment modified and, as modified, affirmed.

1. Evidence 🔑448

When an agreement has been reduced to writing, the parties have the right to rely strictly on the written word.

2. Evidence 🔑448

Before evidence of meaning of written contract can be received, it must first be determined by the trial court to be so ambiguous or uncertain that its meaning cannot be divined from its own language.

3. Contracts 🔑147(2)

The intention of the maker of a contract must be ascertained from the writing alone. Civ.Code, § 1639.

4. Evidence 🔑461(1)

Contract whereby plaintiffs agreed to loan defendants negatives to be used to manufacture greeting cards, and providing that defendants guaranteed minimum production and sale of 15,000 cards on each subject accepted, and that, in event of cancellation or failure to produce cards, royalties on all subjects should become due and payable immediately, and that, in event of no sale or production of cards, defendants agreed to pay royalty on all subjects accepted on minimum volume agreement, and that royalty should be 10 per cent of retail selling price of greeting cards, and that, in event of no sale or production of cards, minimum retail price should be figured at 15 cents, and that royalty to be paid should be 10 per cent of the gross billing for greeting cards, was not ambiguous, and defendants could not resort to parol proof to show intention of parties.

5. Evidence 🔑448

The rule allowing testimony to explain ambiguity in written contract does not authorize a rewriting of the contract.

6. Evidence 🔑448

Rule allowing testimony to explain ambiguity in written contract is resorted to only in those circumstances where ambiguity may be dispelled, not by showing that parties meant something other than what they said, but by showing what they meant by what they said.

7. Evidence 🔑448

As a material provision cannot be added to a written contract on parol proof received for sole purpose of explaining an ambiguity, so an important covenant cannot be stricken from written contract solely on the ipse dixit of a party thereto.

8. Evidence 🔑397(1)

Parol testimony is not admissible to defeat covenant in written contract for payment of royalties on a patented device or a copyrighted document.

9. Evidence 🔑461(1)

When language of a writing is fairly susceptible to either one of two constructions, extrinsic evidence may be received to enable court to ascertain true intent of the parties, but not to vary or modify the terms thereof, or to show that the parties meant something other than what was said.

10. Contracts 🔑150

In construing a written instrument, function of judge is to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.

11. Contracts 🔑143

Where there are several provisions or particulars in a written contract, such a construction is, if possible, to be adopted as will give effect to all. Code Civ.Proc. § 1858.

12. Contracts 🔑152

The language of a contract must control its interpretation when its diction is clear, reasonable and explicit and is in harmony with the general purpose of the agreement. Civ.Code, §§ 1638, 1641.

13. Contracts 🔑152

A court should interpret a contract according to its language and should not make a new contract or rewrite or alter by construction what has been agreed on by the contracting parties.

14. Literary Property 🔑7

Where contract whereby plaintiffs agreed to loan to defendants negatives to be used for purpose of manufacturing greeting cards provided for an automatic two-year renewal unless the parties gave 60 days' written notice of cancellation, but parties later orally agreed to terminate the contract after expiration of original period of two years, plaintiffs could not recover any royalties from defendants after expiration of original two-year period.

15. Contracts 🔑254

Mutual rescission or abrogation of a written contract may be effected by an oral agreement whether executed or not, and statute providing that a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise, has no application. Civ.Code, § 1698.

16. Contracts 🔑255

An oral agreement to rescind or abrogate a written contract must be supported by sufficient consideration.

17. Contracts 🔑255

Sufficient consideration to support an oral agreement to rescind or abrogate a written contract was present where there was a mutual cancellation by the parties of executory contractual rights.

18. Literary Property 🔑7

Contract whereby plaintiffs agreed to loan to defendants negatives to be used for purpose of manufacturing greeting cards, and providing that defendants guaranteed a minimum production and sale of 15,000 cards on each subject accepted from plaintiffs, and that, in event of cancellation of contract or failure to produce cards, royalties due on all subjects should become due and payable immediately, and that, in event of no sale or production of cards, defendants agreed to pay plaintiffs royalty on all subjects accepted on minimum volume agreement, and that royalty should be 10 per cent of retail selling price for greeting cards, and that, in event of no sale or production, maximum retail price of cards should be figured at 15 cents, was not obliterated by amended provision that royalty paid should be 10 per cent of "the gross billing" for greeting cards, and defendants were therefore indebted to plaintiffs for total amount of guaranteed minimum royalties.

◆

Marvin M. Chesebro, Abe Richman, Los Angeles, for appellants.

John A. White, Malcolm E. Stewart, Los Angeles, for respondents.

MOORE, Presiding Justice.

On November 20, 1945, plaintiffs prepared and executed a written contract whereby they agreed to loan to defendants 46 Kodachrome negatives to be used for the purpose of manufacturing a type of greeting card called "Claytoons." Omitting immaterial passages, the contract is as follows:

"1. This contract shall be for the period of two years from the date of this letter. Both parties agree to give 60 days written notice from expiration date for cancellation. In the event of no written notice, the contract shall become renewed automatically for an additional two years.

* * *

"6. The California Greeting Card Company guarantees a minimum production and sale of 15,000 cards on each subject accepted from Sass-Dorne Studio.

"7. In event of cancellation of contract or any failure to produce cards by The California Greeting Card Company, the royalties due Sass-Dorne Studio on all subjects shall become due and payable immediately.

"8. In the event of no sale or production of the cards, California Greeting Card Company agrees to pay Sass-Dorne Studio a royalty on all subjects accepted on the minimum volume agreement (15000 cards).

"9. The royalty to be paid Sass-Dorne Studio by The California Greeting Card Company shall be 10% of *the retail selling price* of the greeting cards. This royalty is due and payable 30 days from date of shipment. * * *

"11. In the event of no sale or production of cards the minimum retail price of the cards shall be figured at 15 cts."

On April 19, 1946, paragraph 9 of this contract was amended to read as follows:

"9. The royalty to be paid Sass-Dorne Studio by the California Greeting Card Company shall be 10% of *the gross billing for* the greeting cards. This royalty is due and payable 30 days from date of shipment." (Emphasis added.)

Forty-six of such negatives were delivered to defendants on the date of the writing. Five months later the contract was amended by substituting four words, to wit, "the gross billing for" in lieu of "the retail selling price" in paragraph 9. Otherwise there was no change.

In January, 1950, plaintiffs sued on the contract in three counts, (1) for 10 per cent of the gross billing of the guaranteed minimum production of 15,000 greeting cards manufactured from each of the 46 plates and sold during the period ending November 19, 1947, in the sum of $10,300; (2) for the same amount as 10 per cent of the gross billing of the guaranteed minimum production of 15,000 cards manufactured from each plate in the next two years, alleging that the contract was renewed automatically by reason of the failure of defendants to give written notice of its cancellation 60 days prior to November 20, 1947; (3) for possession of plates, color separations and original art work pertaining to 46 illustrated subjects of the value of $2,300. This last count was dismissed upon the return of the materials claimed by plaintiffs.

The court found that defendants did not guarantee a minimum production and sale of 15,000 cards on each Kodachrome subject accepted from plaintiffs; that defendants did not agree that in the event of no production or sale of cards the minimum retail price of each card would be 15 cents; that the amount to be paid for the sale of greeting cards manufactured by the use of the Kodachromes was 10 per cent of defendants' gross sales price; that defendants had accounted for and paid plaintiffs for all sales during the period expiring November 19, 1947, except the sum of $346.95 which was tendered in court; that no notice in writing terminating the contract was given but that in September, 1947, the parties made an "oral agreement which was then fully performed and executed by the parties whereby each party waived, relinquished and gave up the right to require written notice from the other party cancelling said contract, and said parties did at said time agree that said contract and the amendment thereto would be rescinded, cancelled and abandoned, and that it would not be in existence after November 19, 1947"; that the contract was not renewed. Upon such findings plaintiffs recovered only the sum of $346.95.

Is the Contract Ambiguous?

The trial court determined that the contract is ambiguous and admitted testimony as to the intention of the parties from which the findings were derived that defendants did not "guarantee a minimum production and sale of 15000 cards on each subject" accepted from plaintiffs.[1] Also, from such testimony, finding was made (1) that defendants did not agree to pay plaintiffs "a royalty on all subjects accepted on the minimum volume agreement (15000 cards)"[2] and (2) that it is not true "in the event of no sale or production of cards the minimum retail price of the cards shall be figured at 15 cents."[3] Respondents contend that the change made in paragraph 9 obliterates the original contract in toto, citing De la Beckwith v. Sheldon, 165 Cal. 319, 131 P. 1049; Restatement of Contracts, section 408; Simmons v. Sweeney, 13 Cal. App. 283, 109 P. 265; Code Civil Procedure, section 1864.

With such contention we cannot agree. There is no contradiction between paragraph 9 as amended and the contents of the other portions of the contract. Paragraph 6 is defendants' guaranty that it will in two years' time produce and sell 15,000 cards on each subject or form leased to them. Such a guaranty is customary and reasonable in contracts licensing the use of a patented device or any object of which the licensor has a monopoly. If the licensee were allowed to use the forms of plaintiffs without holding them to a minimum of production the value of such forms would soon vanish without their owners having profited by permitting others to use them. The amendment did not cancel paragraph 7. The latter obligated defendants to pay immediately the royalties on all subjects in the event defendants should "fail to produce cards." Paragraph 8 obligates defendants to pay plaintiffs a royalty on "all subjects accepted on the minimum volume agreement (15000 cards)." Finally, paragraph 11 obligates defendants to pay "the minimum retail price" (15 cents each) in the event of no production or sale of the cards by defendants. Not one of the four quoted paragraphs (6, 7, 8 and 11) is contradicted by the terms of paragraph 9 as amended.

[1-4] Parties have a right to require their contracts to be in writing. When an agreement has been thus reduced the contractor has the right to rely strictly upon the written word. Before evidence of its meaning can be received it must first be determined by the court to be so ambiguous or uncertain that its meaning cannot be divined from its own language. The intention must "be ascertained from the writing alone, if possible." Civil Code, sec. 1639. Indeed, there was no occasion in this action for resort to parol proof of the intention. Respondent Wilbur Hanks who negotiated for defendants did not testify that the "guaranteed minimum royalty" was ever mentioned in any conversation had prior to the execution of the amendment. His testimony was that he read amended paragraph 9 on receiving it and that it accurately set forth the amendment intended.

We have searched in vain for evidence *aliunde* the contract that would justify the elimination of paragraphs 6, 8 and 11. They clearly do not contradict paragraph 9 as amended.

The latter should be construed as a part of and as modifying the entire contract

[1], [2], [3] Contain quotations from paragraphs 6, 8, 11 of the contract.

and not as a separate instrument. It contains nothing to indicate that the parties intended to abrogate the other provisons of the writing. It changed only the basis of computing royalties on cards actually sold. Instead of paying "10% of the retail selling price of the greeting cards," defendants, by the amendment, were permitted to calculate their payments on their "gross billing for the greeting cards." Such language clearly indicates the amount of royalties earned on cards produced and sold. Provision had already been made for the minimum number that must be sold, to wit, "15-000 cards on each subject" and for the payment of royalties on the minimum in the event of no sale, or of a cancellation of the contract, in which case the minimum retail price should be 15 cents per card. By such provisions defendants had agreed to pay a minimum amount of royalties if no cards at all should be sold and to pay "10% of the retail selling price" within 30 days after shipment of cards that would be sold. Clearly that provision of paragraph 9 prior to modification contemplated that some sales would be made upon which royalties should be paid promptly. Evidently defendants wished a change in the contract that might effect a greater number of sales and plaintiffs desired current returns rather than wait till the end of two years to collect the guaranteed royalties. The question arises then, how did it happen that the parties agreed upon a modification of paragraph 9? It is best told in the language of respondent Wilbur Hank in testifying about his conversation with appellants in early April, 1946, as follows: "Mr. Dorne said he wasn't at all satisfied with the returns that they were getting on these greeting cards; that he thought we should print a lot more than we have done and up to that time we had only printed a few of the Sass-Dorne Claytoon ideas. I then explained to them, both Mr. Sass and Mr. Dorne, that the royalty was so high we couldn't afford to print those pictures on anything less than a twenty-five cent retail selling card and that we had to pick them generally to be sure that they were going to sell, the proper amount of those cards that were set up under the original contract that was signed, and that was one of the main reasons why we had not put too many of the Sass-Dorne numbers in the line up until that time. * * * Mr. Dorne asked me why I couldn't print fifteen cent cards and ten cent cards and five cent cards and Mr. Sass asked me why we couldn't print special baby cards such as birth announcements and birth congratulations and so forth. I said, 'Well, the reason why is because all of these cards are in the five and ten cent bracket and in order for us to put out a line of those cards we would have to put out a fifteen or ten cent card or they would not be bought.' They then suggested that if we would go ahead and reproduce some cards in cheaper brackets that they would go along and work with me; that we revamp this contract and make it easy for me to do and profitable and so I would benefit by it. * * * We sat down then and discussed the framing of this amendment. The question then came up as to how the cards would be priced. Mr. Dorne asked me why I didn't contact Sears-Roebuck, for example. He said he had a contact, he thought, back in Chicago where they would buy a lot of these cards but they would have to buy them more or less on a jobber basis setup; that is, that the jobber does not pay you what the retailer pays you. The price would fluctuate according to the amount of merchandise that they bought. I brought out the point then, supposing the jobber bought a lot that we ordinarily retail for fifteen cents. He would not pay what that retailer such as Robinson's or Bullock's would pay for that card because he would have to take a discount further down the line. That same card would sell to him for fifty per cent off, plus forty per cent and in many cases plus ten per cent from that so the price then on the wholesale price of a fifteen cent card, according to the quantity that they bought, would fluctuate anywhere from one and one-half cent to seven and a half cents per card. Well, that was discussed thoroughly and Mr. Sass said, 'Well, what we will do then is to arrange this amendment so that we will get a ten per cent royalty off of whatever you bill and we will call it gross billing.'" The "guaranteed minimum" was not mentioned in that conversation. There was no occasion for a mention of it. It was not due; defendants had produced cards; the contract had not been cancelled. Since there was no reason for plaintiffs to forego the guaranteed minimum; since it was not even mentioned in the conversation reported by Mr. Hank; since no advantage could have been gained by plaintiffs by erasing the covenant of defendants to pay a guaranteed royalty, on what basis can it be held that the substitution in paragraph 9 of "the gross billing for" in the place of "the retail selling price," cancelled any other provision of the contract? Indeed, it did not do so.

The only possible doubt or ambiguity appearing on the face of the writings is as to whether the guaranteed minimum royalty on 15,000 cards per subject should be computed by applying the percentage figure of 10% to the retail price of 15 cents referred to in paragraph 11 of the agreement, or to apply such figure to the retail price *as adjusted* to respondents' usual gross billing price. The only evidence to which we have been referred in the record would indicate that the parties intended the computation to be made on the basis of the 15 cent retail price as provided in the original contract since there is no testimony of any discussion had with regard to the guaranteed minimum royalty. The only discussions relative to amending the initial contract were concerned with methods of increasing appellants' overall *earned* royalties by reducing the earned royalty payable on each card sold but thereby at the same time giving respondents an incentive to produce a much greater volume of inexpensive cards.

[5–9] Even conceding the presence of this ambiguity, the rule allowing testimony to explain such ambiguity does not authorize a rewriting of the contract. That rule is resorted to only in those circumstances where the ambiguity may be dispelled "not by showing that the parties meant something other than what they said, but by showing what they meant by what they said." United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 84, 141 P. 917, 920. As a material provision cannot be added to a contract upon parol proof received for the sole purpose of explaining an ambiguity, El Zarape Tortilla Factory v. Plant Food Corp., 90 Cal.App.2d 336, 347, 203 P.2d 13, so an important covenant cannot be stricken from a written contract solely upon the *ipse dixit* of a party thereto. If a warranty cannot be added to a written contract by parol testimony, United Iron Works v. Outer Harbor Dock & Wharf Co., supra, 168 Cal. 85, 141 P. 917, such testimony is not admissible to defeat the most important provision of a contract, to wit, the covenant for the payment of royalties on a patented device or a copyrighted document. When the language of a writing is fairly susceptible to one of two constructions, extrinsic evidence may be received to enable the court to ascertain the true intent of the parties, but not to vary or modify the terms thereof, Barham v. Barham, 33 Cal.2d 416, 422, 202 P.2d 289, or to show that the parties meant something other than what was said. Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 23, 297 P. 20.

[10–13] The several portions of the contract are not fairly interpreted by construing each of them separately. The entire writing must be read as a unit, giving effect to every part, "each clause helping to interpret the other." Civil Code, sec. 1641. In construing a written instrument the function of the judge is to ascertain and declare "what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Code Civ.Proc., sec. 1858. The language of a contract must control its interpretation when its diction is clear, reasonable and explicit and is in harmony with the general purpose of the agreement. Civil Code, secs. 1638, 1641. It is the function of a court to follow this rule and not to make a new contract or to rewrite or alter by construction what has been agreed to by the contracting parties. Mitchel v. Brown, 43 Cal.App.2d 217, 221, 110 P.2d 456.

[14–17] However, appellants cannot recover any royalties for the two-year period after November 19, 1947. Although the contract provided for an automatic two-year renewal unless the parties gave sixty days' written notice of cancellation, the trial court found that the parties later orally agreed to terminate their agreement after the expiration of the original period of two years. The record contains ample evidentiary support for such finding. The mutual rescission or abrogation of a written contract may be effected by an oral agreement whether executed or not, in which event section 1698 of the Civil Code * has no application. Grant v. Aerodraulics Co., 91 Cal.App.2d 68, 75, 204 P.2d 683. It is true, as appellants assert, that such agreement must be supported by a sufficient consideration, but such consideration is present here in the form of the mutual cancellation of executory contractual rights. When such is the case each party has suffered a legal detriment in giving up such rights and the consideration is adequate. Grant v. Aerodraulics Co., supra, 91 Cal.App.2d 76, 204 P.2d 683; Sistrom v. Anderson, 51 Cal.App.2d 213, 219, 124 P.2d 372; Rest. Contracts, sec. 406.

Inasmuch as defendants paid $919.62 as earned royalties on sales made during the first two years, they are indebted to plaintiffs in the sum of $10,350, guaranteed minimum royalties, less the sum of $919.62, leaving $9,430.38 for the first two-year period.

It is ordered that findings be modified by striking therefrom findings III, IV, and V and substituting in lieu thereof the following:

III. That defendants used the 46 Kodachrome negatives so leased to them by plaintiffs and from sales made during the first two years paid plaintiffs $919.62 as earned royalties.

[18] IV. That by virtue of their agreement to pay specified, guaranteed, minimum royalties defendants are indebted to plaintiffs for the total amount of guaranteed minimum royalties, less the sum of $919.62 paid as earned royalties, leaving $9,430.38 due with interest from November 19, 1947.

It is further ordered that all five conclusions be stricken and that in lieu thereof the following be substituted:

Conclusions of Law

I

On the first count plaintiffs are entitled to judgment in the sum of $9,430.38 with interest from November 19, 1947; that because the contract was not renewed for the two-year period following November 19, 1947, defendants are not indebted to plaintiffs in any sum on the second count.

Let judgment be entered accordingly.

Plaintiffs' purported appeal from the order denying their motion for a new trial is dismissed. As modified the judgment is affirmed.

McCOMB, J., concurs.

Hearing denied; SHENK, EDMONDS, and SCHAUER, JJ., dissenting.

108 Cal.App.2d 891

STERLING CO. v. GARRETT

Civ. 18597.

District Court of Appeal, Second District,
Division 2, California.

Dec. 17, 1951.

Rehearing Denied Jan. 7, 1952.

Hearing Denied Feb. 14, 1952.

Action by The Sterling Co. against Neal Garrett for partition of vacant lot. The Superior Court of Los Angeles County, Jesse J. Frampton, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, McComb, J., held that where plaintiff's title to vacant lot was based upon deed from city as result of foreclosure of street improvement bonds, and defendant's title was based upon subsequent tax deed from the state for unpaid general taxes, plaintiff was entitled to partition despite claims of defendant of superiority of state tax title.

Judgment affirmed.

Partition 🔑16

Where plaintiff's title to vacant lot was based upon deed from city which stemmed from foreclosure of street improvement bonds, and defendant's title was based upon subsequent tax deed from state for unpaid general taxes, plaintiff was entitled to partition despite claims of defendant of superiority of state tax title. Revenue and Taxation Code, § 3691 et seq.

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* Section 1698 reads: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

◆

Neal Garrett, in propria persona.

John F. Bender and Gizella M. Allen, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for partition of a vacant lot (Lot 467, Tract No. 9088, in the City of Glendale), defendant appeals.

Plaintiff's predecessor in interest was the owner of a street improvement bond issued by the city treasurer of the City of Glendale on November 26, 1929. The bond was issued pursuant to the Improvement Act of 1911. Action to foreclose the bond was filed on May 23, 1935. A commissioner's sale after judgment rendered in the foreclosure action was held November 30, 1936, and a commissioner's deed was executed and delivered to plaintiff's predecessor in interest December 6, 1937. Plaintiff thereafter acquired title by mesne conveyances of record.

Taxes became delinquent on the property for the fiscal year 1933–1934, and because of such delinquency the property was sold to the State in the year 1934 and was deeded to the State July 1, 1939. On August 18, 1947, the State, by its deed and pursuant to Chapter 7, Part 6, Division 1 of the Revenue and Taxation Code, conveyed the property to defendant Neal Garrett.

Defendant contends that the court erred in giving judgment to plaintiff for a partition for the reasons that: (a) defendant's title is clear to the property; (b) there was no evidence before the court to show any right of a taxing agency existent on a parity with the title of the State before the property was conveyed to defendant; (c) the foreclosure of the bond lien was complete; and (d) the State was guilty of inexcusable delay in asserting its rights.

All contentions of defendant have been answered adversely to his position in Monheit v. Cigna, 28 Cal.2d 19, 20 et seq., 168 P.2d 965, 167 A.L.R. 995, and Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 611 et seq., 197 P.2d 537.

A mere reading of these cases demonstrates the fallacy of defendant's contentions and it would serve no useful purpose to here reiterate the reasoning of the cited decisions.

Affirmed.

MOORE, P. J., concurs.

108 Cal.App.2d 231

PEOPLE v. SCOTT.

Cr. 909.

District Court of Appeal, Fourth District, California.

Dec. 14, 1951.

Lloyd Raymond Scott was convicted in the Superior Court, Orange County, Raymond Thompson, J., of the crime of receiving stolen property, and he appealed from the judgment and from an order denying his motion for a new trial. The District Court of Appeal, Barnard, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Receiving Stolen Goods 🔑4

In prosecution for receiving stolen property, fact that defendant did not know that stolen property had been placed in his garage until a day after it had been placed there was immaterial. Pen.Code, §§ 496, 496bb.

2. Receiving Stolen Goods 🔑4

In prosecution for receiving stolen property, it would be immaterial whether defendant had exercised control by selling property or whether control had been exercised by his using it as security for loan. Pen.Code, §§ 496, 496bb.

3. Receiving Stolen Goods ⟹8(3)

Conviction for receiving stolen property was sustained by evidence. Pen.Code, §§ 496, 496bb.

4. Receiving Stolen Goods ⟹9(2)

In prosecution for receiving stolen property, a requested instruction which would have charged jury that word "receive" in its commonly accepted meaning carried with it concept that something had been physically delivered, or placed in hands of recipient, was defective in that it omitted element of constructive possession.

5. Criminal Law ⟹829(3)

In prosecution for receiving stolen property, instructions given adequately covered all essential elements of case, and therefore failure to give defective instruction defining word "receive" was not reversible error. Pen.Code, §§ 496, 496bb.

◆

Lloyd S. Verry, Warren J. Ferguson, Fullerton, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was convicted of the crime of receiving stolen property, and he appeals from the judgment and from an order denying his motion for a new trial.

On the evening of February 7, 1951, two teenage boys broke into a building in Anaheim and stole a motor and a chest of tools. They placed this property in the garage at the home of one of the boys and the next night moved it into the defendant's garage, which was across the alley. On the evening of February 9, the boys informed the defendant that they had stolen these articles and had placed them in his garage. The defendant testified that he was angry, "but I had to get rid of it." He took the chest and tools out to an orange orchard and hid them. The next morning, February 10, he and the boys took the motor to Los Angeles, where the defendant tried to sell it at three or four places. Being dissatisfied with the price offered for the motor, they returned to Anaheim and went to Booth's service station where the defendant either sold the motor for $50 or borrowed $50 and left the motor as security. The defendant signed a paper reading "2-10-51, Booth Service, Lawson Motor, 50 dollars."

The boys testified as to some of the above facts, and testified that the defendant told them that he had sold the motor, and gave one of them $10 and the other $15. A deputy sheriff testified that he talked with the defendant on February 15; that the defendant first denied knowing anything about the motor; and that when he showed the defendant this "receipt" signed by him he said he had taken the motor to that service station and sold it for $50, that the money was divided between the three of them, that he knew the stuff was in his garage and knew it had been stolen, and that he "hauled it out and disposed of it and divided the money." The officer further testified that the defendant said nothing about borrowing $50 or leaving the motor for security; that the defendant told him that he had taken the tool chest out and hidden it; and that the defendant took him out to where it was hidden, where it was found.

The defendant testified that the boys told him on the night of February 9 that the stuff was in his garage; that he was angry and that he had to get rid of it; that he took the chest of tools out that night and hid it; that the next morning he and the boys took the motor to Los Angeles and went to several places trying to sell it; that "I didn't care whether I sold it, borrowed money on it or what"; that they went back to Anaheim; that he left the motor at the service station and gave the boys all he got out of it; that he told the boys he would borrow some money on the motor and they were to pay the money back; that the boys told him on Friday night they were expecting a detective over there; that he told one of the boys to "get rid of it"; and that this boy's mother had refused to let the boys use her car any more "so I put the stuff in my car and disposed of it. There is your story in flatfoot." There was also evidence that over a considerable period prior to February 7, the defendant had told these boys that if they found anything to steal, which was profitable, he thought he could help them in disposing of it.

It is contended that the evidence is insufficient to support the verdict. It is argued that the defendant did not know that these articles were in his garage when they were first placed there; that without knowledge of their presence he could not have received the goods, or have intended to exercise dominion and control over them; and that any acts which occurred subsequent to the placing of the goods in his garage, without his knowledge, cannot be considered in determining whether or not he received them.

[1–3] This contention is without merit. The fact that the defendant did not know that this stolen property had been placed in his garage until a day later is immaterial. After being told the facts, he took possession of and assumed control over the property, and proceeded to dispose of it. He hid the tool chest and tools, (which was also a violation of section 496bb of the Penal Code) and he disposed of the motor, either by selling it or by using it as security for a loan. There is ample evidence that he sold the motor, but it is immaterial which of these methods of exercising control he employed. The evidence conclusively shows that the defendant received this property knowing the same to have been stolen, within the meaning of section 496 of the Penal Code.

It is further contended that the court erred in failing to give two instructions which were refused as covered. The first of these reads, in part, as follows: "You are instructed that the crime of receiving stolen goods consists of either buying or receiving personal property with knowledge that it has been stolen. The gist of the offense is the purchase or receipt of the stolen goods with guilty knowledge." The second reads in part: "You are instructed that the word 'receive' in its commonly accepted meaning carries with it the concept that something has been physically delivered, or placed in the hands of the recipient." Each of these instructions also told the jury that if it found from the evidence that the defendant did not receive any personal property, with knowledge that it had been stolen, he must be found not guilty on that charge.

[4, 5] The second of these instructions was defective in that it omitted the element of constructive possession. People v. Rossi, 15 Cal.App.2d 180, 59 P.2d 206. Insofar as they were correct the substance of both instructions was sufficiently covered in the instructions given. Among other things, the court gave the following instructions.

"Every person who receives any property which has been stolen, knowing the same to be so stolen, is guilty of a felony."

"Whether a defendant had knowledge that property received by him was stolen when he received it may be determined from all of the facts in evidence and reasonable inferences that may be drawn from such facts."

"It is not a necessary element of the offense charged in Count One of the Information that the person charged with receiving stolen property has purchased the stolen property or paid anything to the thief for it; the offense is complete when a person receives stolen property into his possession or control, knowing it to have been stolen."

"Within the meaning of the law, a person has received property into his possession when it is under his dominion and control and either is carried on his person or is in his presence or custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him; provided, however, that two or more persons may have joint possession of property if jointly they have the dominion, control and exclusive possession I have described."

The instructions given covered all the essential elements, and no error appears in this connection.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

108 Cal.App.2d 251

REMINGTON et al. v. DAVIS et al.

Civ. 4439.

District Court of Appeal, Fourth District, California.

Dec. 17, 1951.

Ethel C. Remington, an incompetent by Richard Jackson, guardian of her estate, sued Mansell A. Davis, and others, to recover certain properties alleged to have been obtained from Mrs. Remington, by means of fraud committed by Davis. The defendants filed a cross-complaint. The Superior Court of Orange County, Kenneth E. Morrison, J., rendered an interlocutory judgment for plaintiff, and denied defendant's motion to vacate and set aside the judgment and to enter a new and different judgment and defendants appealed from that order. Plaintiff moved to dismiss the appeal. The District Court of Appeal, Barnard, P. J., held that the order was not appealable under statute providing for a motion to set aside a judgment and enter a different judgment based on facts already found, where improper conclusions of law had been drawn from those facts since judgment entered was interlocutory.

Plaintiff's motion to dismiss the appeal granted and appeal dismissed.

1. Appeal and Error 🔑82(3)

Judgment 🔑345

Under statute providing for a motion to set aside a judgment and to enter a different judgment based on facts already found, where improper conclusions of law had been drawn from those facts, and statute providing that an order made under former statute may be reviewed on appeal in same manner as a special order made after final judgment, the judgment which may be changed, is one final in nature and not one which leaves issues still to be determined. Code Civ.Proc. §§ 663, 663a.

2. Appeal and Error 🔑113(2)

Where in action to recover certain properties alleged to have been obtained from plaintiff by means of fraud, an interlocutory judgment was entered decreeing that certain instruments be cancelled and certain properties be transferred to plaintiff and that jurisdiction be retained for purpose of taking an accounting and rendering a final judgment for amount due plaintiff, order denying defendants' motion to vacate and set aside judgment and to enter a new and different judgment was not an "appealable order". Code Civ.Proc. §§ 577, 663, 663a, 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

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Blodget & Blodget, Santa Ana, for appellants.

David D. French, E. J. Marks, Orange, for respondent.

BARNARD, Presiding Justice.

This action was brought to recover certain properties alleged to have been obtained from Mrs. Remington by means of fraud committed by Davis. After trial the court made its findings of fact and conclusions of law. It was found, in part, that a number of properties, real and personal, had been fraudulently obtained by Davis from Mrs. Remington; that an accounting was necessary for the purpose of determining the exact amount wrongfully appropriated by Davis; that jurisdiction was reserved for the purpose of said accounting, and of rendering judgment against Davis for the appropriate amount; that it is not true that the action is barred by various statutes of limitation; and that the plaintiff had no knowledge or notice of certain material facts until shortly before the action was filed. An "interlocutory" judgment was entered decreeing that certain instruments be cancelled, and certain properties be transferred to the plaintiff; and further decreeing that jurisdiction be retained for the purpose of taking an accounting, ascertaining the credits, if any, allowable to the defendants, and of rendering a "final judgment" for the amount found due to the plaintiff, and for the return of any of the properties in question remaining in the possession of the corporate defendant.

The defendants moved to vacate and set aside this judgment, and to enter a new and different judgment decreeing that plaintiff's cause of action is barred by certain statutes of limitation, and quieting title to the property in the defendants in accordance with their cross-complaint. This motion was denied and the defendants filed a notice of appeal from that order. The plaintiff has moved to dismiss that appeal on the grounds that this order is not appealable, and that the appeal is frivolous and was taken merely for delay.

The appellants contend that it is immaterial that the judgment entered was interlocutory; that the words "judgment or decree" in section 663, Code of Civil Procedure, under which the motion was made, refer to any judgment or decree, whether final or interlocutory; that under that section the facts found must be taken as established, and it is the court's duty to enter a correct judgment thereon, regardless of whether it be final or interlocutory; that for this reason section 663a contains a special provision permitting an appeal from such an order; and that, citing Socol v. King, 34 Cal.2d 292, 209 P.2d 577, this provision also permits an appeal from an order denying such a motion. It is argued that section 663a provides that such an order may be reviewed on appeal in the same manner as an "order made after final judgment"; that without this provision such an order would be appealable under section 963; that this provision would be meaningless unless it was intended to permit an appeal from such an order involving an interlocutory judgment; and that the only logical conclusion is that this appeal provision was inserted for the purpose of covering the situation which here appears.

[1] Sections 663 and 663a are not expressly made applicable to interlocutory judgments, and there is nothing in the language used which indicates that they were so intended. Section 663 provides for a motion to set aside a judgment and enter a different judgment based upon the facts already found, where improper conclusions of law had been drawn from those facts. Such a situation involves questions of law only, and strongly indicates that the judgment which may be thus changed is one final in nature and not one which leaves issues still to be determined. Section 663a provides that an order made under section 663 may be reviewed on appeal "in the same manner as a special order made after final judgment". This refers to a final judgment, strongly indicates that the situation is to be treated as though a final judgment had been entered, and is a further indication that the judgment referred to in section 663 was intended to be a final judgment. Section 577 defines a "judgment" as the final determination of the rights of the parties. It appears more reasonable that the appeal provision was inserted in section 663a for the purpose of removing any doubt or confusion as to the appealability of such an order, rather than for the purpose of allowing an appeal from an order refusing to change an interlocutory judgment. Some of the reasoning in Peninsula Prop. Co. v. Santa Cruz County, 34 Cal.2d 626, 213 P.2d 489, is here applicable.

[2] The order here appealed from was clearly not appealable under section 963 of the Code of Civil Procedure, and it must be held that it was not appealable under section 663a.

It is unnecessary to decide the further question argued as to whether the appeal is frivolous. It may be observed, however, that the appellant's contentions are based upon the claim that it appears as a matter of law that the court's conclusions with respect to the running of the statute of limitations are not supported by the findings of fact. It appears probable that questions of fact will be involved in passing on the matters thus relied on. Dabney v. Philleo, Cal.Sup., 237 P.2d 648.

The motion is granted and the appeal is dismissed.

GRIFFIN and MUSSELL, JJ., concur.

108 Cal.App.2d 156

SCHULMAN v. SHORES et al.

Civ. 18436.

District Court of Appeal, Second District, Division 3, California.

Dec. 11, 1951.

Hearing Denied Feb. 7, 1952.

Quiet title action by Irving Schulman against Olive J. Shores, Ida Stockton, an incompetent person by her guardian, Chas. L. Overshiner (substituted in lieu of Ida Stockton). The Superior Court of Los Angeles County, Andrew H. Schottky, Judge assigned, entered a judgment which decreed that plaintiff was the owner of the property, and Ida Stockton (an incompetent person) by her guardian Chas. L. Overshiner, appealed. The District Court of Appeal, Vallée, J., held that fact that owner's given name was misspelled in affidavit of service of notice to redeem land which plaintiff had purchased at foreclosure of street improvement liens, did not render treasurer's deeds void.

Judgment affirmed.

1. Municipal Corporations ⟹579

In quiet title action brought by purchaser more than six months after he received treasurer's deeds to land which was sold at foreclosure of street improvement liens, purchaser's objection to introduction of evidence attacking validity of deeds should have been sustained, since six months period within which validity of deeds could be assailed had expired. Streets and Highways Code, §§ 6550, 6571; Code Civ.Proc. § 2055.

2. Municipal Corporations ⟹582

Treasurer's deeds to land which was sold at foreclosure of street improvement liens, constituted prima facie evidence of the regularity of all proceedings ante-dating execution of deeds. Streets and Highways Code, § 6555.

3. Appeal and Error ⟹237(2)

Where, in quiet title action, trial court erroneously overruled plaintiff's objection to evidence attacking validity of treasurer's deeds to land which was sold at foreclosure of street improvement liens, and admitted such evidence subject to motion to strike, but plaintiff made no motion to strike, District Court of Appeal would consider the record as made in the trial court. Streets and Highways Code, § 6571.

4. Municipal Corporations ⟹579

Fact that given name of landowner was inadvertently misspelled in affidavit of service of notice to redeem land sold at foreclosure of street improvement liens, did not render treasurer's deeds to purchaser void. Streets and Highways Code, § 6550.

5. Municipal Corporations ⟹581

In determining whether there has been proper service of notices to redeem land sold at foreclosure of street improvement liens, fact of service is controlling and not the proof of service. Streets and Highways Code, § 6550.

6. Municipal Corporations ⟹579

In quiet title action brought by purchaser more than six months after he received treasurer's deeds to land which was sold at foreclosure of street improvement liens, evidence sustained finding that proper notices to redeem had been served on the owner. Streets and Highways Code, § 6550.

7. Appeal and Error ⟹909(2)

In quiet title action brought by purchaser who received three treasurer's deeds to three fractional parts of one lot which was sold at foreclosure of street improvement liens, wherein defendant contended that there was fatal variance in fractional descriptions as contained in the three treasurer's deeds, and the single all-inclusive description of the lot as contained in the complaint, findings and judgment, but treasurer's records were not made part of record on appeal, appellate court would assume that there was evidence in files of the treasurer containing the records of the foreclosure proceedings which were before the trial judge, showing that the total of the three fractional portions of the lot comprised the whole thereof. Streets and Highways Code, § 6571.

8. Appeal and Error ⟹837(9)

Fact that defendant in quiet title action was adjudged an incompetent after judgment had been rendered against her would have no bearing on the merits of the case on appeal in absence of showing that she was incompetent at any time prior to the incompetency proceedings.

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Warner, Peracca & Cowan and George E. Lindelof, Jr., all of Los Angeles, for appellant.

Max Bergman, Warren M. Goodwin and Joseph P. Guerin, all of Los Angeles, for respondent.

VALLÉE, Justice.

Appeal of Ida Stockton, an incompetent, by her guardian, from a judgment in a quiet title action which decreed that plaintiff is the owner of "Lot 12 in Block H of Strong and Dickenson's Hollywood Tract No. 1."

Ida Stockton purchased the property in 1919, but title was taken in the name of Olve J. Shores. Ida Stockton, Olve J. Shores, and Olve J. Shors are one and the same person. The property is improved with three residential units—5951, 5957 and 5961 Melrose Avenue. Three street improvement bonds, dated April 14, 1931, which were liens on the property, were foreclosed and the property sold to plaintiff on December 2, 1946. On August 26, 1948, Ida Stockton, who occupied 5951, and Marion Massey, one of the occupants of 5961, were served with notices to redeem. Apparently 5957 was unoccupied at the time but Ida Stockton was served with a notice to redeem with respect to it. Notices to redeem were also posted on the property. On December 29, 1948, three deeds covering the three different fractional portions of lot 12 were issued to plaintiff by the treasurer of the city of Los Angeles.

On May 11, 1949, plaintiff filed this action to quiet title against Olive J. Shores and Ida Stockton. The complaint contained the same legal description of the property as that contained in the judgment, supra. Plaintiff's claim of ownership was based upon the three treasurer's deeds issued to him, and it was alleged that they had been issued "more than six months prior to the commencement of this action," and that plaintiff was "therefore within the provisions of Section 6571, Streets and Highways Code of California."

An answer was filed, entitled "Answer of Ida Stockton p. p. and for Olve Shors," and signed "Olve Shors by Ida Stockton—In propria persona." On December 16, 1949, an amendment to the answer was filed by "Ida Stockton pa." The amendment alleged that the three treasurer's deeds were void and of no force and effect because issued upon false affidavits of service under section 6550 of the Streets and Highways Code; that Olve J. Shores, "a real and not a fictitious person," is the record owner of the property described in the complaint; that Ida Stockton is the owner of the property "described in the complaint"; that she has occupied it for several years past; and that the notice provided by section 6550 of the Streets and Highways Code was not personally served upon her or upon Olve J. Shores "designated in said complaint as Olive J. Shores."

At the commencement of the trial, the action was dismissed as to the defendant Olive J. Shores. Plaintiff introduced in evidence the three treasurer's deeds, introduced by reference three files of the city treasurer which contained the records of the foreclosure proceedings, including the notices to redeem and the affidavits of service of the notices, called Ida Stockton under section 2055 of the Code of Civil Procedure, elicited from her that she was the owner of the property, and rested.

When defendant presented her defense, plaintiff objected to the introduction of evidence attacking the validity of the deeds on the ground the defense was barred under section 6571 of the Streets and Highways Code.[1] The court overruled the objection and admitted the evidence subject to a motion to strike. No motion to strike was thereafter made.

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[1] "Any action, suit or proceeding attacking or contesting the validity of any deed issued under the provisions of this division, or the validity of the proceedings subsequent to the issuance of the certificate of sale, must be brought within six months after the issuance of the deed, and if the validity of the deed or of the proceedings is not contested within that six months' period, it shall not be thereafter contested or questioned in any action, suit or proceeding."

The court found that: plaintiff is the owner of the property; Olve J. Shors and Ida Stockton are one and the same person and Olve J. Shors is the alter ego of Ida Stockton; the notice of redemption required by section 6550 of the Streets and Highways Code was served on Olve J. Shors by service on Ida Stockton. Conclusions and judgment followed accordingly.

[1–3] Plaintiff's objection to the introduction of evidence attacking the validity of the deeds should have been sustained. (Sts. & Hy. Code, § 6571.) The deeds constituted prima facie evidence of the regularity of all proceedings antedating their execution. Sts. & Hy. Code, § 6555;[2] Pacific States S. & L. Co. v. Perez, 51 Cal. App.2d 84, 88, 89, 124 P.2d 184. The deeds were issued September 29, 1948, and the complaint filed May 11, 1949. The six months' period within which the validity of the deeds could be assailed had, therefore, expired. However, since no motion to strike the evidence was made by plaintiff, we consider the record as made in the court below.

[4–6] Appellant's claim that the deeds were void because an affidavit of service of one of the notices to redeem gave the given name of the owner served as "Olive" in place of "Olve," is without merit. No contention is made that the notices were defective. The fact that the given name was inadvertently misspelled in the affidavit is not fatal. The same rule which applies to the service of process applied to the service of notices. It is not so much the *proof* of service but the *fact* of service that is controlling. 21 Cal.Jur. 575, § 88. Cf. In re Spiers, 32 Cal.App.2d 124, 127, 89 P.2d 456; Vail v. Jones, 209 Cal. 251, 255, 287 P. 99; Alpha Stores, Ltd. v. You Bet Min. Co., 18 Cal.App.2d 249, 251, 63 P.2d 1137. Plaintiff testified he personally served the notices to redeem upon defendant Stockton and introduced photographs showing that the notices had been posted on the property. The evidence supports the court's finding that service of the notice required by section 6550 of the Streets and Highways Code had been made on Ida Stockton.

[7] Appellant's contention that there is a fatal variance between the three different fractional descriptions of lot 12 as contained in the three treasurer's deeds and the notices to redeem, to-wit, the "Ely 49.75 ft. of Fractional Lot 12," the "Ely 42 ft. of Wly 76.5 ft. of Fract. Lot 12," and the "Wly 34.5 ft. of Fract. Lot 12," and the single all-inclusive description of lot 12 as contained in the complaint, findings and judgment, is likewise without merit. Three files of the treasurer of the city of Los Angeles containing the records of the foreclosure proceedings were before the trial judge. These records are not made a part of the record on appeal and we must, therefore, assume that there was evidence therein showing that the total of the three fractional portions of lot 12 comprised the whole thereof. The case was treated by the parties and tried upon the basis that the single all-inclusive description of the property in the complaint constituted the same property as the aggrevate of the three fractional descriptions in the treasurer's deeds and notices to redeem.

[8] The fact that after the judgment had been rendered Ida Stockton was adjudged an incompetent obviously can have no bearing on the merits of the case. There was no evidence that she was incompetent at any time prior to the incompetency proceedings.

Other contentions made by appellant are so palpably without merit they need not be discussed.

Judgment affirmed.

SHINN, P. J., and WOOD, J., concur.

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[2] "The deed of the treasurer, when duly acknowledged or proved, is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for State, county and municipal taxes."

108 Cal.App.2d 279

PEOPLE v. LAMMERS.

Cr. 841.

District Court of Appeal, Fourth District, California.

Dec. 18, 1951.

Joseph John Lammers was convicted in the Superior Court, Kern County, Warren Stockton, J., for committing lewd and lascivious acts on the body of a female child eight years of age, and he appealed from the judgment and from an order denying a new trial. The District Court of Appeal, Griffin, J., held that remarks made in connection with the court's request that the jury reconsider after they had announced that they could not agree were not prejudicial error.

Judgment and order affirmed.

1. Criminal Law ⚿1166½(12)

Conviction will not be allowed to stand if court has made remarks to jurors which might reasonably be interpreted as indicating court's belief of guilt and if it also appears upon entire record that infringement upon defendant's rights resulted in miscarriage of justice.

2. Criminal Law ⚿864, 1174(1)

Province of jury is invaded and reversible error is committed only when inquiry of court as to how jury stands numerically is coupled with purpose on part of court to ascertain how jury is divided as to innocence or guilt of defendant.

3. Criminal Law ⚿865(1)

Where jury disagreed, it was proper for judge to point out that other juries had tried harder and for much longer period of time to arrive at agreement.

4. Criminal Law ⚿1174(1)

Where court asked jury foreman to numerically state how jury was divided without telling court whether they stood for conviction or acquittal, and court then stated that it was an important case and asked jury to go back and try again and incidentally mentioned that court once had a jury that stood as they stood but was out for five days before arriving at agreement and jury then returned verdict in two hours, remarks resulted in no prejudicial error.

5. Infants ⚿20

In prosecution for lewd acts committed on eight year old female, where there was evidence that victim developed a venereal disease several days after alleged offense, question of sufficiency and accuracy of examination and tests made on defendant to determine whether he had gonorrhea at time of alleged offense was an issue for the jury. Pen.Code, § 288.

6. Infants ⚿20

In prosecution for lewd acts on eight year old female, record did not support defendant's contention that testimony of victim was uncorroborated. Pen.Code, § 288.

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Dorris, Fleharty & Phillips, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury of the crime of violating sec. 288 of the Penal Code in committing lewd and lascivious acts on the body of a female child eight years of age, on April 21, 1950.

The sole question involved in the instant appeal is whether the trial court was guilty of prejudicial misconduct in making certain statements to the foreman of the jury after the jury had deliberated about five hours and had returned to the courtroom and was at that time questioned by the trial judge as to whether it desired further instruction or desired any of the evidence read to it. In reply to this query by the court the foreman stated:

"No, I believe not. They feel there is insufficient evidence for * * *

"By the Court: Just a minute. Without telling me whether you stand for conviction or acquittal will you tell me numerically how the jury is divided, say nine to three or * * *.

"Foreman: The jury is divided nine to three.

"By the Court: This is an important case and I am going to ask you to go back and try it again for a while. Will you do that? Maybe you can come to an agreement.

"Foreman: We really tried very hard, Your Honor.

"By the Court: I might tell you that we had a jury here once that stood nine to three and they were out five days. You folks go back and try it * * * again, will you please?"

The jury then returned to the jury room and in about two hours reached a verdict.

It is defendant's contention that the trial judge's statement, taken in conjunction with the statement of the foreman of the jury, could reasonably be interpreted by the jury that the judge was threatening the jurors that if they did not agree upon a verdict they might be kept locked up for five days longer or until they did agree; that as a result the jury returned a verdict of guilty within two hours. It is contended that this action constituted prejudicial misconduct on the part of the judge, citing People v. Talkington, 8 Cal.App.2d 75, 88, 47 P.2d 368; Kesley v. U. S., 5 Cir., 47 F.2d 453, 85 A.L.R. 1418, and cases cited; People v. Carder, 31 Cal.App. 355, 160 P. 686; People v. Walker, 93 Cal.App. 2d 818, 209 P.2d 834; and People v. Crowley, 101 Cal.App.2d 71, 224 P.2d 748.

In the Talkington case, in addition to the question as to the numerical standing on the innocence or guilt of the defendant, the court also strongly indicated that in his opinion the defendant was guilty and strongly intimated that if the jury did not bring in a guilty verdict they were not going to "get away". In that case the court also asked the jurors as to how they stood, i. e., whether for guilt or innocence. Other authorities are there discussed, including People v. Miles, 143 Cal. 636, 77 P. 666, where the judgment was affirmed because there were no remarks by the judge as to how the jury should decide the case. There the court told the jurors that the protracted character and expense of litigation necessitated the duty, on their part, to honestly and faithfully arrive at a verdict. In a concurring opinion, one justice remarked that such expressions were hazardous and it would be better for the court to say nothing on the subject.

In People v. Carder, supra [31 Cal.App. 355, 160 P. 686], the court asked the foreman: "How many contrary ones are there?" And the juryman answered: "Two". The court replied: "* * * don't get contrary * * * go to work * * * The court will be here any time when you agree." The court on appeal reversed the judgment and held that it was quite apparent from all the remarks of the trial judge that the jurors believed the judge was convinced of the defendant's guilt and that as honest men it was their duty to so find.

[1] In People v. Walker, supra [93 Cal.App.2d 818, 209 P.2d 838], after the jurors answered that they were ten to two for conviction, the court held the remarks of the judge created "'the impression that he thought the jury ought to convict'." And in People v. Crowley, supra, 101 Cal.App.2d at page 175, 224 P.2d at page 751, the court remarked that:

"* * * a conviction will not be allowed to stand if the court has made remarks to the jurors which might reasonably be interpreted as indicating the court's belief of the guilt of the accused, and if it also appears upon the entire record that the infringement upon the rights of the defendant resulted in a miscarriage of justice. * * *

"The courts have not hesitated to reverse convictions where trial judges have urged that an agreement be reached after learning that a small minority of the jurors were holding out for acquittal. * * * It is manifestly true that insistence upon an agreement with knowledge that the jurors favoring acquittal constitute a small minority, is an indication of the court's belief that the verdict should be against the accused. The jurors would naturally suppose the court's remarks to be addressed to those who were in the minority."

[2] In People v. Curtis, 36 Cal.App.2d 306, 98 P.2d 228 it was held that it was not error for a court to inquire how the jurors are numerically divided so long as inquiry is not made for ascertaining how the jury is divided as to the innocence or guilt of the defendant, and that the province of the jury is invaded and reversible error is committed only when the inquiry of the court as to how the jury stands numerically is coupled with the purpose on the part of the court to ascertain how the jury is divided as to the innocence or guilt of the defendant. See, also, People v. Miles, supra, 143 Cal. at page 637, 77 P. 666; People v. Selby, 198 Cal. 426, 439, 245 P. 426; and People v. Rhodes, 17 Cal.App. 789, 121 P. 935, where the rule is stated to be that where the jury reported to the court the general condition of its votes and its inability to agree, without stating the particulars of its votes and the court detained them for further consideration of the case, until they finally rendered a verdict, with remarks, when so detaining them which, when considered as a whole, were clearly intended as an explanation of the reason for detaining them and to impress upon them that the case was an important one, requiring their careful and dispassionate consideration, and wherein some sort of a verdict should be rendered without indicating that it should be a verdict of guilty, there was no indication of coercion or prejudicial error in such remarks, and the verdict should not be set aside on those grounds. See, also, People v. Finkelstin, 98 Cal.App.2d 545, 561, 220 P.2d 934, where People v. Walker, supra, is distinguished.

[3, 4] In the instant case the record does not indicate that the court inquired nor was it informed as to whether the jury stood nine to three for acquittal or for guilt. The court indicated that it was an important case and asked that the jury go back and try again "for a while". The remarks complained of did not necessarily indicate that if that jury did not agree the court would keep it locked up for five days. The proper interpretation would be that the judge asked the jury to go back and try again "for a while", and that maybe it could come to an agreement; that one jury once kept trying and stayed out five days and still stood nine to three. It was proper for the judge to point out that other juries had tried harder and for a much longer period of time to arrive at an agreement than had this particular jury. The judge did not say nor necessarily indicate that he once kept a jury out five days before he would discharge them. Possibly the remark may have been better left unsaid. However, under a fair interpretation of it, we conclude that such remark was not similar to the ones denounced in the cases relied upon by defendant and accordingly no prejudicial error resulted.

It is further argued that since the defendant was convicted on the uncorroborated testimony of a minor child under 14 years of age, the error was aggravated to the extent that a reversal of the judgment should follow and a new trial should be ordered. The evidence shows that while defendant was seated in the back seat of a car that had been parked by the child's mother while she was visiting a relative in a hospital one evening, defendant, who was wearing only his pajamas and a robe, committed certain acts denounced by section 288 of the Penal Code upon the child after he induced her to sit on his lap. We will not set forth the detailed acts. On arriving home that evening the child immediately complained to her mother, who found wet spots on her clothing and body which resembled semen. She also saw red blotches which covered the child's body. The defendant admitted that he hugged and kissed the child at the time at least twice, but claimed that these were innocent acts of kindness and were not "French kisses", as described by the little girl. Several days thereafter, the minor had a disturbance with her female organs, and after medical examination it was discovered that she had a gonorrhea infection.

[5, 6] Some medical testimony was produced by defendant indicating that he did not have gonorrhea at the time of the alleged offense, nor in June of that year. The question of the sufficiency and ac-

curacy of the examination and tests made was an issue presented to the jury. It cannot be said that the testimony of the minor child, as to the acts charged, was uncorroborated.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

WEST KEY NUMBER SYSTEM

108 Cal.App.2d 191

STRYKER v. REPUBLIC PICTURES CORPORATION et al.

Civ. 18256.

District Court of Appeal, Second District, Division 1, California.

Dec. 13, 1951.

Hearing Denied Feb. 7, 1952.

Action by Louis B. Stryker against Republic Pictures Corporation, and others, for damages for alleged invasion of plaintiff's right of privacy, by exhibition of motion picture produced by defendant depicting, in part actual facts and occurrences encountered by plaintiff while serving as an enlisted man in the marine corps in its campaigns against the Japanese army in World War II, and depicting certain fictionalized occurrences. The Superior Court of Los Angeles County, William B. McKesson, J., sustained defendants' general and special demurrer to the complaint, and entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem., held that the complaint was vulnerable to the general demurrer for failing to state a cause of action by way of ultimate facts instead of conclusions, and equally vulnerable to the special demurrer for failure to segregate the fictional from the actual activities relied on by the pleader.

Judgment affirmed.

1. Torts 🔑8

The independent right of privacy is not an absolute right to be let alone and to live one's life in utter privacy freed at all times from the prying eyes of the public or of a public recountal of the facts thereof, but the right of an individual to privacy of his private life is a limited right in that it is always subject to right of public to a disclosure thereof where there is a proper warranted public interest as to the facts of his life.

2. Torts 🔑8

The so-called right of privacy, permits limited scrutiny of the private life of any person who has achieved, or has had thrust on him, the questionable and indefinable status of a public figure.

3. Torts 🔑8

Men who are called to the colors subject their activities in that particular field to the public gaze and may not contend that in discharge of such activities their actions may not be publicized.

4. Torts 🔑26(1)

As the right of privacy is not absolute, but limited, ultimate facts must be alleged sufficient to show affirmatively that plaintiff has a particular right of privacy, not subject to invasion, and that act of defendant violated that right.

5. Action 🔑1

A cause of action cannot exist without concurrence of a right, a duty, and a default.

6. Pleading 🔑8(3), 207

Complaint alleging that defendants violated plaintiff's right of privacy by depicting in a motion picture, without plaintiff's consent, certain actual facts and occurrences and conditions encountered by plaintiff while serving as an enlisted man in the marine corps in his campaigns against the Japanese army in World War II on the islands of Iwo Jima and Guadalcanal, and by depicting certain fictionalized activities, was vulnerable to general demurrer for failing to state a cause of action by way of ultimate facts instead of conclusions, and vulnerable to special demurrer for failure to segregate fictional from actual activities relied on by plaintiff.

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David J. Sachs, Los Angeles, for appellant.

Loeb & Loeb, Los Angeles, Herman F. Selvin, Los Angeles, of counsel, for respondents.

HANSON, Justice pro tem.

The problem posed by this case is whether a general and special demurrer to the complaint was or was not rightly sustained. The demurrer was sustained with leave to the plaintiff to amend, but plaintiff elected not to amend on the theory that none of the grounds set forth in the demurrer were well taken. The question at issue is not primarily one of the law of privacy, as plaintiff would have us believe, but rather one of the law of pleading, based upon rules of law inherent in the substantive law of privacy. If, in the case before us, the plaintiff has in fact a perfectly good cause of action under the law for violation of his right of privacy we cannot assume he has any such right or cause of action based thereon unless his complaint sets it forth in a manner not vulnerable to a demurrer.

The complaint alleged that the plaintiff Louis B. Stryker, as a member of the marine corps, participated in the invasion and occupation of Iwo Jima in 1945 against the Japanese who at the time held the island; that at that time the plaintiff was a staff sergeant and was generally known among the invading forces as "Sergeant Stryker." The complaint goes on to aver that subsequent thereto, in the year 1949, the defendant produced a motion picture play entitled the "Sands of Iwo Jima" which it caused to be exhibited throughout the United States and elsewhere for defendants' personal gain; that the picture depicts, in part actual facts and occurrences, and in part is based on fiction; that the picture reenacts and depicts certain incidents, circumstances and conditions encountered by the plaintiff Stryker, while he was serving as an enlisted man in the marine corps in its campaigns against the Japanese army in World War II on the islands of Iwo Jima and Guadalcanal; that the defendants advertised that the motion picture reenacted certain incidents of the life and activities of the plaintiff. The complaint proceeds to allege that the defendants did not consult with the plaintiff or at any time seek or obtain his consent or permission to use any portion of his past life, activities or name as a theme for publication or exploitation; that at no time had plaintiff given his consent to defendants, or any other persons, to use his past life, activities or name as a plot for the said or any other motion picture photoplay; that as a direct result of the unauthorized and wrongful producing, showing and exhibiting of said motion picture photoplay, and the consequent violation of the right of privacy of the plaintiff, the said plaintiff has been damaged in the amount of $150,000.00.

It will be noted from the allegations of the complaint that it is based on the theory *first,* that plaintiff's *actual activities* as a member of the marine corps could not be publicized at all as they invaded his rights of privacy as an individual and *secondly,* that the activities ascribed to him, whether based on fiction or on fact, likewise invaded his right of privacy under the law. In short, the plaintiff rests his cause of action on the theory that the mere use of his name along with a reenactment of a part of his life history, in part real and in part fictionalized for private gain, *ipso facto,* without more, spells out an invasion of his right of privacy.

The special demurrer to the complaint sought to elicit from the plaintiff to what extent, if any, the plaintiff claimed that the picture represented fictitious activities, on his part, rather than his actual activities. This request on the part of the demurring party defendant it seems plain should have been supplied by him unless he is correct in his contention that none of his activities as a sergeant of the marine corps were subject to publication by way of a motion picture on the theory it invaded his rights of privacy.

[1, 2] The so-called independent right of privacy which is recognized in this state is not an absolute right "to be let alone" and to live one's life in utter privacy freed at all times from the prying eyes of the public or of a public recountal of the facts thereof. The right of the individual to privacy of his "private" life is a limited right in that it is always subject to the right of the public to a disclosure thereof where

there is a proper warranted public interest as to the facts of his life. The dividing line between the individual right and the so-called public right is not easily drawn and must be determined in every instance by the facts of each case. The general test, in large measure, is whether the public interest in obtaining or having disclosed to it the information outweighs the protection of the individual's personal interest and desires. See 48 Col.L.Rev. 713, 717. Accordingly, it is well established in this state that the so-called right of privacy to borrow apt language from Sidis v. F-R Pub. Corporation, 2 Cir., 113 F.2d 806 at page 809, permits "limited scrutiny of the 'private' life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a 'public figure.'" See also, Metter v. Los Angeles Examiner, 35 Cal.App.2d 304, 95 P.2d 491; Rest., Torts, § 867, comment d.

[3] In the complaint before us as has been stated it is alleged that the plaintiff was a sergeant in the marine corps. We think that men who are called to the colors subject their activities in that particular field to the public gaze and may not contend that in the discharge of such activities their actions may not be publicized. Continental Optical Co. v. Reed, 119 Ind.App. 643, 86 N.E.2d 306, 88 N.E.2d 55, 14 A.L.R. 2d 743. This does not imply that their personal activities, unrelated to their activities in defense of the colors are necessarily open to public gaze. A politician running for public office, in effect offers his public and private life for perusal so far as it affects his bid for office. Not so a man called to the colors. The distinction between the two we think is clear.

The complaint avers generally by way of conclusion, and without any statement of ultimate facts, that the motion picture in question ascribed to plaintiff certain activities, without naming them, which were true and others that were purely fictional. It is not alleged that any of the activities of the plaintiff in private life or while off duty were portrayed or that any of the activities as portrayed were false or detrimental or caused him any mental anguish of any kind or character.

[4, 5] As the right of privacy is not absolute, but limited it follows that ultimate facts must be alleged sufficient to show affirmatively that the plaintiff has (1) a *particular* right of privacy not subject to invasion; and (2) that the act of the defendant violated that right. A cause of action cannot exist without the concurrence of a right, a duty, and a default. The phrase comprises every fact which if traversed, the plaintiff must prove in order to obtain judgment. (Cf. Pomeroy's Code Remedies, 5th ed., sec. 347.) In Hutchinson v. Ainsworth, 73 Cal. 452, 455, 15 p. 82, 84, the court said: "The facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up *the cause of action*. If these facts, taken together, give a unity of right, they constitute but one cause of action."

"If a right as it usually exists is one dependent upon a condition, or—what is the same thing—is unconditional only when exceptional circumstances exist, in either case plaintiff, seeking to enforce such right, must, in order to state a right of action, either allege the facts to show the exceptional circumstances or the existence of the condition upon which the right depends." Houston Land & Trust Co. v. Sheldon, Tex.Civ.App., 69 S.W.2d 796, 801. The principle and its application is further illustrated by Anniston Mfg. Co. v. Davis, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed. 1143. That was an action by a taxpayer to recover taxes illegally exacted because of the unconstitutionality of the statute under which they were levied and paid. A federal statute permitted a recovery of the taxes so paid provided that the taxpayer had not been reimbursed nor shifted the burden to another (such as a purchaser) directly or indirectly. The court speaking through Chief Justice Hughes held that the statute "substantively" limited the right to recover to cases where the taxpayer either had not directly or indirectly collected the tax from a purchaser or having so collected it had returned it to him. The court said quoting an earlier case, U. S. v. Jefferson Electric Mfg. Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.

Ed. 859, that this "'substantive limitation' was deemed to be 'an element of the right to a refund of such taxes,' although they were wholly invalid and not merely laid in excess of what was lawful, and hence the statute required that this element, like others, 'be satisfactorily established * * *.'" [301 U.S. 337, 57 S.Ct. 822.] Accordingly, the court sustained the dismissal of the cause below in turn based upon the sustaining of a demurrer to the complaint which had failed to set forth the requisite allegations of fact, i. e., to the effect that there had been no shifting of the taxes by the taxpayer.

[6] In the case before us the complaint, in view of the law, carves out of the cause of the action as therein alleged the allegation pertaining to the actual activities of the plaintiff and, hence, leaves for consideration only the alleged fictional activities. But these activities are not stated by any ultimate facts and so cannot be differentiated or determined from the alleged actual activities of the plaintiff. Under the circumstances the complaint is vulnerable to the general demurrer for failing to state the cause of action by way of ultimate facts instead of conclusions, and is equally vulnerable to the special demurrer for failure to segregate the fictional from the actual activities relied upon by the pleader. Because of this impasse the demurrer, general and special, was rightly sustained.

In view of the conclusion we have arrived at it is unnecessary to consider the additional challenges levied against the complaint by defendant such as that it is deficient in that it fails to charge (1) that the Sergeant Stryker portrayed referred to the plaintiff rather than some other sergeant by that surname in the invading forces, or (2) that the fictionalized portrayal of the actual activities of the plaintiff were not in fact accurate portrayals of his actual activities or (3) that the fictional portrayals were in any manner untrue or discrediting or did not properly portray plaintiff's actual activities or (4) that the portrayal was in any sense an unwarranted portrayal of the actual activities of the plaintiff. It is unnecessary here to set forth in detail, these and other challenges raised by the special demurrer all of which could readily have met by pleading over—a right which was specifically granted by the court below.

The case of Binns v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108, L.R.A. 1915C, 839, so heavily relied upon by plaintiff, is not in point. Recovery was permitted in that case by reason of a New York statute for which no counterpart rests in California. That statute gives a cause of action for the use, without consent, of a person's name or photograph for the purposes of trade or of advertising. The dictum found in Levey v. Warner Bros. Pictures, D.C.S.D.N.Y.1944, 57 F.Supp. 40, which has been quoted to us, is likewise based on the New York statute mentioned. The case of Melvin v. Reid, 112 Cal.App. 285, 297 P. 91, 93, does not hold as appellant seems to think that a motion picture photoplay depicting the incidents of a person's life is in and of itself actionable. On the contrary the court itself said that "* * the use of the incidents from the life of appellant in the moving picture is in itself not actionable." What the court held was that the incidents portrayed went so far that they should be regarded as an unwarranted intrusion into plaintiff's privacy. No comparable set of facts is presented in the instant case. The medium of the publication, as we view it, is not a controlling factor.

In this case we are not faced with a real and honest endeavor to comply with the ruling of the court below, as is often the situation in cases that come before us, but instead with an initial and continuing refusal to comply, based on the view that plaintiff's concepts of the law could not be challenged in the least by the court below. This concept, as we think we have adequately shown was erroneous and hence, it follows that the decision below was not erroneous.

The judgment is affirmed.

DORAN, Acting P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER, J., dissenting.

108 Cal.App.2d 284

SUVERKRUP et al. v. SUHL.

Civ. 4415.

District Court of Appeal, Fourth District, California.

Dec. 19, 1951.

Action by A. P. Suverkrup and others, doing business as John Suverkrup Lumber Company, a copartnership, against Margaret Suhl to foreclose a mechanic's lien. The Superior Court of San Bernardino County, A. D. Mitchell, J., entered a money judgment against defendant and she appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that defendant promised and agreed to pay for materials furnished and that they were furnished at her instance and request.

Judgment affirmed.

1. Mechanics' Liens ⚷281(3)

In action to foreclose mechanics' lien, evidence sustained finding that defendant promised and agreed to pay for materials furnished and that they were furnished at her special instance and request.

2. Frauds, Statute of ⚷23(1)

Where merchandise was sold to defendant personally and not to corporation and there was no evidence of agreement of guaranty between the parties, statute requiring a writing before guarantor can be held liable was not applicable. Code Civ. Proc. § 1973.

3. Frauds, Statute of ⚷89(1)

Where part of building materials sold by plaintiff were accepted and received by defendant and her agents, statute requiring certain agreements to be in writing was not applicable. Code Civ.Proc. § 1973a.

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Joseph V. Mazziotta, San Bernardino, for appellant.

Waldo Willhoft, San Bernardino, for respondents.

MUSSELL, Justice.

Defendant appeals from a money judgment rendered against her in an action to foreclose a mechanic's lien.

It is alleged in the complaint that plaintiff sold and supplied to defendants certain building materials for use in the construction of an ice skating rink near the city of San Bernardino and that defendants promised and agreed to pay the reasonable value of said building materials. A judgment was prayed for in the sum of $2,296.75, the alleged unpaid balance. Margaret W. Suhl was the only defendant who was served and appeared at the trial.

It was stipulated that the merchandise was actually delivered at the ice hockey rink and that the charges made therefor were reasonable. The controlling question before us is whether there is substantial evidence to support the trial court's findings that the materials were furnished at the defendant's instance and request and that she agreed to pay for them personally.

Defendant was the principal shareholder in the San Bernardino Ice Hockey Club, a corporation. The remaining shares were owned by Mr. Cornell and Mr. William Kipp.

In May, 1950, Mr. Kipp and Mrs. Suhl called at plaintiffs' place of business to arrange for the purchase of building materials for the construction of an ice rink. They talked to A. P. Suverkrup, who was a junior partner and in charge of plaintiffs' extension of credit to prospective purchasers of building materials. Mr. Suverkrup testified concerning the conversation which took place at his office as follows: "A. Mrs. Suhl said—Mrs. Suhl wanted to purchase lumber and Mr. Kipp wanted to purchase lumber for the San Bernardino Ice Hockey Association and I said that I did not sell to any small corporation because previous to that time, in the year 1951, the company had taken a loss selling to small corporations because there was no single personal financial responsibility and I suggested that they apply for a modernization loan."

Following this conversation, Mr. Suverkrup prepared an application for a loan and submitted it to the Bank of America. The bank rejected the application of the hockey club corporation, following which Mr. Kipp again called upon Mr. Suverkrup and asked him to sell the merchandise to Mrs. Suhl and to Mr. Kipp personally. Mr. Suverkrup called Mrs. Suhl on the telephone and informed her that Mr. Kipp had been in his office and wanted to charge the merchandise to himself and Mrs. Suhl. Mr. Suverkrup told Mrs. Suhl that he didn't know Mr. Kipp and that if she wanted to open an account, he would sell and deliver the merchandise to her. Mrs. Suhl then stated that it would be all right to open the account in her name and charge the material to her. Mr. Suverkrup then obtained a credit report on Mrs. Suhl and after considering it, sold the materials to her and delivered them to the construction site. All invoices were made out to "Margaret W. Suhl" and sent to her address. The bills for May and June, 1950, were paid. The defendant then failed to make further payments. On or about August 22, 1950, Mr. Suverkrup called upon Mrs. Suhl and asked for payment of the account. He testified concerning the conversation as follows: "A. I asked her for payment of the account. She told me that at the present time she couldn't pay it and I said well, that we had extended credit on the basis of the tenth of the month following and we needed our money and I wanted the money. She said that she was negotiating or making some arrangements for the sale of the Ice Hockey Association and she would pay me; she was responsible for the bill, she said she would send the money in a few days and have something worked out on it. I said that was all right and I went back to my office, then I called her again possibly a week or so later and again requested payment and she said she couldn't pay me."

The defendant first argues that there was no agreement, express or implied, between the parties that defendant would be liable personally to plaintiffs for the building materials furnished. However, in addition to the testimony of Mr. Suverkrup concerning the conversations had with defendant, Mr. Kipp testified as follows:

"Q. Did she (Mrs. Suhl) say anything about what arrangements she made with Suverkrup? A. Yes.

"Q. What did she say? A. That the stuff was sold to her, that she was responsible."

Defendant testified that she did not make any arrangement with plaintiffs concerning obtaining credit for lumber. However, she admitted talking to Mr. Suverkrup on the telephone and the conversation had in his office and admitted that Mr. Suverkrup told her he did not care to extend credit to a little corporation because of previous experiences with other small corporations.

[1] While there is some conflict in the testimony of defendant and Mr. Suverkrup, that conflict was resolved in favor of the plaintiff by the trial court and since its findings that defendant promised and agreed to pay for the materials furnished and that they were furnished at her special instance and request are supported by substantial evidence they are binding upon this court.

[2] It is argued that defendant was only a guarantor of the account of the hockey club corporation and that therefore under the provisions of section 1973 of the Code of Civil Procedure there must be a writing before she can be held liable. This argument is without merit as the code section has no application where, as here, the merchandise was sold to defendant personally. The evidence shows that plaintiffs were not interested in selling the merchandise to the ice hockey corporation and in fact refused to do so. Defendant presented no evidence which would support a finding that an agreement of guaranty was entered into between the parties. Such an agreement was neither alleged nor proved.

[3] Defendant argues that the trial court erred in admitting parol evidence of an agreement required to be in writing by the provisions of section 1973a of the Code of Civil Procedure. This section has no application to the present case since there is substantial evidence that part of the building materials sold were accepted and received by defendant and her agents.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

D. L. GODBEY & SONS CONST. CO. v. DEANE et al.*

Civ. 18590.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1951.

Rehearing Denied Jan. 2, 1952.

Hearing Granted Feb. 11, 1952.

D. L. Godbey & Sons Construction Company sued Ben C. Deane and others for money due on contract and for services and materials furnished. The Superior Court of Los Angeles County, Julius V. Patrosso, J., sustained a demurrer without leave to amend, and plaintiff appealed. The Court of Appeals, Moore, P. J., held that the oral modification of a written building contract relied on by plaintiff was not enforceable under statute as "executed," because plaintiff had performed its terms, where defendant had not made payment thereunder.

Judgment affirmed.

1. Contracts ⟹238(2)

Performance on one side is not sufficient to make an oral agreement altering a written agreement enforceable under statute as "executed," but there must be complete execution of obligations of both parties. Civ.Code, §§ 1661, 1698.

See publication Words and Phrases, for other judicial constructions and definitions of "Executed".

2. Contracts ⟹238(2)

Building contractor's performance of duties called for in initial written contract did not render alleged oral agreement to modify such contract as to basis of payment "executed" so as to make the oral alteration enforceable, where other party to contract had not made payment. Civ. Code, §§ 1661, 1698.

3. Evidence ⟹445(7)

In building contract, provision "basis of payment to be determined by actual measurement of forms" was not ambiguous and parol evidence of subsequent oral agreement was inadmissible.

4. Contracts ⟹170(1)

In absence of fraud the plain, unmistakable, unambiguous language of contract cannot be stricken or altered upon a mere declaration of parties' concept of the contract.

5. Estoppel ⟹58

Defendants were not estopped from resisting enforcement of oral modification of written building contract as to basis of computing compensation, where plaintiff contractor had suffered no detriment or prejudice in reliance upon any act or promise. Code Civ.Proc. § 1962, subd. 3.

6. Work and Labor ⟹10

Count of contractor's complaint for value of alleged services and materials furnished in reliance on written contract and unenforcible oral modification thereof could not be maintained where original agreement contemplated that plaintiff would furnish all materials and labor required for fulfillment of the contract.

7. Pleading ⟹223

Where a demurrer is properly sustained to the first count, a second cause of action in form of a common count and based upon same facts must likewise fall before demurrer.

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Glen Behymer and Lewis M. Andrews, Los Angeles, for appellant.

Edmond Gattone, Los Angeles, for respondents.

MOORE, Presiding Justice.

Defendants' general demurrer to plaintiff's fourth amended complaint having been sustained without leave to amend, plaintiff appeals from the ensuing judgment.

The complaint is in two counts: (1) for money allegedly due on a contract; (2) for the reasonable value of alleged services and materials furnished to defendants. Count I pleads the written contract in haec verba and declares that appellant was to furnish materials and perform certain concrete work for respondents, consisting of, insofar as applicable here, the construction of foundation and retaining walls. Respondents therein agreed to compensate appellant at the rate of 76 cents per cubic foot. The contract further recited that the

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* Subsequent opinion 246 P.2d 946.

"basis of payment to be determined by actual measurement of forms." Count I alleges that subsequent to the execution of the contract the parties agreed that the last above quoted phrase was ambiguous and it did not provide a method for computing cubic concrete work not contained within the form, and "in exchange for their mutual covenants and agreements in that respect, and for the purpose of eliminating possible future dispute between the parties to said contract and in order to provide for that portion of the concrete that under the plans were required to be poured outside of forms (and which ultimately were actually poured outside of forms) orally expanded and clarified said written agreement by entering into an understanding that, in order to properly arrive at the amount of cubic concrete work in foundation and retaining walls and footings upon said jobsite, whether poured within or outside of forms, the parties to said contract would calculate the amount of cubic yards of concrete actually poured, whether within forms or outside of forms, and with respect to such classes of work only (to wit: cubic concrete work in foundation and retaining walls and footings), at the contract price of 76 cents per cubic foot * * and the plaintiff would furnish to defendants each day * * * copies of delivery tickets * * * to show the actual cubic yards of concrete poured on the jobsite each day * * *." Count I proceeds to declare that the contract as modified by the oral agreement was faithfully and punctually performed by plaintiff; all computations were made in accordance therewith by plaintiff who relied upon the oral amendment which fact defendants knew and by reason thereof defendants are estopped by their conduct from questioning the oral clarification of the writing.

On the basis of form measurement appellant was paid $74,647.94. In this action he seeks an additional $12,182.99—a sum allegedly resulting from computing the payment basis according to the actual amount of concrete delivered.

Respondents contend that the alleged oral modification of the written contract was a nullity by reason of the fact that it was not supported by a sufficient consideration nor was it an "executed oral agreement" within the meaning of section 1698 of the Civil Code. The question thus posed for decision is whether the complaint alleges a valid cause of action on the oral modification of the original written contract.

Civil Code section 1698 provides that "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Since plaintiff relies herein upon an oral modification alone, the issue is whether it meets the code requirement of "executed oral agreement".

[1] Section 1661 of the Civil Code provides that "an executed contract is one, the object of which is fully performed. All others are executory." "An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligations of both parties * * *" Pearsall v. Henry, 153 Cal. 314, 325, 95 P. 154, 157; see also Klein Norton Company v. Cohen, 107 Cal.App. 325, 330, 290 P. 613; 4 Cal.Jur.Supp., Contracts, sec. 226, p. 162.

[2] From the agreement as allegedly modified herein, appellant was to construct certain foundations and retaining walls on respondents' construction sites. Thereafter, it rendered full performance as promised. Respondents on the other hand were to perform by compensating appellant for his labors at the rate of 76 cents per cubic foot of concrete delivered to and poured on the jobsite. This they have not done. How can it be said, then, that the oral agreement has been executed when complete performance has taken place only on one side?

Appellant, however, argues that under section 1698 where materials have been supplied or services rendered and accepted and when all that remains is for payment to be made, a suit may be maintained on the contract as modified. Such contention is at variance with the law that full payment is essential to render an oral agreement executed. In Western Machinery

Company v. Graetz, 42 Cal.App.2d 296, 298–299, 108 P.2d 711, a lessee sought to show that a lease agreement had been orally changed to a contract of sale. It was there held that the oral agreement was not executed under section 1698 when an $87.75 balance remained to be paid on the alleged agreed price of $700. In Bennett v. Potter, 180 Cal. 736, 744, 183 P. 156, 159, an action based upon an alleged oral modification of a contract for attorney's fees, the modification relied upon was in the form of an account stated which the court held to be a "mere unperformed promise" and not an executed contract and denied recovery. Likewise, in Puritas Laundry Company v. Green, 15 Cal.App. 654, 661, 115 P. 660, 663, it was held error to admit evidence of an oral modification increasing sales commissions above the rate provided for in a written contract for the reason that the "agreement as to the sum claimed was unexecuted".

The decisions involving construction contracts later modified by oral agreements, Nuttman v. Chais, 101 Cal.App.2d 476, 225 P.2d 660, Anderson v. Johnston, 120 Cal. 657, 53 P. 264, and Gottlieb v. Tait's, Inc., 97 Cal.App. 235, 275 P. 446, are distinguishable on their facts. In Nuttman v. Chais [101 Cal.App.2d 476, 225 P.2d 661], the builder commenced construction of certain additions to defendants' residence, then the plans at the instance of defendants were revised and a "much larger and more expensive structure" was agreed upon and completed by the contractor. In Anderson v. Johnston the plans for constructing the building were altered orally in that defendant requested the contractor to omit two windows; also, certain posts furnished by the defendant were not of the proper height as designated in the contract and the defendant therefore requested that the building be constructed lower in height than provided for in the written agreement. The owner sought to avoid payment to the builder on the ground that the building had not been completed according to the plans. In Gottlieb v. Tait's Inc., the builder, pursuant to an oral agreement, completed extra construction work above and beyond that called for in the written contract. The decision in favor of the contractor, however, turned on the point that there was a new contract substituted for the original and section 1698 was not applicable.

Thus, in each of the decisions cited by appellant, it is seen that the plaintiff at the defendant's request has performed work or service outside the scope of the written contract, something beyond that which he was originally obligated to do. In each situation, an element of estoppel was present: the defendant was properly not permitted to stand idly by while the other party acted in reliance upon the oral promise. "To apply section 1698 * * * to such a state of facts would * * * be to make it an engine for the perpetration of fraud, instead of a defense against it." 4 Cal.Jur.Supp., Contracts, sec. 226, p. 164. A contrary situation is present herein since appellant has performed only the very duties called for in the initial written building contract.

[3, 4] Appellants also contend that the provision "Basis of payment to be determined by actual measurement of forms" is ambiguous and therefore that parol evidence of the subsequent agreement is admissible to make such terms definite. The ready answer to such contention, however, is that in the quoted phrase no ambiguity exists. The contract clearly and precisely provides that the cement work is to be paid for at the rate of 76 cents per cubic foot and that the cubic area is to be computed by measuring the forms. On no basis can the infinitive phrase be declared ambiguous or uncertain. Accordingly, in the absence of fraud, the plain, unmistakable, unambiguous language cannot be stricken or altered upon a mere declaration of appellants' concept of the contract. Fleming v. Law, 163 Cal. 227, 234, 124 P. 1018.

[5] Appellants' argument that an estoppel should be invoked against respondents cannot be adopted for the good reason that no detriment or prejudice has been suffered by plaintiff in reliance upon any act or promise of respondents. Code of Civil Procedure, section 1962, subd. 3, therefore, has no application.

[6, 7] Count II necessarily falls since the original written agreement contemplated that plaintiff would furnish all the materials and labor required for the fulfillment of the contract. Also, where a demurrer is properly sustained to the first count, a second cause of action framed in the form of a common count and based upon the same facts necessarily must likewise fall before the demurrer. Rose v. Ames, 53 Cal.App.2d 583, 589, 128 P.2d 65.

Judgment affirmed.

McCOMB, J., concurs.

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108 Cal.App.2d 254

WELLMAN v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 18308.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1951.

Harrison W. Wellman, Jr., brought action against the Security-First National Bank of Los Angeles, etc., and others to quiet title to personalty that had been in joint safety deposit box of plaintiff and his father and to have written agreement executed by plaintiff and widow of plaintiff's father in settlement on their conflicting claims set aside on ground of alleged fraud of named defendant, and to have it and other defendants declared trustees. The Superior Court of Los Angeles County, William B. McKesson, J., entered a judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, White, P. J., held that second cause of action alleged a good cause of action.

Judgment reversed with directions.

1. Pleading 🔑192(3)

Where plaintiff pleaded specific and detailed facts of his case in second cause of action, and it clearly appeared that first and third causes of action were based on same facts as those in second cause, first and third causes of action, consisting as they did of legal conclusions derived from specific facts of second cause of action, could not prevail against a demurrer, if second cause failed to state facts sufficient to constitute a cause of action.

2. Executors and Administrators 🔑443(1)

In action against administrator of deceased father of plaintiff to quiet title to personalty that had been in joint safety deposit box of plaintiff and father and to have written agreement by plaintiff and widow of plaintiff's father in settlement of conflicting claims set aside on ground of alleged fraud of administrator, and to have administrator and other defendants declared trustees of property of father's estate, second cause of action alleging that plaintiff, by fraudulent representations, was prevented from appearing in adversary proceeding in probate court on merits and that there had been no adversary trial of issues involving plaintiff's rights, sufficiently presented a case of breach of fiduciary duty.

3. Trusts 🔑365(2)

In action brought on April 24, 1950 against administrator of deceased father of plaintiff to quiet title to personalty that had been in joint safety deposit box of plaintiff and father and to have written agreement by plaintiff and widow of plaintiff's father in settlement of conflicting claims set aside on ground of alleged fraud of administrator, and to have administrator and other defendants declared trustees of property of father's estate, second cause of action alleging that plaintiff was induced by fraudulent representations on January 5, 1948 to enter into agreement, and that agreement was approved by court on August 6, 1948, and that plaintiff, by fraudulent representations was prevented from appearing in adversary proceeding on merits, did not show on its face that cause of action was barred by laches.

4. Limitation of Actions 🔑178

In action brought against administrator of estate of deceased father of plaintiff to quiet title to personalty and to have written agreement executed by plaintiff and widow of plaintiff's father in settlement of conflicting claims set aside on ground of alleged fraud of administrator, and to have administrator and other defendants declared trustees, first cause of action was not vulnerable to contention that it was barred by the statute of limitations, where it alleged that "within three years last past" administrator took possession of personalty of plaintiff. Code Civ.Proc. § 338.

5. Limitation of Actions ⚷178

In action brought on April 24, 1950 against administrator of estate of deceased father plaintiff to quiet title to personalty and to have written agreement executed by plaintiff and widow of plaintiff's father in settlement of their conflicting claims set aside on ground of alleged fraud of administrator, and to have administrator and other defendants declared trustees, third cause of action was barred by two-year statute of limitations, where allegations established that possession of plaintiff's personalty by administrator was allegedly wrongful as against plaintiff from at least May 1, 1947. Code Civ.Proc. § 339, subd. 1.

◆

Houser & Houser, J. Everett Houser, Long Beach, for appellant.

Church, Church & Howard and Charles H. Church, Los Angeles, for respondents.

WHITE, Presiding Justice.

Demurrers, general and special, to plaintiff's amended complaint were sustained with leave to amend. Plaintiff having failed to amend within the time allowed, the action was dismissed pursuant to the provisions of section 581 of the Code of Civil Procedure. From the judgment of dismissal plaintiff prosecutes the present appeal.

In general, the facts are that Harrison W. Wellman, father of plaintiff, died intestate on February 13, 1947, and the defendant Security-First National Bank, hereinafter referred to as the bank, was appointed administrator of the estate. At the time of the death of decedent, certain personal property was held in a safe deposit box at a branch of defendant bank. The decedent also left surviving him his widow, Elsie P. Wellman. On January 5, 1948, the conflicting claims of Elsie P. Wellman and plaintiff to the estate of decedent were settled by written agreement, whereby plaintiff received $5,000 in cash and a ranch in Colorado, and Elsie P. Wellman received the residue of the estate. The agreement was presented to and approved by the superior court, sitting in probate, on August 6, 1948. On April 26, 1949, the final account of the bank as administrator of the estate was approved and distribution ordered pursuant to the terms of the agreement. On May 2, 1949, Elsie P. Wellman died, her will was admitted to probate, and letters testamentary issued to defendant bank. On April 24, 1950, plaintiff instituted the present action, seeking to quiet title to the personal property that had been in the joint safety deposit box, to have the agreement of January 5, 1948, declared void on the ground of fraud, to have the bank and other defendants declared trustees of the property of the estate received by them, and seeking other relief.

The amended complaint contains three causes of action. In the first cause of action it is alleged that on February 13, 1947, and for a long time prior thereto, and at all times since, and now, plaintiff was and is the owner of and entitled to possession of property consisting of $4,220 in currency and cashier's checks on a branch of defendant bank in the total amount of $38,500; that this personal property "was deposited and held in a safe deposit box" at a branch of defendant bank "in joint tenancy between plaintiff and his father," and "upon the death of the latter, plaintiff became entitled to the same as his sole and exclusive property." It is then alleged: "That plaintiff is informed and believes, and on that ground alleges, that within three years last past, and on or about May 1, 1947, disregarding plaintiff's rights, defendant Security-First National Bank of Los Angeles, as Administrator of the Estate of Harrison W. Wellman, deceased, took possession of said property and thereafter transferred possession of the same to itself as Executor of the Last Will and Testament of Elsie P. Wellman, deceased, and at all times since has been, and is still in possession of the same as such." It is then alleged that the claims of defendants are without right.

In his second cause of action plaintiff alleged that the decedent, Harrison W. Wellman, was married in 1896 to Eda Wellman, and that plaintiff was the only child of this union; that his father and mother were divorced in 1922 and in 1931 decedent married the defendant Elsie P. Wellman; that no children were born of this second marriage; that at the time of the second marriage decedent owned property worth $250,000 and defendant Elsie P. Wellman owned real property worth $15,000. That on August 16, 1941, decedent and Elsie P. Wellman agreed in writing that the wife would always have a home and an income of $300 per month and that except for a certain home and income property all other property was the separate property of the party in whose name it was placed. A copy of the agreement was annexed to and made a part of the amended complaint.[1] It was further alleged that although Harrison W. Wellman had contracted to make certain testamentary provisions, no will was found upon his death, and defendant bank was appointed administrator of his estate.

Upon the death of Harrison W. Wellman, it is averred, it was found that he had already placed about half of his property, real and personal, in the name of plaintiff and that other personal property, consisting of $4,220 in currency and six cashier's checks drawn on defendant bank in favor of plaintiff for a total of $38,500, were in a safe deposit box rented from defendant bank "and held in joint tenancy between Harrison W. Wellman and plaintiff"; that the total value of the estate in California was $82,214.34, and decedent also had real property in Colorado valued at $24,000.

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[1] Pertinent portions of the agreement are as follows:

"The parties are husband and wife and are possessed of separate property as well as community property. Since they have been residents of California and also of Colorado since their marriage and their present assets have been acquired at various times, partly with the proceeds of separate property and partly with the proceeds of community property, it would be difficult to determine the proportions and identity of the separate property and the community property of the parties.

"To avoid any difficulty, dispute, or uncertainty regarding their property, the parties are this day mutually dividing all assets standing in either or both of their names so that all their assets hereafter will be the separate property of one or the other as specified herein.

"The apartment house property numbered 1106 Harvard Boulevard, Los Angeles, California is and shall be the separate property of the wife and the husband in equal shares as tenants in common; but the husband hereby agrees that after his death the wife shall have the right to occupy and manage the entire property and shall have the right to retain as her own and separate property so much of the net income from his half of said apartment house as will make her total net income from said property equal the sum of Three Hundred Dollars ($300.00) per month. The husband further agrees to make a provision in his Will which will confirm this right.

"The residence property numbered 1861 Nichols Canyon Road, Hollywood, California, is and shall be the separate property of the wife and husband in equal shares as tenants in common. Each party agrees that after her or his death the other party may occupy said residence for life without payment of rent. Each party further agrees to make a provision in his Will which will confirm this right.

"All other property and assets of either or both parties shall be considered and is hereby made the separate property of the parties respectively according to whatever name it may stand in on the records. If any of the property mentioned in the preceding paragraphs is disposed of, the proceeds thereof shall be considered as governed by this paragraph rather than as retaining the character stipulated as to the original and specifically mentioned real estate.

"Each party agrees that the other party may make any testamentary or inter vivos disposition of his or her separate property and that she or he will not contest, question or attempt to avoid the effect of the provisions of any Will of the other party in regard to the separate property of that party except as may be necessary to enforce the provisions of this agreement as to 1106 Harvard Boulevard and 1861 Nichols Canyon Road.

"* * * * *."

In the foregoing estate proceeding, it is alleged, the administrator was represented by "its officers, agent, and attorneys John Doe, Richard Roe, Harry Roe, and David Roe; that said administrator bank was well informed of the joint tenancy arrangement which had been made * * * as to said safe deposit box, also a separate joint tenancy account between the same parties, and had held conferences with Harrison W. Wellman and taken notes preparatory to drafting a will, but" it is alleged on information and belief, no will was executed; that both the bank and defendant Elsie P. Wellman knew that decedent desired to leave her the house, $300 per month mentioned in the agreement, a car, and nothing else, the rest of the estate to go to plaintiff.

Further, it is alleged, the agents and officers of the bank and Elsie P. Wellman represented to plaintiff that it would be necessary for the bank to take charge of all the property mentioned for the purpose of getting tax clearances; that plaintiff would get back the currency and cashier's checks and one-half of the other property; but that it was necessary to liquidate all properties quickly in order to meet administration expenses, taxes and the allowance of $300 per month set up for Elsie P. Wellman; that said representations were false and known by the makers thereof to be false, but were relied on by plaintiff, who surrendered the currency and cashier's checks to the bank. That about February 15, 1947, Harry Roe, as agent and trust officer of the bank introduced plaintiff to Richard Roe, and both of them told plaintiff that Richard Roe was the bank's attorney; that he would advise plaintiff and act as his California attorney; that there was no necessity for plaintiff to have any other attorney; that plaintiff accepted this offer and returned to Colorado "upon receiving assurances from said defendant that plaintiff's interests would be fully protected."

The complaint continues as follows:

"That in December, 1947, Elsie P. Wellman, acting jointly with Richard Roe, and with the knowledge and consent of defendant bank, and while Richard Roe was representing the said administrator, summoned plaintiff from Colorado to California, whereupon Elsie P. Wellman represented to plaintiff that she was entitled to income in addition to the $300.00 per month set up for her in Exhibit A; that plaintiff was not entitled to one-half of his father's estate, but to considerably less; that a parcel of real property on Normandie near Fourth Street in Los Angeles, of the value of $5,000.00, which decedent had granted to plaintiff by outright deed, would have to be turned back to the estate; that Elsie P. Wellman had consulted with Richard Roe, who was her attorney, and that she had his support; that she and Richard Roe had a plan for settlement of the estate and that unless plaintiff agreed to such plan and permitted the estate to be closed in accordance with said plan, she would make demand for the increased allowance per month, and would see that plaintiff got considerably less than one-fourth out of the estate, if he got anything.

"That plaintiff has had no legal training and at said time had received no independent legal advice; that he knew John Doe and Richard Roe were skilled in the law and in charge of defendant bank's legal affairs; that he had trust and confidence in Richard Roe and relied on the latter's assurances heretofore mentioned that he would be plaintiff's California attorney and protect his interest, and when Elsie P. Wellman suggested a conference with Richard Roe, plaintiff readily agreed.

"That in December, 1947, or January, 1948, the conference was held with Elsie P. Wellman, Richard Roe and plaintiff present when Elsie P. Wellman made the following representations, originating either from her or Richard Roe but all concurred in and approved by Richard Roe as agent, and attorney for defendant bank, and also as legal advisor and attorney for plaintiff:

"(1) That the currency and cashier's checks in plaintiff's name, taken from the join tenancy safe deposit box heretofore described and totalling $42,720, and turned over to defendant bank for 'tax clearances' were irrevocably and irretrievably a part of the assets of the estate and did not belong to plaintiff.

"(2) That the said lot on Normandie, worth $5,000, and standing in plaintiff's name, was actually a part of the assets of the estate; that the apparent transfer to plaintiff was not legal or valid; that plaintiff would have to turn said lot over to the administrator and that if he did not do so he could and would be forced to do so by legal means.

"(3) That the provisions of 'Exhibit A' establishing the separate character of property standing in the name of decedent and granting him the right to make inter vivos disposition of the same did not apply to transfers made by decedent to plaintiff, but that all such were null and void and such property actually belonged to the estate in spite of such transfers.

"(4) That the provisions of 'Exhibit A' granting Elsie P. Wellman an income of $300 per month out of the rents from an apartment property at 1106 Harvard Boulevard, Los Angeles, California, did not actually limit such income to said source but that the $300 per month was a general charge upon the entire estate.

"(5) That the $300 per month last mentioned was not the limit of income to which Elsie P. Wellman was entitled but that the legal effect of 'Exhibit A' was to permit her to also claim additional income to cover sickness; that the additional income would amount to thousands of dollars; that it would be necessary to set aside $85,000 out of the estate to cover the income needs of Elsie P. Wellman; that the same was a proper and necessary obligation from which there was no escape and that such income payments would entirely exhaust the estate in fifteen years.

"(6) That plaintiff's interest in his father's estate was not one-half as he had supposed and as they had previously told him, but was actually one-fourth at best, and that if plaintiff appeared in said estate proceeding and insisted on proving 'Exhibit A' and presented an adversary proceeding to determine his interest in the estate, *they* would assert all possible claims in behalf of Elsie P. Wellman, including those heretofore mentioned and some not specified so that plaintiff would finally receive little or nothing from the estate.

"(7) That they had a plan for compromise under which plaintiff would receive the ranch in Colorado valued at $24,000 and $5,000, additional, and Elsie P. Wellman would receive everything else in the estate as augmented by the joint tenancy property and the lot on Normandie heretofore mentioned; that the amount offered plaintiff was in excess of that to which he was entitled under the law; that it was offered only on condition that he refrain from appearing in the estate matter to contest the claims of Elsie P. Wellman or to seek a determination of his rights by adversary proceedings, but would return to Colorado forthwith, leaving the California estate to be settled in accordance with their plan and without opposition.

"(8) That they had considered plaintiff's interests carefully and that their plan did not take advantage of him in any way, but in fact, worked to his financial advantage and that he could safely rely on the representations made and put full confidence in them without further investigation; that no investigation or consultation with others was needed in order to protect plaintiff's interests."

The foregoing representations, plaintiff charged, were false and known to be false by the makers, but were believed by plaintiff, who, in reliance thereon, consented to the proposed plan and entered into a written agreement, a copy thereof being attached to the complaint as "Exhibit B", whereby he agreed to the proposed plan. The agreement recited the existence of a "controversy" with respect to the character and nature of the property of the estate and the rights and extent to which plaintiff and Elsie P. Wellman were entitled to share in the estate, and their desire to "settle and compromise all rights, differences and controversies."

It was further alleged that in truth the currency and cashier's checks belonged to plaintiff as surviving joint tenant; that the Normandie lot was his sole property; that Exhibit A limited the widow's income to $300 from a certain source and was not a charge on the entire estate, and did not authorize additional income for sickness; that plaintiff was entitled to one-half the estate; that the amount offered in compromise was but a fraction of that to which he was entitled; that no consideration was given to his interests and there was no financial advantage to him in the plan; that the purpose of said representations was to deceive plaintiff and "keep plaintiff out of court, or to receive independent advice thereon, or to file an adversary proceeding to enforce distribution to him of his just share of said estate"; that in the absence of such representations plaintiff would not have agreed to the plan or allow the same to be approved by the probate court or refrained from seeking independent legal advice or failed to file objections to the decree of distribution in his father's estate.

It further appears from the amended complaint that the bank's attorneys prepared a will for Elsie P. Wellman excluding plaintiff from any share in her estate, and upon her death on May 2, 1949, and prior to distribution in the father's estate, Elsie P. Wellman died and defendant bank was appointed her executor. The compromise agreement between plaintiff and Elsie P. Wellman was presented to and approved by the probate court on August 6, 1948, without notice to or knowledge of plaintiff. The final account in his father's estate was settled and distribution ordered, pursuant to the terms of the compromise agreement, on April 26, 1949.

The theory of this second cause of action, as indicated from the foregoing and from other allegations of the amended complaint, is that plaintiff, by fraudulent representations "has been prevented from appearing in or presenting an adversary proceeding in the probate court upon the merits and that, in fact, there has been no adversary trial or decision of the issues involving plaintiff's rights herein."

In the third cause of action it was charged that about June, 1949, defendant bank, as executor of the estate of Elsie P. Wellman, deceased, wrongfully obtained from plaintiff currency in the amount of $4,220 and cashier's checks drawn on defendant bank in favor of plaintiff for $38,500, which checks were cashed by defendant bank and the currency and proceeds of the checks transferred to it as executor; that the remaining defendants assert a claim to said sum or some part thereof and are joined so that their rights, if any, can be adjudicated.

The general and special demurrers filed by the bank, Grace P. Calhoun and Yeates Parsons (the latter two individuals being beneficiaries under the will of Elsie P. Wellman) were sustained without specification in the order as to what grounds of demurrer were found to be meritorious.

[1] It is true, as respondent contends, that plaintiff having pleaded the specific and detailed facts of his case in his second cause of action, and it clearly appearing that the first and third causes of action are based on the same facts as those set forth in the second cause, the first and third causes of action consisting as they do of legal conclusions derived from the specific facts of the second cause of action, cannot prevail against a demurrer if the second cause fails to state facts sufficient to constitute a cause of action. Shive v. Barrow, 88 Cal.App.2d 838, 199 P.2d 693; Harris v. Kessler, 124 Cal.App. 299, 12 P.2d 467; Powers v. Freeland, 114 Cal. App. 146, 299 P. 736; Hays v. Temple, 23 Cal.App.2d 690, 73 P.2d 1248; Rose v. Ames, 53 Cal.App.2d 583, 128 P.2d 65. The decision of this appeal, therefore, turns upon the sufficiency of the facts set forth in the second cause of action.

The position of respondents is that the second cause of action shows only that plaintiff and Elsie P. Wellman entered into an agreement to settle their conflicting claims to the estate; that the decree of the probate court approving the agreement and the decree of final distribution in the estate of Harrison W. Wellman are res judicata; that alleged fraud in the procurement of the agreement, which was presented to and approved by the probate court, and upon which the decree of distribution was made, does not constitute extrinsic fraud giving rise to a cause of action in equity to avoid the effect of such decree. The probate court, it is urged, not only had jurisdiction to inquire into the validity of the agreement so far as it embraced property claimed not to be part of the estate and property concededly a part of the estate, but it had the duty to inquire into the fairness of the agreement. Carr v. Bank of America, 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282; In re Estate of Stanley, 34 Cal.2d 311, 209 P.2d 941; Bennett v. Forrest, 24 Cal.2d 485, 150 P.2d 416; In re Estate of Cazaurang, 75 Cal.App.2d 217, 170 P.2d 694. Thus the problem presented turns upon whether respondents are correct in their contention that the facts show no more than a compromise of differences and that appellant was not prevented, by fraud extrinsic to the matters in controversy, from presenting his claims in court. For the classic definition of "extrinsic fraud", reference is made to United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93.

A case much similar to the one at bar is Jorgensen v. Jorgensen, 32 Cal.2d 13, 193 P.2d 728, where equitable relief was denied a wife who sought to set aside provisions of a divorce decree involving a property settlement agreement induced by alleged false representations of the husband as to whether certain property was separate or community. Concededly, the cases are alike in that conflicting claims were settled by an agreement presented to and approved by the court. We perceive a distinction between the facts of the two cases, however, and for the purpose of pointing out this distinction, as well as stating the considerations applicable to cases of this character, we quote from the opinion in the Jorgensen case prepared by Mr. Justice Traynor, as follows, 32 Cal.2d at pages 18, 19, 193 P.2d at page 731: "* * * The public policy underlying the principle of res judicata that there must be an end to litigation requires that the issues involved in a case be set at rest by a final judgment, even though a party has persuaded the court or the jury by false allegations supported by perjured testimony. This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case. Thus, equitable relief will be denied where it is sought to relitigate an issue involved in the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his case. * * * The terms 'intrinsic' and 'extrinsic' fraud or mistake are generally accepted as appropriate to describe the two different categories of cases to which these policies of the law apply * * *. They do not constitute, however, a simple and infallible formula to determine whether in a given case the facts surrounding the fraud or mistake warrant equitable relief from a judgment. * * * It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case."

The court in the cited case proceeded to hold that since the husband had fully disclosed his assets, and her attorney did not intentionally fail to protect her interests, she was barred from equitable relief by her admission that she did not investigate the facts, but chose to rely on the husband's representation as to what part of the disclosed property was community property. A similar ruling would be indicated in the present case, where there was no concealment of the assets of the estate, and the agreement entered into settled the conflicting claims of the widow and the son.

But in the present cause, we find in the amended complaint allegations that a trust officer of the defendant bank and an attorney for the bank advised plaintiff that he should consult with the bank's attorney, and that this attorney "would advise plaintiff and act as his California attorney" and that his interests "would be fully protected." Further, that the representations inducing execution of the agreement, as hereinabove quoted, were "concurred in and approved" by the attorney as agent and attorney for the bank, and also as legal advisor and attorney for plaintiff. These charges, however difficult of proof they may be thought to be, bring the case within the rule applicable where a party has been deprived of a fair opportunity fully to present his case. As was said in Jorgensen v. Jorgensen, supra, 32 Cal.2d at pages 19 and 20, 193 P.2d at page 732: "The latter policy" (permitting relief) "applies when a party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him facts essential to the protection of his rights, even though such facts concerned issues involved in the case in which the judgment was entered. 'The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule.' 3 Freeman, Judgments, 5th ed., p. 2576; see, Laun v. Kipp, 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655. In this state equitable relief has been granted from final judgments settling the accounts of guardians, administrators, or executors who withheld information that would have enabled the beneficiaries to attack the accounts. * * * The same principle applies to decrees distributing the estate of a decedent adversely to the rights of beneficiaries who have been precluded from pursuing their rights by concealment of facts by the fiduciary * * * and to other probate decrees obtained under similar circumstances. * * *."

It is true, in the present case, there was no concealment of *facts,* strictly speaking, the amount and character of the property being fully disclosed and known to both parties. But the facts alleged in the second cause of action sufficiently charge that plaintiff was prevented from presenting his case by reason of deception by persons under a fiduciary duty toward him, within the meaning of the language in United States v. Throckmorton, supra, 98 U.S. 61, 65, 25 L.Ed. 93, where the court said: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced upon him by his opponent, * * * or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side,—these, and similar cases which show that there never has been a real contest at the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside the former judgment or decree and open the case for a new and fair hearing."

See, also, Duffy v. Duffy, 82 Cal.App.2d 203, 207, 186 P.2d 61; Larrabee v. Tracy, 39 Cal.App.2d 593, 598, 599, 600, 104 P.2d 61.

[2] The facts, taking them as alleged, clearly present a case of a breach of a fiduciary duty whereby the plaintiff was prevented from "fully exhibiting his case" within the meaning of the language in the case last cited, and an overreaching on the part of persons in a fiduciary position which resulted in the plaintiff, the son of the decedent, entering into an improvident agreement upon what he believed to be sound legal advice given in his interest. The terms of the agreement between Elsie P. Wellman and decedent, as well as the alleged facts concerning the personal property in the joint safe deposit box and the real property allegedly granted to plaintiff, would appear to justify a conclusion, although we do not expressly so hold, that the alleged representations were false and that plaintiff was entitled to a substantial share of his father's estate, or at least to the property in the safe de-

posit box, which latter property the bank allegedly appropriated under the claim that it was required to do so for "inheritance tax" purposes.

We have given consideration to the several cases cited by respondents. However, they set forth and apply the rules already adverted to in this opinion as applicable to varying factual situations. None of the cited cases are identical with the one now under consideration and none are controlling. At most, they serve to illustrate that the rule of "extrinsic" and "intrinsic" fraud must be applied to a variety of factual situations. That the rule does not constitute "a simple and infallible formula" was pointed out by Mr. Justice Traynor in Jorgensen v. Jorgensen, supra, 32 Cal.2d at page 19, 193 P.2d at page 732, wherein he further pointed out the necessity of examining the facts "in the light of * * * the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case."

[3] The facts hereinbefore set forth are a sufficient answer to the argument that laches appears on the face of the complaint. If any of the parties defendant have been prejudiced or damaged by plaintiff's delay in prosecuting his suit for relief, such prejudice or damage may be shown upon a trial of the cause. We hold that laches does not appear on the face of the amended complaint. Varrois v. Gommet, 43 Cal.App. 756, 185 P. 1001.

[4] Plaintiff's first cause of action, standing by itself, is not vulnerable to the contention that it is barred by the statute of limitations (Code Civ.Proc. § 338), since it is charged that "within three years last past" defendant bank took possession of personal property of the plaintiff. This allegation is not impeached or controverted by the allegations of the second cause of action, which set forth the alleged circumstances under which defendant bank took possession of the personal property in the safe deposit box for "inheritance tax purposes" and asserted no claim thereto as administrator until within the three-year period within which the action herein was commenced. Until an adverse claim was asserted, plaintiff's cause of action did not arise.

[5] By the third cause of action defendant bank is charged, as executor of the will of Elsie P. Wellman, with having received the joint deposit moneys and checks on or about June, 1949, for the use of plaintiff, and that the "other defendants" are also asserting a claim to the moneys or some part thereof and are joined so that their rights can be adjudicated. In other words, the bank is here sought to be held as having received moneys of plaintiff, in its capacity as executor of the will of Elsie P. Wellman, following her demise, and on or about June, 1949, said moneys being the same moneys and funds which the bank had previously acquired and held as administrator of the Estate of Harrison W. Wellman, Deceased. If the allegations of the first and second causes of action are taken as true, then the possession of the bank was wrongful as against the plaintiff from at least May 1, 1947, when, according to the first cause of action, the bank took possession as administrator of the Estate of Harrison W. Wellman, Deceased. It follows, in accordance with the rule hereinbefore mentioned, that the third cause of action must fail, as being barred by the two-year statute of limitations, Code Civ.Proc. § 339, subd. 1. The demurrers were properly sustained as to the third cause of action.

The various grounds of special demurrer advanced by respondents have been considered and found unmeritorious. The facts upon which plaintiff seeks to recover have been adequately set forth in his first and second causes of action.

The judgment is reversed, with directions to overrule the demurrers, general and special, so far as they apply to the first and second causes of action of the amended complaint, to allow the demurring defendants a reasonable time to answer, if they be so advised. Appellant to recover costs on appeal.

DORAN and DRAPEAU, JJ., concur.

108 Cal.App.2d 219

SMITH et al. v. SMITH et ux.

SMITH v. SMITH et al.

Civ. 18669.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1951.

Actions by Earl D. Smith and another against Warren Seymour Smith and another and by Earl D. Smith, administrator of the estate of Minnie A. Smith, deceased, against Elsa Mina Smith, and another, to impose a trust upon decedent's money and personal property in the possession of the defendants and upon proceeds from sale of decedent's realty deeded to defendants by deceased. From a judgment of the Superior Court, Los Angeles County, Julius V. Patrosso, J., for plaintiffs, defendants appealed. The District Court of Appeal, Moore, P. J., held that the evidence supported the judgment.

Affirmed.

Trusts ⚿44(2)

In action to impose a trust for benefit of heirs upon a decedent's money and personal property in the hands of defendants, and upon proceeds of sale of realty deeded to defendants by deceased, evidence supported finding that decedent had transferred the property to defendants in trust for decedent rather than in return for defendants' promise of care and support or as an outright gift. Code Civ. Proc. § 2061.

◆

David G. Watts, Los Angeles, for appellants.

Richard L. North, Los Angeles, for respondent Earl D. Smith, Administrator.

Joseph J. Jonesi, Los Angeles, for respondent Earl D. Smith.

Russell K. Lambeau, Los Angeles, for respondent Gerald Anderson Smith.

MOORE, Presiding Justice.

Defendants appeal from a judgment imposing a trust upon certain personal property in their possession and declaring that respondent Earl Smith as administrator of the estate of Minnie A. Smith is entitled to such property.

Respondent, Earl D. Smith, son of decedent, initiated this action to impress a trust in favor of the heirs of decedent upon the proceeds from the sale of certain realty situated in Salt Lake City, Utah; one thousand shares of the capital stock of Equity Oil Company, and $1700 in money—all formerly owned by decedent and transferred shortly before her death to respondents' brother, Warren, and the latter's wife, Elsa.

Mrs. Smith deceased in Los Angeles on May 17, 1948, at the age of 78. She formerly resided in Salt Lake City where in March, 1948, she was severely injured in an accident. During the period of her ensuing hospitalization, her daughter-in-law Elsa paid her a visit on April 13 and remained there until the twenty-fourth when she returned to her own home in Los Angeles, accompanied by Mrs. Smith. Just prior to such departure for Los Angeles, decedent delivered a deed conveying her Utah realty to Elsa and Warren. At the same time she presented to appellants her household furniture, a draft for $800 or $900 and endorsed in blank and delivered to appellants her certificate for the shares of Equity Oil Company.

Appellants answered affirmatively that there was an absolute transfer of the property to them in consideration of their promise to care for decedent and to assume and pay the expenses of her funeral and her last illness. A second affirmative defense alleged that an outright gift of her Utah home and the various items of personalty had been made to appellants by decedent. However, the trial court found that such property was transferred "only in trust for the use and benefit of the said Minnie A. Smith, with the right in the defendants to apply so much thereof as might be necessary for the support, care and maintenance of the said Minnie A. Smith." Accordingly, it was adjudged that Earl, as administrator of decedent's estate was entitled to the possession of all the personalty including the proceeds from the sale of the real property which had been effected by appellants.

The latter now contend that the evidence is insufficient to support the findings that a trust was intended, that such evidence is not "clear and convincing" and thus does not meet the rule that testimony as to the oral admissions of any person must be received with caution (Code Civ. Proc., sec. 2061) but when he is dead and it is impossible to contradict the witnesses who testify, an even greater degree of caution must be exercised for the reason that evidence so given under such circumstances is the weakest and most unsatisfactory, Austin v. Wilcoxson, 149 Cal. 24, 29, 84 P. 417. The ensuing discussion will disclose that such rule more aptly applies to the proof offered by appellants.

The sole question for decision, therefore, is whether there is any substantial evidence supporting the trial court's determination that decedent never intended an outright gift to appellants, but rather contemplated a transfer in trust for her support.

The record discloses that the most that can be said for appellants' contention is that there is a conflict in the evidence. Certainly there is substantial evidence in the form of testimony by Warren and Elsa that they were given the property absolutely. With equal force it may be asserted that the record contains evidence that decedent did not intend appellants to take the entire and absolute interest in her property. Such evidentiary support consists first of the following two documents signed by decedent on April 21 and 22:

"I saw Mr. Allen today and he said he would see me tomorrow about things. Do you want him to keep your stock or should I take it with me and put it in a deposit box for you when we get home? He said if you wanted to, he would turn the papers he had over to Warren by giving them to me to take down there. Will put it in bank for you. He said he would let me have money to pay for your bills and then get a draft for the rest and we will bank it for you. Will you sign your name on this and I'll show it to him?

"(Signed) Minnie A. Smith."

"April 22, 1948. To Whom It may Concern:

"In the event of my death I wish my Equity Oil Company stock Certificate No. 4891 to go to Warren S. and Elsa M. Smith.

"(Signed) Minnie A. Smith."

These instruments do not indicate an absolute transfer to Elsa but on the contrary support the finding that decedent made the transfer of her stock and other valuables only to a custodian for safekeeping. Both writings were prepared by Elsa and submitted to decedent while preparations were being made for the trip to Los Angeles.

Further support is found in the inconsistency revealed by Elsa's own testimony when she related that upon arriving in Los Angeles she felt the property all belonged to her and Warren and that her mother-in-law had no further interest in it. Yet, four days after arriving in the metropolis, she opened a joint account with decedent in which was deposited the $900 draft given to her in Utah.

Elsa testified that decedent on April 18 gave her the furniture in the Utah home, that she sold it to her own mother who sent a money order to Los Angeles payable to Elsa. But Elsa had decedent sign the receipt for such money.

Appellants' defense that the property was transferred to them in consideration of their promise to care for decedent was completely refuted by Elsa's own testimony that "there were no promises made." In addition, the record shows that a claim was presented to respondent as administrator of decedent's estate for hospital services rendered decedent just prior to her death.

Appellants' first exercise of ownership over any of the property occurred only after decedent suffered a stroke and was hospitalized for her last illness. Elsa testified, though, that decedent's physician had advised her that decedent would live for a number of years, notwithstanding her stroke. The doctor denied making such a statement.

Appellants argue that it was only natural that the decedent should have transferred her property to them since it was Elsa who journeyed to Salt Lake to look after the aged and infirm lady and that it was they who cared for her in Los Angeles. This is a logical argument, but it cannot be regarded as absolutely conclusive in the light of the record. Mr. and Mrs. Kinnaird had known decedent for a long period of years. They testified that they had visited her in the Utah hospital; that she had during the last year of her life stated that Earl was her favorite son; that she had declared with reference to Elsa, "I don't like that woman"; that she had said with reference to her property, "who can get it but my sons?"

On the whole, it was established by substantial evidence that the decedent made the transfers to appellants not as outright gifts or pursuant to any promises of care and support but merely to accomplish the move to Los Angeles, to facilitate the management and ultimate disposition of the property by appellants when decedent was not physically able to do so herself.

Judgment affirmed.

McCOMB, J., concurs.

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108 Cal.App.2d Supp. 895

STEINER v. CROONQUIST et al.

Appellate Department, Superior Court,
San Diego County, California.
Nov. 26, 1951.

L. L. Steiner brought action against Hugh A. Croonquist and others on two notes. The Municipal Court, City of San Diego, State of California, A. F. Molina, J., Number 44,300, entered a judgment adverse to the plaintiff, and the plaintiff appealed. The Superior Court, Appellate Department, Burch, J., Number 167,984, held that finding of Municipal Court that there was no acknowledgment of the debt so as to take the case out of the operation of four-year statute of limitations, would not be disturbed on appeal.

Judgment affirmed.

1. Limitation of Actions 🔑175

The four-year statute of limitations applicable to an action on a note, is a personal defense and may be waived. Code Civ. Proc. § 337, subd. 1.

2. Limitation of Actions 🔑182(2)

In an action on a note, defendant, if defendant desires to plead four-year statute of limitations, must make some expression in defendant's pleadings that lateness of the commencement of the action is a ground of defense. Code Civ.Proc. § 337, subd. 1.

3. Limitation of Actions 🔑185

The rule as to the proper plea of the four-year statute of limitations applicable to an action on a note, is not self-operating but depends for its enforcement on the diligence of the plaintiff in objecting to the insufficiency of the plea, either by demurrer to the answer or by timely objection at the trial. Code Civ.Proc. § 337, subd. 1.

4. Limitation of Actions 🔑183(2)

In action on notes, allegation by defendants in answer that plaintiff's action "is barred by section 337 of the Code of Civil Procedure of the State of California" was sufficient to raise defense of the four year statute of limitations applicable to an action on a note. Code Civ.Proc. § 337, subd. 1.

5. Limitation of Actions 🔑143(2)

Generally, the promise of one of several joint obligors to pay note on which four-year statute of limitations has run cannot avail to revive, as against the others, a cause of action barred by limitations or to suspend the running of the statute. Code Civ.Proc. §§ 337, subd. 1, 360.

6. Appeal and Error 🔑909(5)

The Appellate Department of the Superior Court could not assume on appeal that letter written by one of two joint obligors who executed note, requesting that holder of notes send that joint obligor an accounting of what he owed the holder of the notes so that the matter could be cleaned up, bound the other joint obligor so as to revive the cause of action barred by four-year statute of limitations. Code Civ.Proc. §§ 337, subd. 1, 360.

7. Limitation of Actions 🔑148(3)

A letter written by one of the makers of note requesting holder of note to send the maker of the note an accounting of what he owed and suggesting that they get the matter cleaned up, did not, as a matter of law, revive, as against that maker of the note, cause of action barred by four-year statute of limitations. Code Civ.Proc. §§ 337, subd. 1, 360.

8. Limitation of Actions 🔑157(1, 3)

The running of four-year statute of limitations on a note is tolled by payment of any part of the principal or interest. Code Civ.Proc. §§ 337, subd. 1, 360.

9. Evidence 🔑151(1)

Where an act is equivocal, evidence of the intent of the party is competent and relevant to establish its legal effect.

Ruel Liggett, San Diego, for appellant.

W. B. Dennis, Fall Brook, for respondents.

BURCH, Judge.

This is an action on two promissory notes, one for $750 dated February 2, 1940, which became due February 1, 1942, the other for $300, dated November 1, 1939, due six months from date. The complaint was filed on May 17, 1950. The court held the notes barred by subdivision 1 of section 337 of the Code of Civil Procedure.

Plaintiff urges on appeal that the affirmative defense of the statute was not before the court because the subdivision of the section relied upon was not pleaded in the answer, and, further, that if the issue was before the court the running of the statute was tolled by a new promise to pay within four years of suit.

The answer of the defendants alleges, among other things, that plaintiff's action "* * * is barred by Section 337 of the Code of Civil Procedure of the State of California." At the trial it developed that defendants had, within four years of the date of filing the suit but more than four years after the notes matured, written a letter to plaintiff's assignor, in which it was stated "* * * will you send me an accounting of what I owe you and let's get this cleaned up. I have my books from C. Lee now and would like to close them."

Section 458 of the Code of Civil Procedure authorizes a plea of the statute of limitations by "* * * (giving the number of the section and subdivision thereof, if it is so divided, relied upon) * * *." Section 337 has two subdivisions. It has been held that a failure to plead the pertinent subdivision, though pleading the section, is an insufficient plea. Wolters v. Thomas, 3 Cal.Unrep.Cas. 843, 32 P. 565; Overton v. White, 18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99; Hart v. Slayman, 30 Cal.App.2d 556, 86 P.2d 861; Davenport v. Stratton, 24 Cal.2d 232, 149 P.2d 4; Downs v. Benatar's etc. Stores, 75 Cal.App.2d 61, 170 P.2d 88.

Other decisions are to the effect that where the section is pleaded and the pertinent subdivision is not designated the pleading is nonetheless not a nullity. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155; St. Paul Title & Trust Co. v. Stensgaard, 162 Cal. 178, 121 P. 731, 39 L.R.A.,N.S., 741.

[1, 2] Since the statute of limitations is a personal defense, it may be waived. It is therefore required by the decisions that there be "* * * some expression that lateness of the commencement of the action is a ground of defense." Hall v. Chamberlain, 31 Cal.2d 673, 680, 192 P.2d 759, 764. If the section, but not the pertinent subdivision, be pleaded, there is "some expression" but not the exactness of pleading specified by section 458 of the Code of Civil Procedure.

In Davenport v. Stratton, 24 Cal.2d 232, 248, 149 P.2d 4, upon the authority of Churchill v. Woodworth, 148 Cal. 669, 84 P. 155, as approved in Universal Sales Corporation, Ltd. v. California Press Manufacturing Co., 20 Cal.2d 751, 773, 128 P.

2d 665, 678, the strictness of the statutory requirement is thus limited: "The rule as to the proper plea of the statute of limitations is not self-operating but depends for its enforcement on the diligence of the plaintiff in objecting to the insufficiency of the plea either by demurrer to the answer or by timely objection at the trial."

[4] The appeal here is on the judgment roll which fails to disclose that plaintiff either demurred or made timely objection at the trial; nor does plaintiff appeal from any adverse rulings in these respects. On the contrary, he urges that the defendants' attempt to plead the bar of the statute is a mere nullity. In view of the rule quoted above, we are unable to agree with plaintiff in this contention.

The other contention of plaintiff on appeal relates to the application of section 360 of the Code of Civil Procedure which provides that no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute of limitations, unless the acknowledgment or promise is contained in some writing, signed by the party to be charged thereby.

[5–7] At the outset of this discussion, it will be noted that the writing relied upon is signed only by the defendant Hugh A. Croonquist. As a general rule, the promise of one of several joint obligors cannot avail to revive as against the others a cause of action barred by limitation or to suspend the running of the statute. State Loan etc. Co. v. Cochran, 130 Cal. 245, 255, 62 P. 466, 600; Searles v. Gonzalez, 191 Cal. 426, 434, 216 P. 1003, 28 A.L.R. 78. We cannot assume on this appeal that the defendant Vivian Croonquist empowered Hugh A. Croonquist to bind her by the writing quoted above, whatever may be its effect upon Hugh's defense. Nor do we think the writing revived the action as against Hugh A. Croonquist, as a matter of law.

In Western Coal and Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685, thorough consideration is given by the court to the sufficiency of the acknowledgment or promise as enacted in section 360 of the Code of Civil Procedure, in order to stay the several limitation statutes. The rule is stated clearly by a quotation from Biddel v. Brizzolara, 56 Cal. 374, 380:

"'1. That a debt barred by the Statute of Limitations may be revived by a new promise.

"'2. That such new promise may either be an express promise or an implied one.

"'3. That the latter is created by a clear and unqualified acknowledgment of the debt.

"'4. That if the acknowledgment be accompanied by such qualifying expressions or circumstances as repel the idea of an intention or contract to pay, no implied promise is created. * * *'"

[8] The running of a statute of limitations upon a promissory note would be tolled by the payment of any part of the principal or interest. Section 360, Code of Civil Procedure; Barron v. Kennedy, 17 Cal. 574, 577. Here the complaint alleges, however, that no part of the principal or interest has been paid.

[9] In applying the foregoing principles to the instant case, clearly there is no express promise to pay the promissory notes in suit. There is no clear and unqualified acknowledgment even of the existence of the indebtedness which the notes represent. The ambiguity of the writing as respects an indebtedness called for evidence of the circumstances under which it was made and the matter to which it related. Section 1647, Civil Code. Such evidence was introduced at the trial and the court found that one of the defendants wrote the letter August 3, 1946, "* * * desiring to know what claims the plaintiff's assignor was making against him * *." To seek knowledge is not equivalent to an acknowledgment. The finding that there was no acknowledgment of the debt was a proper function of the trial court and will not be disturbed on appeal. Heslin v. Lapham, 77 Cal.App. 137, 246 P. 150; In re

Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319; In re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874; Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258. Where an act is equivocal, evidence of the intent of the party is competent and relevant to establish its legal effect. Brant v. California Dairies, Inc., 4 Cal.2d 128, 134, 48 P.2d 13.

We find no errors, and the judgment for defendants is affirmed.

TURRENTINE, P. J., and GLEN, J., concur.

OTTO v. UNION NAT. BANK OF PASADENA et al.

L. A. 21377.

Supreme Court of California, in Bank.

Dec. 21, 1951.

Rehearing Denied Jan. 17, 1952.

Action by Helen E. Otto against Union National Bank of Pasadena, a national banking association, and others for declaratory relief and termination of an inter vivos trust created by plaintiff. The Superior Court, Los Angeles County, Kenneth C. Newell, J., rendered judgment for defendants and plaintiff appealed. The Supreme Court, Edmonds, J., held that provision in trust indenture requiring remainder interest of any minor beneficiary to be retained in trust during minority of beneficiary was void under statutes against perpetuities, Civ.Codes, §§ 715, 716, 771, but that under modifying clauses doctrine such invalid provision did not invalidate prior absolute gift of trust estate in remainder.

Judgment affirmed.

Traynor and Carter, JJ., dissented in part.

For prior opinion see 226 P.2d 629.

1. Perpetuities 🔑6(2)
Trusts 🔑124

Trust indenture, requiring payment of income to settlor for life and providing for termination of trust upon her death and distribution of trust estate, in event of failure to exercise power of appointment by will, to settlor's issue per stirpes, created a future interest in class designated as "issue" which might include children born after creation of trust, and hence further provision for retention in trust of share of any child under age of 21 at termination of trust until such child should attain majority was void under statutes against perpetuities. Civ.Code, §§ 715, 716, 771.

2. Perpetuities 🔑6(11)

Power of trustee under inter vivos trust indenture to sell trust property and reinvest proceeds did not take trust out of the statutes against perpetuities. Civ.Code, §§ 715, 716, 771.

3. Perpetuities 🔑6(1)

The "absolute power of alienation" within meaning of statutes against perpetuities is equivalent to the power to convey an absolute fee. Civ.Code, §§ 715, 716, 771.

See publication Words and Phrases, for other judicial constructions and definitions of "Absolute Power of Alienation".

4. Trusts 🔑282

Under trust indenture providing for termination of trust at death of life beneficiary and distribution of trust estate to settlor's issue per stirpes subject to further provision that share of any child of settlor under 21 years of age at termination of trust should be retained in trust during minority, but that income of such share accruing after death of settlor should be distributed to or for benefit of minor beneficiary, minor beneficiaries could not convey their present rights to income or compel trustee to convey corpus as directed by them until they attained majority.

5. Trusts 🔑52

The rule that invalidity of a particular trust does not invalidate other trusts declared in the same instrument, unless invalid trust is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of settlor or working manifest injustice to other beneficiaries applies only to a trust instrument making two or more dispositions, some of which are valid and others void.

6. Trusts 🔑52

Under the "doctrine of modifying clauses" a gift in trust may be valid in spite of the imposition of a qualification thereof invalid under statutes against perpetuities, if the gift and qualification are verbally separable. Civ.Code, §§ 715, 716.

See publication Words and Phrases, for other judicial constructions and definitions of "Modifying Clauses Doctrine".

7. Trusts 🔑52

The doctrine of modifying clauses is essentially a rule of construction employed to effectuate, insofar as possible, the intention of settlor.

8. Trusts 🔑52

Validity under modifying clauses doctrine of provision for distribution of trust estate upon death of life beneficiary depended on what settlor would have intended had she known at time she created trust that further provision for a second trust during minority of any remainderman would be declared invalid, settlor's intention, insofar as it could be found in trust instrument, being the controlling factor.

9. Perpetuities ⚿6(18)
Trusts ⚿52

Trust indenture requiring payment of income to settlor during life and providing for termination of trust at her death and conveyance of trust estate to her issue per stirpes created valid remainder interests in settlor's issue and under "modifying clauses doctrine" such interests were not invalidated by further invalid provision for retention in trust of remainder interest of any minor beneficiary during minority, since such invalid qualification was verbally separable from prior absolute gift and could be eliminated without destroying main intent of settlor.

◆

George Penney, Los Angeles, Dunlap, Holmes, Ross & Woodson and Robert H. Dunlap, all of Pasadena, for appellant.

Hahn & Hahn, Pasadena, for respondent, Union Nat. Bank of Pasadena.

Delbridge, Hamblin & Linton, Leon W. Delbridge, and Donald W. Hamblin, all of Pasadena, for respondents, Wheeler.

EDMONDS, Justice.

By this action, Helen Otto seeks to terminate an inter vivos trust created by her. The appeal is from a judgment which followed an order sustaining general demurrers to her complaint which she failed to amend.

In 1941, Helen Otto, then Helen Wheeler, created an *inter vivos* trust with a corpus consisting of assets in excess of $500,000, which was her separate property. The trust indenture includes a spendthrift provision in favor of the trustor and requires the payment of the income to her for life. Paragraph IV of the declaration of trust provides that upon the death of the trustor, the trust shall terminate, and the entire trust estate shall be distributed according to the trustor's will. If Mrs. Otto "should fail to exercise this power of appointment", according to the terms of the trust, the corpus shall go "in equal shares to her issue *per stirpes* and if there be no issue to her heirs at law in accordance with the Statutes of Succession of the State of California then in effect. Should any child of Trustor be under the age of twenty-one (21) years upon the termination of this trust and, by reason of Trustor's exercise or failure to exercise her power of appointment herein provided be entitled to have distributed to him or her a portion of the then corpus of the Trust Estate and the undistributed income therefrom, said Trustees shall retain his or her share thereof until he or she becomes twenty-one (21) years of age, when the same shall be distributed to him or her, but said Trustees shall distribute the income of said share accruing after the death of Trustor to or for the benefit of said minor child until he or she becomes twenty-one (21) years of age."

Following the trustor's divorce from John Wheeler, the trustees named in the indenture were removed and the Union National Bank of Pasadena was named successor trustee.

When the present action for declaratory relief and termination of the trust was filed, the trustor was 43 years of age and had two sons, Evans Wheeler, age 22 years, and Gordon Wheeler, age 20 years. Gordon was then unmarried. Evans was married and the father of two minor children, Scott and Stephanie. In her complaint, Mrs. Otto asks for a judgment that she is the sole and absolute owner of all assets of the trust, that the trustee be ordered to transfer and convey to her all assets of the trust, and that it be adjudged that the trust was never valid, or that she has full power of revocation, or that it has terminated by reason of the accomplishment of its purposes.

Upon his failure to appear, the default of Evans Wheeler was entered. The general demurrers of the trustee and the minor children were sustained with leave to amend. Upon the trustor's failure to do so, judgment was entered accordingly.

Helen Otto now argues that the trust was void in its inception because Paragraph IV creates a suspension of the absolute power of alienation in violation of sections 715 and 771 of the Civil Code. Assuming that the trust so suspends the power of alienation, the void portion is not severable from the balance of the trust. But in any event, she argues, she is the sole beneficiary of the trust and entitled to terminate it.

Insofar as pertinent to the issues of this case, section 715 of the Civil Code provides that the absolute power of alienation cannot be suspended by any limitation or condition for a longer period than "During the continuance of the lives of persons in being at the creation of the limitation or condition * * *". Section 716 declares: "Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

[1] In the present case, the trustor has created a future interest in a class, designated as "issue *per stirpes*", which includes all her children in being at her death and the lineal descendants of any deceased child. It is clear, from the language of the trust indenture, that the class may include children born after the execution and delivery of the trust instrument. Unquestionably, therefore, the clause requiring the share of a minor child to be retained in trust until he attains his majority suspends the absolute power of alienation beyond the continuance of "* * * lives * * * in being at the creation of the limitation or condition * * *". Civil Code, § 715. As this court firmly stated in Sheean v. Michel, 6 Cal.2d 324, 327, 57 P.2d 127, 128, "If the trust thus attempted to be created is by its terms designed to be continued during the minorities of children born after the delivery of the trust instrument, it is obvious that the instrument creates a suspension of the power of alienation in violation of the provisions of section 715 of the Civil Code." To the same effect is In re Estate of Troy, 214 Cal. 53, 56, 3 P.2d 930, and see the cases cited therein.

To avoid the rule of these decisions, the respondents argue that the rule against the suspension of the power of alienation is not violated if, at the expiration of a life in being at the creation of the trust, there are persons in being by whom an absolute interest in possession can be conveyed. Under the terms of the trust here being considered, say the respondents, at the death of the trustor, and in the absence of a testamentary disposition by her, there will be ascertainable persons in being who may unite to convey an absolute interest in possession, although such persons may be minor children of the appellant for whose benefit the trust is to continue until they reach majority.

[2-4] However, contrary to the position taken by the respondents, the power of the trustee to sell the trust property and reinvest the proceeds would not have the effect of relieving the trust from the inhibitions of the Civil Code. As stated in Re Estate of Maltman, 195 Cal. 643, 652, 234 P. 898, their argument is fully met by the provisions of section 771 of the Civil Code, which read as follows: "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section seven hundred and fifteen." The absolute power of alienation is equivalent to the power of conveying an absolute fee. Civ.Code, § 716; In re Walkerly's Estate, 108 Cal. 627, 647, 41 P. 772. The respondents erroneously assume that the minor beneficiaries of the trust might convey their present rights to income and compel the trustee to convey the corpus as directed by them. This, however, they could not do until they attained majority. In re Estate of Yates, 170 Cal. 254, 149 P. 555, and the principles stated in the Walkerly case, supra, 108 Cal. at pages 648, 649, 658, 41 P. 772, are controlling. Applying the rule of that decision, the clause of the trust indenture establishing a trust for the minority of the trustor's children is void as creating a suspension of the absolute power of aliena-

tion beyond the time permitted by section 715 of the Civil Code.

In a memorandum opinion, the trial court also reached this conclusion. However, it held that the challenged provision is not so inseparably blended with the other provisions of Paragraph IV "that it may not be cut off and the balance permitted to stand". The trustor takes issue with this latter statement. She contends that the rule of severability has no application to the facts of the present case.

[5] In Re Estate of Micheletti, 24 Cal. 2d 904, 909, 151 P.2d 833, 835, quoting from In re Estate of Willey, 128 Cal. 1, 11, 60 P. 471, it was said that "valid trusts should not be disregarded because in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to other beneficiaries." The trustor correctly contends that this rule has application only to a case in which there are two or more dispositions, some of which are valid and others void. That was the situation in the Willey case, where the trust provided for the payment of income to the trustor for life and, on his death, the income to certain named beneficiaries. The testator also provided that, before making any payments of income under the trust, the trustees should set aside $25 and any further amount that might be reasonably necessary for the care and preservation of a cemetery lot. The gift of income to maintain the cemetery lot was declared to be invalid, but severable from the remaining gifts. Similar applications of the doctrine are found in Nellis v. Rickard, 133 Cal. 617, 66 P. 32; In re Estate of Phelps, 182 Cal. 752, 190 P. 17; In re Estate of Troy, 214 Cal. 53, 3 P.2d 930; and In re Estate of Micheletti, supra.

[6, 7] However, closely allied to the rule of severability and often confused with it is the doctrine of modifying clauses which "permits a gift to be valid in spite of the imposition of an invalid qualification thereof, if the gift and qualification are verbally separable". Leach, Perpetuities In a Nutshell, 51 Harv.L.Rev. 635; and see Towle v. Doe, 97 Me. 427, 54 A. 1072; Sears v. Putnam, 102 Mass. 5. Essentially, it is a rule of construction employed to effectuate, insofar as possible, the intention of the trustor. "The particular ground on which the construction in question is rested is, that the author of the limitations intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualifying one." (Gray, The Rule Against Perpetuities [4th Ed.] § 423, p. 437; 1 Jarman on Wills [6th Ed.], pp. 292–294.)

[8, 9] Under the doctrine of modifying clauses, the question is: At the time of creating the trust, had Mrs. Otto known that the qualification by way of the provisions for a second trust during the minority of her children would be declared invalid, what would she have intended? Her intention, insofar as it can be found in the trust instrument, is the controlling factor. Mrs. Otto made a full and detailed arrangement for the disposition of the trust estate. After providing for a life estate in herself, she declared that upon her death the trust should terminate. An absolute gift of the corpus was made by creating a future estate in a class composed of her issue *per stirpes,* the trust instrument providing that if she died leaving issue and without having exercised her power of appointment, "* * * the entire Trust Estate, together with any income accrued or undistributed to said Trustor on the date of her death, shall be transferred, conveyed, delivered and distributed in cash or in kind * * * in equal shares to her issue *per stirpes* * * *." It was only after making this gift of the absolute remainder in fee that she attempted to modify that provision by a subsequent and invalid qualification as to the gift to those of her children who might not, at the termination of the trust, have attained their majority. Clearly, that modification of the otherwise valid gift is verbally separable from the prior absolute gift and can be eliminated without destroying the main intent of the trustor.

However, the trustor argues that such construction is not permitted under section

716 of the Civil Code which provides that every "future interest is void" which may suspend the absolute power of alienation. To strike the qualifying clause, says the trustor, leaves the future interest freed from the restraint upon alienation in the contravention of section 716 which declares that the "future interest", not the restraint, is void.

This argument erroneously assumes that section 716 of the Civil Code precludes the application of any rule of construction. No such intention on the part of the Legislature may be read into the statute. The qualifying clause of the trust instrument did not *create* the future interest. It qualified an interest previously created by the direction to the trustee to convey the entire trust estate to the trustor's issue *per stirpes.* That interest in no way suspends the absolute power of alienation beyond the period permitted by section 715 of the Civil Code. There is no reason for striking down the provision for an absolute gift of the corpus of the trust to the trustor's issue. These are valid remainder interests, and the trustor is not the sole beneficiary of the trust.

The judgment is affirmed.

GIBSON, C. J., and SHENK, SCHAUER, and SPENCE, JJ., concur.

TRAYNOR, Justice (concurring and dissenting).

I concur in the result reached in the majority opinion. I do not agree, however, that the trust instrument violates the rule against restraints on alienation. Civ.Code, §§ 715, 716, 771.

In my opinion the beneficiaries can convey an absolute interest in possession upon the death of the settlor. The settlor has not suspended the beneficiaries' power of alienation by limitations taking effect after a life in being; there is no provision making their interests contingent upon survival until majority or terminating the interest of issue that fail to reach majority. If the settlor does not otherwise dispose of the property by will, her issue will take vested interests in the corpus at her death. Furthermore, the trustor has not restrained the beneficiaries' power of alienation by means of a spendthrift clause as in Re Estate of Maltman, 195 Cal. 643, 646, 243 P. 898. Unless a trust instrument declares otherwise, the beneficiaries are free to alienate their interests. Civ.Code, § 867; Fatjo v. Swasey, 111 Cal. 628, 637, 44 P. 225; see Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 463, 471, 165 P.2d 15, 163 A.L.R. 838.

The fact that some of the issue may be minors and thus incapable of executing a valid conveyance without court intervention, will not make their interests inalienable within the meaning of the statutes. "The prohibition is against those limitations upon the power of alienation which may be imposed by dispositions of property, and not against limitations made by the law upon the capacity to convey." In re Estate of Campbell, 149 Cal. 712, 718, 87 P. 573, 575. The minors may be unable to require the trustee to convey the corpus to them, Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838, during minority, but since the trust does not contain a spendthrift clause, they can convey their interests to a third party and thus transfer an absolute interest in possession. In re Estate of Yates, 170 Cal. 254, 257, 149 P. 555.

At the death of the settlor, a life in being, the beneficiaries will thus not be restrained by the trust instrument from conveying their interests in the trust to a purchaser. The purchaser may terminate the trust and discharge the trustee. Eakle v. Ingram, 142 Cal. 15, 75 P. 566; see Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 465, 165 P.2d 15, 163 A.L.R. 838. The purchaser will then have the absolute interest in possession required by Civil Code Section 716.

The trust is not within the prohibitions ot Civil Code Section 771, which provides, "The suspension of *all* power to alienate the subject of a trust, *other* than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section seven hundred and fifteen." (Italics added.) In a spendthrift trust, where the beneficiaries cannot alienate their interests, this section would be relevant. It cannot be invoked in the present case, however, for the settlor has not suspended all power to alienate the subject of the trust. There is no spendthrift clause limiting the power of the beneficiaries to alienate their interests upon the death of the settlor.

In re Walkerly's Estate, 108 Cal. 627, 41 P. 772, on which appellant relies, declared that a trust that might continue longer than the statutory period would violate the code provisions. The court stated that even if it were assumed that the interests of the beneficiary were vested and alienable, a beneficiary "could not alienate [his interest] within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries." 108 Cal. at 649, 41 P. at page 776. The court relied on New York cases. Those cases, however, were based on a New York statute, 1 R.S. 730, § 63, now McKinney's Consol.Laws of New York, Real Property Law, § 103, which, until 1903, provided that the beneficiary of a New York trust could not assign or dispose of his interest. By contrast, California beneficiaries of a trust not expressly limiting alienability have been able to alienate their interests since Civil Code section 867 was amended in 1874. Fatjo v. Swasey, 111 Cal. 628, 637, 44 P. 225. See discussion in Hohfeld, The Need of Remedial Legislation in the California Law of Trusts and Perpetuities, 1 Cal.L.Rev. 305, 320–328. After transfer of the beneficial interests, the transferee would be able to terminate the trust under Eakle v. Ingram, supra, 142 Cal. 15, 75 P. 566, and would obtain an absolute interest in possession.

The rule against restraints on alienation is not violated simply because of the duration of a trust. The rule is violated only when the beneficiaries are unable to convey an absolute interest in possession within the statutory period. Thus, sections 715 and 771 are a check upon the creation of long-term trusts only when the interests of all beneficiaries do not become alienable within the allowable period of suspension. (See Turrentine, Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests, 21 Cal. L.Rev., 1, 19–22.)

The statements or holdings in the cases relied on in the majority opinion that a trust that continues beyond the statutory period must always fail are not justified under the Civil Code and should be disapproved or overruled. Of course, if restrictions in the trust instrument prevent transfer of an absolute interest in possession, alienation is restrained in violation of the statute. But when, as here, the interests vest at the expiration of a life in being at the time of creation of the trust, and the settlor has not restrained the beneficiaries' power of alienation by means of a spendthrift clause, there is no restraint on alienation.

CARTER, J., concurs.

38 Cal.2d 199

In re SALMONSKI'S ESTATE.

SALMONSKI et al. v. BARDZINSKI et al.

Sac. 6088.

Supreme Court of California.

Dec. 19, 1951.

Proceedings in the matter of the estate of Wladyslaw Salmonski, also known as Walter Salmonski, deceased, wherein Josephine Salmonski and another brought a proceeding against Theresa Bardzinski and another, to determine interests of parties under decedent's will. The Superior Court, Sacramento County, Malcolm C. Glenn, J., adjudged the defendants to be entitled to distribution of the estate of decedent, one-half to each, and that plaintiffs had no interest therein, and the plaintiffs appealed. The Supreme Court, Spence, J., held that probate court properly construed documents in question and determined that property should be distributed in accordance with terms of codicil as later testamentary expression, with the operative force of formal will accordingly confined to the appointment of respondent Bardzinski as executrix.

Judgment affirmed.

Prior opinion 228 P.2d 860.

1. Wills ⚷309

When one or more instruments presented for probate are claimed to constitute a will, only question legitimately before court is whether such instrument or instruments constitute a will, and in determining that question court ordinarily has nothing to do with construction of will, resolving inconsistencies in disposition of property or interpreting testamentary provisions.

2. Wills ⚷423

What documents go to make up a will must necessarily be determined in first instance on application for probate, and determinations so made have the effect of judgments and become conclusive in course of time.

3. Wills ⚷423

In absence of an appeal, order admitting two documents to probate after contest stood as conclusive adjudication of their status as will and codicil thereto, but beyond consideration for the determination of precise issue of what documents constituted deceased's last will, questions of construction and interpretation in measure of the effect of two documents one on other were appropriate matters for consideration and determination in heirship proceeding in resolving opposing claims for distribution of the estate.

4. Wills ⚷207, 215

Where two documents were admitted to probate because both had been duly executed, and letter as later instrument contained no express revocation clause or indication of testator's intent that no effect was to be given earlier formal instrument, it was not incumbent on probate court to determine what bequests in will were superseded by codicil, for earlier executed document, regardless of efficacy of its dispositive clauses, was entitled to probate as a testamentary instrument.

5. Wills ⚷184(3)

Where an executor is named in the first instrument but not in the second, and the latter is wholly inconsistent in its other provisions, determination of question whether appointment of executor is to be given effect is left to direction of the court.

6. Wills ⚷215

Order of admission to probate, conclusive in subsequent proceedings as to ultimate fact that two documents executed by testator stood together as complete and entire will, did not effect power of court to determine their import under applicable rules of construction in effecting distribution of estate as later presented for adjudication.

7. Wills ⚷439

Cardinal rule of interpretation of wills is to find intent of testator.

8. Wills ⚷470, 472

In process of arriving at intent of testator for purposes of construction of will, different parts of will are to be harmonized if possible, endeavoring to give expression to all words of will, referring to other parts of will to clear up any doubt or uncertainty that may appear with respect to any single part, and construing all parts in relation to each other so as, if possible, to form one consistent whole, but where several parts are absolutely irreconcilable, the latter must prevail. Probate Code, § 103

9. Wills ⚷182

All instruments constituting the testamentary disposition must be construed together as one instrument, but later executed document as testator's last expression must control where it makes a clear and distinct gift of property wholly irreconcilable with a dispositive provision in prior document. Probate Code, § 101.

10. Wills ⚷471

A clear and distinct devise or bequest cannot be affected by inference or arguments from other parts of an instrument. Probate Code, § 104.

11. Wills ⚷184(2)

The terms of a will may not be disturbed by language in a codicil unless such language evinces a limitation or change in words as definite in expression as the terms of the will.

12. Wills ⚷184(3)

Where testator executed formal will making conditional bequests to his sister and brother, and five days later wrote letter declared to be codicil addressed to named executrix requesting that she sell stocks and divide everything between herself and named beneficiary and declaring that such was his last wish, testator destroyed dispositive provisions of the former will.

13. Wills ⚷184(1)

Rule that additional or substitutional bequests given by a codicil are attended by same incidences and conditions as were the bequests given originally by will has no application where from language used in codicil, or from application of recognized rules for construction of wills, it appears that testator intended by codicil to make a substantive and independent bequest.

14. Wills ⚷476

While the will and codicil together constitute decedent's last will in testamentary disposition of his estate, they will not be regarded as a single instrument and as if both had been executed at time of making of codicil where manifest intention of testator requires otherwise.

15. Wills ⚷184(3)

The mere making of a codicil gives rise to the inference of a change of intention, a distinguishable circumstance which does not enter in the construction of a single document constituting decedent's will, so that where there are any genuine inconsistencies between the two instruments, the codicil, as the latest expression of the testator's wishes, must be given precedence.

16. Wills ⚷184(3)

Where testator executed will making conditional bequests to sister and brother and five days later wrote letter to named executrix that in case of his death she was to sell stocks and divide everything between herself and named beneficiary and that such was his last wish, by directing sale of stock, it would be presumed that testator knew executrix could not carry such direction out except as executrix, and that testator had his former will in mind and therefore such dispositive provisions in letter being later in time and place to those in formal will would prevail.

17. Wills ⚷184(3)

Where testator executed will making conditional bequests to sister and brother and five days later wrote letter to named executrix that in case of his death she was to sell stocks and divide everything between herself and named beneficiary and that such was his last wish, such words addressed to executrix were mandatory and evinced an intent that no limitation or condition be attached to absolute terms of dispositive provisions in codicil and dispositive provisions being irreconcilable with provisions of will favoring brother and sister, and being later in time and place, took precedence.

18. Wills ⚷189

Where testator executed formal will in which he expressed doubt whether sister and brother were alive but made bequests to them conditioned on their proof of survivorship within one year from testator's death and five days later wrote letter to named executrix that in case of his death she was to sell stocks and divide everything that belonged to him between herself and named beneficiary and that such was his last wish, in absence of showing that at some time during such five days testator mistakenly concluded that brother and sister were dead and for that reason wrote letter, doctrine of dependent relative revocation was inapplicable.

19. Wills ⚷452

Rule that if there is any doubt or uncertainty as to testator's intent, an interpretation will be adopted which prefers his natural heirs as against strangers cannot alter a clear and positive bequest in expression of testator's purpose for he may transmit without regard to moral or natural claims upon his bounty.

20. Wills ⚷441, 488

Will under which testator made bequests to his brother and sister conditioned on their proof of survivorship and letter written five days later to named executrix stating that in case of testator's death she was to sell stocks and divide everything that belonged to testator between herself and named beneficiary and that such was his last wish did not present any uncertainty as to intention of testator requiring the admission of evidence of circumstances attending the execution of the two testamentary documents. Probate Code, § 105.

21. Wills ⚿440, 441

Where an uncertainty arises upon face of will as to meaning of its provisions testator's intent is to be ascertained from words of will, but circumstances of execution thereof may be taken into consideration, excluding oral declarations of testator as to his intentions but where intent is plain from words used, duty of court is to declare that intent, without regard to consequences. Probate Code, § 105.

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Thomas W. Loris, Sacramento, for appellants.

Busick & Busick, Sacramento, for respondent, Theresa Bardzinski.

Charles M. Frey, San Francisco, for respondent Leocadia Butkin.

SPENCE, Justice.

This is an appeal from a judgment determining heirship and interest in the estate of Wladyslaw Salmonski, deceased, upon proceedings instituted under the provisions of section 1080 of the Probate Code. The parties argue the propriety of the court's construction of two testamentary documents, executed at different dates and both admitted to probate, one as the decedent's will and the other as a codicil thereto. Consideration of the record sustains the judgment as a proper adjudication of the problem presented.

Wladyslaw Salmonski died on July 6, 1946. He left a formal typewritten will executed June 12, 1946. Therein he gave to his sister, Jozefa Salmonski, and to his brother, Waclaw Salmonski, each 45 per cent of his estate. Each bequest was conditioned upon the beneficiary producing proof of survivorship within one year of the decedent's death; otherwise, such bequest should lapse. He stated that such condition was imposed because his brother and sister lived in that part of Poland overrun by invading armies, that he had written to them on several occasions "since World War II ended" but had received no reply, and that he was doubtful if either was alive. The remaining 10 per cent of his estate he gave to Theresa Bardzinski. He further provided that in the event either or both bequests to his brother and sister should lapse, then Leocadia Butkin should receive $1,000 and Mrs. Bardzinski should have all the residue of his estate. Mrs. Bardzinski was named executrix and as such, he gave her power of sale of his property subject to confirmation of the court.

Five days after the execution of this will, the decedent wrote the following letter:

"Sacramento, Calif.
June 17, 1946.

"Dear Mrs. Bardzinski.

"In case of my death kindly sell the stocks and devide everything that belongs to me between yourself and Mrs. Leocadia Butkin.

"This is my last wish.

Your friend
Walter Wladyslaw Salmonski"

Upon the decedent's death the following month, Mrs. Bardzinski filed a petition praying that both documents be admitted to probate together as his last will and testament, and that she be appointed the executrix. She alleged the letter to be a codicil to the formal will. Mrs. Butkin then filed a contest, in which she asked that the first document, the formal will, be denied probate and that the letter be admitted as the holographic will of the decedent. At the same time she filed a petition for her appointment as administratrix with the will annexed of the alleged holographic will. All three matters were heard together and the court made the following dispositions thereof in its order of November 29, 1946: It dismissed the contest, it denied Mrs. Butkin's petition for letters of administration upon the holographic will alone, and it admitted both documents to probate together as the last will and testament of the decedent, with the appointment of Mrs. Bardzinski as the executrix thereof. The letter was admitted to probate as a codicil of the prior will. No appeal was taken from this order and it has now become final.

Thereafter the brother and sister of the decedent appeared in the proceeding and, as attested by the court's order of July 3, 1947, made the necessary proof of survivorship. On April 12, 1949, they instituted the present proceeding to determine heirship, Prob.Code, § 1080, each claiming to be entitled to 45 per cent of the distributable estate of the deceased. Mrs. Bardzinski and Mrs. Butkin filed answers, alleging that the whole of the estate should be distributed one-half to each. At the time set for hearing, counsel for Mrs. Butkin moved the court for an order submitting the matter on the pleadings and all other papers on file in the estate proceeding, upon the ground that no other evidence, oral or documentary, was admissible. This motion was granted over objection of counsel for the brother and sister. Thereafter the court adjudged Mrs. Bardzinski and Mrs. Butkin to be entitled to distribution of the decedent's estate, one-half to each, and that the brother and sister had no interest therein.

In disposing of the heirship proceeding, the court made findings as follows: That decedent "died testate leaving a Will dated June 12, 1946, and an Holographic Will, wholly dated, written and signed in the handwriting of said decedent, dated June 17, 1946"; that "after a contest of the Will between said Leocadia Butkin, as contestant, and said Theresa Bardzinski, as contestee, both documents were admitted to probate, one as the Will and the other as a Codicil thereto, as the Last Will and Testament of said Decedent"; that "said Theresa Bardzinski * * * was appointed Executrix of the said Will and Codicil and thereafter she duly qualified as such"; that "said Codicil is in words and figures, as follows [Quoting the letter of June 17, 1946]"; that "said Codicil * * * [was] addressed to Mrs. Bardzinski who was named in said Will dated June 12, 1946, as Executrix thereof"; that "there [was] no uncertainty in the words or language of either the said Will or the said Codicil"; that "said Codicil [was] a later testamentary disposition * * * and by its terms adequate to * * * dispose of the entire estate of the Decedent"; that therefore "distribution of the estate * * * should be made under the terms and provisions of the said Codicil"; that "said Codicil * * * bequeathes * * * subject to administration, one-half (½) of the property [in] the estate" to Mrs. Bardzinski and "one-half (½) to Mrs. Butkin; that neither the brother nor the sister "ha[d] any right, title or interest in or to the estate * * * or any part thereof" and "neither * * * [was] entitled to distribution to him or her of any part" thereof. The court concluded that distribution of the decedent's estate should be so ordered and it was decreed that the distribution, when made, should be in accordance with the findings. From such judgment the brother and sister of the decedent have appealed.

The respective positions of the parties may be briefly stated as follows: Appellants argue that (1) the order admitting the will and codicil to probate was "absolute and unqualified," with the result that both testamentary documents were adjudicated to constitute "the entire will" of the decedent and in the construction thereof both must be considered; that (2) in hearing the contest as to the status of the respective documents before making its order for admission to probate, the court considered and rejected the claim that the letter as the later instrument revoked the earlier will, and that since no appeal was taken from said order, it has become a final and conclusive adjudication of that issue; that (3) the conditions impressed upon the bequests made to respondents in the will apply likewise as incidents to the bequests made to them in the codicil, with the latter classified as "additional or substituted gifts" and the interest of respondents in the estate to vest "only in the event that the brother and sister of the decedent failed to produce proof of their existence within a year from the date of the testator's death"; that (4) the rule of dependent relative revocation is applicable upon the premise that the decedent executed the codicil "under the mistaken belief that the brother and sister were not alive," and the general tenor of the entire will indicates the testator's intention "to modify and change" the bequests to his brother and sister "only in the event [they] failed to appear within the year"; and that (5) the court erred in refusing to allow appellants "the right to present extrinsic evidence regarding the facts surrounding the execution of the will and codicil," for when the two instruments are "considered as one entire document * * * ambiguity and uncertainty" appear, and in the absence of the proffered evidence, the order disposing of the opposing claims of interest in the estate may not be sustained.

On the other hand, respondents contend that (1) the order admitting the will and codicil to probate reflects no attempt on the part of the court to construe those documents but only its determination that both constituted "the last expression of the testator's intention" and "together express his desire that Theresa Bardzinski be the Executrix of his estate"; that (2) the codicil plainly disposed of the entire estate in absolute and independent terms, wholly contrary to the conditional tenor of the bequests under the language of the previously executed will, and distribution of the estate was ordered in recognition of this circumstance of inconsistence working a revocation of the dispositive provisions in the earlier instrument; that (3) the doctrine of dependent relative revocation has no application, for the "mistaken belief" or doubt as to the existence of appellants does not appear on the face of the codicil as the later testamentary instrument effecting a complete disposition of the estate; and that (4) the court "correctly excluded testimony of facts surrounding the execution of the two documents admitted to probate when [they] were clear, certain and not ambiguous on their face."

[1, 2] When there is presented for probate one or more instruments claimed to constitute a will, the only question legitimately before the court is whether or not the propounded instrument or instruments constitute a will; and in determining that question the court ordinarily has nothing to do with the construction of the will, resolving inconsistencies in the disposition of property or interpreting the testamentary provisions. 26 Cal.Jur. sec. 335, p. 1068; In re Estate of Murphy, 104 Cal. 554, 566, 38 P. 543; In re Estate of Cook, 173 Cal. 465, 468, 160 P. 553; In re Estate of Dunn, 32 Cal.App.2d 240, 243, 89 P.2d 667; In re Estate of Montgomery, 89 Cal.App.2d 664, 667, 201 P.2d 569. However, what documents go to make up a will must necessarily be determined in the first instance on application for probate; and determinations so made have the effect of judgments and become conclusive in the course of time. Apt illustration of this principle is found in the case of In re Estate of Parsons, 196 Cal. 294, 237 P. 744. There a document had been admitted to probate as the will of the decedent. Pencil lines and marks appeared on the face of the will which might or might not have been made by the testator with intent to revoke three legacies. No mention was made of these markings or cancellations in the order admitting the document to probate in its entirety. No appeal was taken from the order nor was any contest initiated within the year then allowed therefor. On a petition for partial distribution later, the court found that the testator had drawn the lines with intent to cancel the dispositive provisions contained in the paragraphs so marked. In reviewing the propriety of this finding, it was held that the "question of revocation" must be "presented and decided either when the will is offered for probate, or by a proceeding or contest brought within" the statutory time thereafter; that "probate procedure * * contemplates in the administration of the estates of deceased persons a series of different proceedings, each of which is separate as to the matters embraced within its purview"; that an "adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate"; that an "order admitting a will" to probate is appealable; that a "proceeding for the probate of [a] will is one *in rem,* instituted for the purpose of establishing the status of a written instrument"; that an "attack aimed at [a] will * * *

in response to a petition for * * * distribution filed more than one year after the will was admitted to probate—an independent and wholly distinct proceeding from that for the probate of the document * * * is * * * a collateral and not a direct attack"; that where questions of revocation are so tendered, the "issue thus joined was one which could properly have been raised upon the proceeding for * * probate"; and that if not so raised, then the order admitting the document as a will is conclusive against any later attempt to invalidate part of the document upon claim of cancellation or revocation. In re Estate of Parsons, 196 Cal. 294, 298–300, 237 P. 744; see, also, In re Estate of Moeller, 199 Cal. 705, 709–711, 251 P. 311.

[3–6] Consistent with these observations, it is clear here that in the absence of an appeal, the order admitting the two documents to probate after contest now stands as a conclusive adjudication of their status as a will and a codicil thereto; but beyond consideration for the determination of that precise issue of what documents constituted the deceased's last will, questions of construction and interpretation in measure of the effect of the two documents one on the other were "appropriate matters for consideration and determination" in the instant heirship proceeding in resolving the opposing caims for distribution of the estate. Estate of Dunn, supra, 32 Cal.App.2d 240, 243, 89 P.2d 667; also In re Estate of Plaut, 27 Cal.2d 424, 427, 167 P.2d 765, 162 A.L.R. 837. It is apparent that the two documents were admitted to probate because both had been duly executed, and the letter as the later instrument contained no express revocation clause in indication of the testator's intent that no effect was to be given to the earlier instrument. In re Estate of Brodersen, 102 Cal.App.2d 896, 906, 229 P.2d 38. It was not incumbent then on the probate court to determine what bequests in the will were superseded by the codicil, for the earlier executed document, regardless of the efficacy of its dispositive clauses, was entitled to probate as a testamentary instrument. In re Hickman's Estate, 101 Cal. 609, 613, 36 P. 118; In re Estate of Meade, 118 Cal. 428, 430, 50 P. 541; In re Estate of Philippi, 71 Cal.App.2d 127, 134, 161 P.2d 1006; In re Estate of Selditch, 91 Cal.App.2d 62, 67, 204 P.2d 364. Where an executor is named in the first instrument but not in the second, and the latter is wholly inconsistent in its other provisions, the determination of the question whether the appointment of the executor is to be given effect is left to the direction of the court. Prob. Code, § 72; but see In re Estate of Iburg, 196 Cal. 333, 335, 238 P. 74, where the court refused to give effect to the appointment of an executor in the first will; In re Estate of Shute, 55 Cal.App.2d 573, 575, 131 P.2d 54; 19 Cal. Law Rev. 602, 610–611. Accordingly here, the order of admission to probate, conclusive in subsequent proceedings as to the ultimate fact that the two documents stand together as the complete and entire will of the decedent, does not affect the power of the court to determine their import under applicable rules of construction in effecting distribution of the estate as later presented for adjudication. Estate of Brodersen, supra, 102 Cal.App.2d 896, 905–906, 229 P.2d 38.

[7–10] In the interpretation of wills, ascertainment of the intention of the testator is the cardinal rule of construction, to which all other rules must yield. Prob. Code, sec. 101; In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893. In the process of arriving at that intention, different parts of the will are to be harmonized if possible—endeavoring to give expression to all the words of a will, Prob.Code, sec. 102, referring to other parts of the will to clear up any doubt or uncertainty that may appear with respect to any single part, and construing all parts in relation to each other so as, if possible, to form one consistent whole but "where several parts are absolutely irreconcilable, the latter must prevail." Prob.Code, sec. 103; In re Estate of Moorehouse, 64 Cal.App.2d 210, 215, 148 P.2d 385. All instruments constituting the testamentary disposition must be "construed together as one instrument", Prob.Code, sec. 101, but the later executed document as the testator's last expression must control where it makes a clear and distinct gift of property wholly irreconcilable with a dispositive provision in the prior document. In re

Estate of Mallon, 28 Cal.App.2d 106, 110, 81 P.2d 992. A clear and distinct devise or bequest cannot be affected by inference or arguments from other parts of the instrument. Prob.Code, sec. 104; In re Estate of Moorehouse, supra, 64 Cal.App.2d 210, 215, 148 P.2d 385.

[11, 12] Manifestly here, the dispositive provisions of the letter or codicil stand in sharp contrast with those of the formal will. The first document was clear in all its terms and the parties agree that it disposed of the entire estate. But five days later the testator executed the document admitted to probate as the codicil to the formal will. The terms of this second document were equally clear and adequate in disposing of the entire estate but in a manner contrary to and destructive of the dispositive provisions in the formal will. While the "terms of a will may not be disturbed by language in a codicil unless such language evinces a limitation or change in words as definite in expression as the terms of the will", In re Estate of Dunn, supra, 32 Cal.App.2d 240, 242, 89 P.2d 667; see, also, In re Estate of Dominici, 151 Cal. 181, 189–190, 90 P. 448; In re Estate of Moorehouse, supra, 64 Cal. App.2d 210, 216, 148 P.2d 385, such appears to be the case here by reason of the independent sufficiency of each of the two successive instruments in their dispositive provisions.

[13–15] Appellants seek a construction of the two documents so that the plain dispositions of the codicil would be made conditional and not absolute. To this point they argue that the entire will should be construed as providing for the testator's brother and sister if they appeared and proved their survivorship, and that if they did not, then and then only would respondents take the whole estate under the codicil. Accordingly, they cite the general rule that additional or substitutional bequests given by a codicil are attended by the same incidences and conditions as were the bequests given originally by the will. 57 Am.Jur. sec. 610, p. 418; anno. 156 A.L.R. 795; In re Estate of De Laveaga, 119 Cal. 651, 653–656, 51 P. 1074; In re Estate of Cross, 163 Cal. 778, 781, 127 P. 70; see, also, In re Estate of Hite, 155 Cal. 436, 441–444, 101 P. 443, 21 L.R.A.,N.S., 953. But such rule has no application where "from the language used in the codicil, or from the applications of recognized rules for the construction of wills," it appears that "the testator intended by the codicil to make a substantive and independent bequest". Estate of De Laveaga, supra, 119 Cal. at page 655, 51 P. at page 1075. While the will and codicil together constitute the decedent's last will in testamentary disposition of his estate, they will not be regarded as a single instrument and as if both had been executed at the time of making of the codicil where the manifest intention of the testator requires otherwise. The mere making of a codicil gives rise to the inference of a change of intention, a distinguishable circumstance which does not enter in the construction of a single document constituting the decedent's will, so that where there are any genuine inconsistencies between the two instruments, the codicil, as the latest expression of the testator's wishes, must be given precedence. 26 Cal.Jur. sec. 143, pp. 809–810; 57 Am. Jur. sec. 608, p. 416; In re Estate of Moorehouse, supra, 64 Cal.App.2d 210, 215, 148 P.2d 385.

[16, 17] The testator made a formal will indicating consultation with and guidance of counsel. Five days thereafter he wrote the letter declared to be a codicil and by it he completely changed the dispositive provisions of the formal will. There is not here a single testamentary act covering both will and codicil, but two distinct testamentary acts occurring at different times, the later making no reference to the earlier bequests but consisting in terms of an unqualified and unconditional disposition of the entire estate. For what reason the testator only five days later made the subsequent and totally dissimilar disposition does not appear, but his intention must be determined as expressed in clear language by his last testamentary act evincing a wholly new and complete disposition of his entire estate rather than a mere substitutional provision in relation to the conditions earlier prescribed. In re Estate of Bourn, 25 Cal.App.2d 590, 602, 78 P.2d 193;

In re Estate of Moorehouse, supra, 64 Cal. App.2d 210, 216, 148 P.2d 385. The letter which constituted the codicil was addressed to Mrs. Bardzinski, whom the testator had named as his executrix in his prior formal will. He directed her to sell his stocks, a direction which he must be presumed to have known that she could not effect except as the executrix of his will, and accordingly he must be deemed then to have had his formal will in mind. He further told her that after the sale of the stocks, she was to divide everything that belonged to him between herself and Mrs. Butkin. So having in mind the dispositive provisions which he had made in the formal will in favor of appellants, his brother and sister, conditional as they were, it necessarily follows that what he said in the codicil reflects a clear change of intent in respect to those dispositions and his purpose to leave his entire estate to respondents here. There is no language, no expression of any nature, which would suggest that he intended that the absolute terms of the bequests in the codicil should be modified or subject to conditions prescribed in the will. While the two documents should be read together in the sense that each should be considered in the light of the other, and their terms harmonized where possible, that is a very different thing from changing the express terms of the later codicil by importing conditions into it without its containing express warrant therefor. It is pertinent to note that the decedent, in view of his having given 90 per cent of his estate to appellants, his brother and sister, conditioned upon their proof of survivorship, did not direct Mrs. Bardzinski by his codicil to divide 10 per cent of his estate between herself and Mrs. Butkin, but rather he directed Mrs. Bardzinski to divide everything and he declared such distribution to be his "last wish." Such words addressed to the executrix are mandatory and evince an intent that no limitation or condition be attached to the absolute terms of the dispositive provisions in the codicil. In re Estate of Marti, 132 Cal. 666, 671, 61 P. 964, 64 P. 1071; In re Estate of Miles, 72 Cal.App.2d 336, 343, 164 P.2d 546. Moreover, giving the words of the codicil their ordinary and natural meaning, the reference therein to the disposition of his estate as his "last wish" is not without significance. Prob. Code, § 106; 57 Am.Jur. § 1148, p. 746; In re Estate of Tooley, 170 Cal. 164, 167, 149 P. 574. Construing the two documents together as the decedent's "last will," the dispositive provisions of the codicil appear last in the will, they are absolutely irreconcilable with the provisions favoring appellants, his brother and sister, and being later in time and place, they take precedence.

Nor does the doctrine of dependent relative revocation have application here in relation to the efficacy of the two documents admitted to probate together as the testator's last will. No question arises as to the effectiveness of the second instrument, the codicil, so that upon its failure to be operative for want of proper execution or other cause, the testator will be presumed to have intended the original instrument to stand to the extent that the later proves ineffective. 57 Am.Jur. § 514, p. 356; In re Estate of Kaufmann, 25 Cal.2d 854, 859, 155 P.2d 831; In re Estate of Kahan, 76 Cal. App.2d 766, 768, 174 P.2d 15. Likewise application of that doctrine may not be correlated with a false assumption of fact as basis for execution of the second instrument, the codicil, for it is his intent as therein manifested which is the controlling consideration. 57 Am.Jur. § 519, p. 360; Campbell v. French, 3 Vesey Jr. 321, 323, 30 Eng.Rep. 1033, 1034; Gillespie v. Gillespie, 96 N.J.Eq. 501, 126 A. 744, 748; see, also, Page on Wills, Vol. I, Lifetime Ed., § 484, p. 897; 5 So.Cal. Law Rev. 272, 300.

[18, 19] In invoking such doctrine, appellants argue that the revocation, if any, by reason of the execution of the codicil, was conditioned upon the decedent's mistaken belief that his brother and sister were not living. To this point they refer to the mistaken belief expressed in the will itself coincident with the decedent's declaration that it was doubtful if they were still alive. But application of such doctrine here would have to stem from the premise that at some time during the five days intervening between the execution of the formal will and the writing of the codicil,

the decedent mistakenly concluded that his brother and sister were dead, and for that reason wrote the letter to Mrs. Bardzinski. This is a speculative assumption having no support in the language of the subsequently executed instrument. It is true that he did state in the formal will his doubt of their survival. If that doubt continued and motivated the changes in testamentary disposition expressed in his letter as his "last wish," that was his privilege in providing for the distribution of his estate at death but in so doing, he was not acting under a mistake. Rather his action throughout would be based upon an existing doubt. If he arrived at the mistaken belief that they were dead, he failed to state that fact either directly or by implication, and without such expression somewhere in the testamentary documents the court is without power to supply it. In re Estate of Hartman, 21 Cal.App.2d 266, 270, 68 P.2d 744; In re Estate of Moorehouse, supra, 64 Cal. App.2d 210, 216, 148 P.2d 385. Appellants cite the settled rule that if there is any doubt or uncertainty as to the testator's intent, an interpretation will be adopted which prefers his natural heirs as against strangers. In re Estate of Norrish, 135 Cal. App. 166, 169, 26 P.2d 530; In re Estate of Boyd, 24 Cal.App.2d 287, 289–290, 74 P.2d 1049. However, such principle of construction cannot alter a clear and positive bequest in expression of the testator's purpose, In re Estate of Watts, 179 Cal. 20, 23, 175 P. 415, for he "may transmit without regard to moral or natural claims upon his bounty." Estate of Moorehouse, supra, 64 Cal.App.2d 210, 216, 148 P.2d 385, 388.

[20, 21] Finally there is appellants' contention that the court erred in refusing to allow them to introduce evidence of the circumstances attending the execution of the two testamentary documents. Assuming that this contention may now be considered without there having been made in the trial court or on this appeal some statement of the evidence upon which appellants would rely, the situation presented here does not appear to be one which would authorize the taking of testimony as an aid in ascertaining the testator's intent. When an uncertainty arises upon the face of a will as to the meaning of any of its provisions, the testator's intent is to be ascertained from the words of the will, but the circumstances of the execution thereof may be taken into consideration, excluding the oral declarations of the testator as to his intentions. Prob.Code, § 105; 57 Am.Jur. § 1040 et seq., p. 674 et seq.; In re Estate of Bourn, supra, 25 Cal.App.2d 590, 602, 78 P.2d 193; Estate of Mallon, supra, 28 Cal. App.2d 106, 110, 81 P.2d 992; Estate of Moorehouse, supra, 64 Cal.App.2d 210, 216, 148 P.2d 385. But "where the intent is plain" from the words used, "the duty of the court is to declare that intent, without regard to the consequences." In re Estate of Spreckels, 162 Cal. 559, 561, 123 P. 371; see 26 Cal.Jur. § 200, p. 884.

In line with the foregoing observations, it is our conclusion that the probate court properly construed the documents in question and determined that the property should be distributed in accordance with the terms of the codicil as the later testamentary expression—with the operative force of the formal will accordingly confined to the appointment of respondent Bardzinski as executrix.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

38 Cal.2d 136

ANGER v. BORDEN et al.

L. A. 21519.

Supreme Court of California, in Bank.

Dec. 11, 1951.

Action for partition and to quiet title by C. F. Anger against Harry I. Borden, City of Pasadena, and others. The Superior Court, Los Angeles County, Otto J. Emme, J., rendered judgment, and C. F. Anger appealed. The Supreme Court, Spence, J., held that where city treasurer deeded land to city for non-payment of city property taxes and special assessments, and thereafter the land was deeded to state for delinquent county taxes and was sold at a tax sale by state to plaintiff, and right of redemption did not terminate under city ordinances upon execution of the deed to city but continued until city should dispose of property by sale or enter it for a public purpose or give certain notice, the respective tax liens of plaintiff and city were on a parity, and on partition the city's lien was the amount necessary to redeem on date of partition and included the city's delinquent taxes and penalties for all the years following the first delinquent sale.

Judgment affirmed.

Prior opinion, 233 P.2d 197.

1. Municipal Corporations ⚿519(5)

Under statute raising presumption of extinguishment of assessment liens not enforced within established period of limitations, there was created in favor of city whose tax deed antedated issuance of improvement bond a disputable, rather than a conclusive presumption as would prevail with bona fide purchaser, that bond lien had been extinguished by the lapse of such limitation, and in absence of anything to refute such disputable presumption the statute was an effective bar to enforcement of the bond liens. Civ.Code, § 2911.

2. Taxation ⚿824

Where city treasurer deeded land to city for non-payment of city property taxes and special assessments, and thereafter the land was deeded to state for delinquent county taxes and was sold at a tax sale by state to plaintiff, and right of redemption did not terminate under city ordinances upon execution of the deed to city but continued until city should dispose of property by sale or enter it for a public purpose or give certain notice, the respective tax liens of plaintiff and city were on a parity, and on partition the city's lien was the amount necessary to redeem on date of partition and included the city's delinquent taxes and penalties for all the years following the first delinquent sale. Revenue and Taxation Code, §§ 3771–3912, 3900, 3950.

3. Costs ⚿172

A party is not entitled to attorney's fees except where authorized by statute or by contract.

4. Taxation ⚿818

In action by owner of county tax deeds against defendant city and others for partition and to quiet title, trial court properly declined to allow plaintiff attorney's fees so far as quiet title aspect of proceeding was concerned. Revenue and Taxation Code, § 3695; Code Civ.Proc. §§ 796, 798.

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Jacob Forst, Los Angeles, for appellant.

H. Burton Noble, City Atty., Frank L. Kostlan, Asst. City Atty., and Robert E. Michalski, Deputy City Atty., all of Pasadena, for respondent.

SPENCE, Justice.

In this action for partition and to quiet title brought against several defendants, plaintiff appeals from that portion of the decree granting such relief as to two parcels of property wherein the respective rights of plaintiff and defendant city of Pasadena are involved. The appeal is presented on an agreed statement, wherefrom it appears that plaintiff objects to the trial court's (1) rejection of the lien of plaintiff's improvement bond as an enforceable claim; (2) fixing of the quantum of defendant city's lien against the property; and (3) disallowance of attorney fees insofar as the quiet title aspect of this action is concerned. Plaintiff's objections cannot be sustained in the light of settled legal principles and applicable statutory law.

In 1925 Parcel 1 was deeded to the city of Pasadena by its city treasurer for the nonpayment of city property taxes and special assessments totaling $24.52. The amount claimed by the city to be necessary to redeem this property on the date of trial was $247.91. The property also was sold for $55 at a tax sale by the state in 1945, after having been deeded to the state in 1937 for delinquent county taxes. The purchaser at the latter sale thereafter conveyed his interest to plaintiff. Plaintiff also holds a street improvement bond against this property issued in 1927 under the Improvement Act of 1911. Stats.1911, p. 730; now Sts. & Hy.Code, div. 7. This bond matured in 1937 and has not been foreclosed by court action or sale through the city treasurer's office. On motion of the city, the court struck the improvement bond from the record on the ground that the lien evidenced by the bond was presumed to have been extinguished under the provisions of section 2911 of the Civil Code as amended in 1945.

In 1934 Parcel 2 was likewise deeded to the city by its treasurer for the nonpayment of city property taxes and special assessments totaling $52.29. The amount claimed by the city to redeem this property on the date of trial was $1,415.96. Plaintiff purchased this property at a state tax sale in 1948 for $2,060, it having been deeded to the state in 1934 for delinquent county taxes.

The court adjudged that the title of plaintiff and the city, as tenants in common, be quieted against all claims and demands of certain defendants. The court further decreed: (1) that the enforcement of the lien of plaintiff's improvement bond as to Parcel 1 was barred "by reason of time"; (2) that plaintiff was "entitled to a lien on [the] property" limited to the amount paid for the respective deeds from the state, and that the city was "entitled to a lien" for the "sum of its [respective] tax deed and assessments, *plus general taxes accruing subsequent to the time it obtained its tax deed*"; and (3) that no attorney fees should be allowed insofar as the quiet title aspect of the action was concerned. (Emphasis added.) Plaintiff contests the propriety of these last three adjudicated points, and they will be discussed in that order.

[1] The first question—the validity of section 2911 of the Civil Code, as amended in 1945, which raises the presumption of the extinguishment of assessment liens not enforced within the established period of limitations--was fully considered in the cases of Scheas v. Robertson, Cal.Sup., 238 P.2d 982, and Sipe v. Correa, Cal.Sup., 238 P.2d 989, to which reference is hereby made. Although the present case involves one factual difference from the cited cases —here the city's tax deed on Parcel 1 antedates the issuance of the improvement bond, while in the cited cases the purchasers of the respective tax deeds acquired title after issuance of the improvement bond and their status as bona fide purchasers for value was at issue—such disparity only has the effect of creating in favor of the city a disputable, rather than a conclusive presumption as would prevail with a bona fide purchaser, that the bond lien had been extinguished. Civ.Code, sec. 2911, as amended Stats.1945, ch. 361, sec. 1. Since the record presents nothing to refute this disputable presumption, the trial court did not err in concluding that section 2911 constituted an effective bar to the enforcement of plaintiff's bond liens. See, also, Rombotis v. Fink, 89 Cal.App.2d 378, 201 P.2d 588.

[2] The second disputed point is whether in effecting the partition of each of the two parcels involved, the city, as holder of its own tax deed, is thereby entitled to a lien computed upon a different and greater basis than the lien available to plaintiff under the state tax deed. The decree gave the city a lien against the property for the full amount of the city's delinquent taxes and penalties for all the years following the first delinquency, although Parcel 1 had been sold to the city in 1925 and Parcel 2 in 1934. Plaintiff's liens, on the other hand, were limited to the amounts paid for the respective tax deeds from the state. The court found that plaintiff had paid all county taxes due against the property at the time this action was commenced, Rev. & Tax.Code, sec. 3950, and had "made no claim for said sum." The finding as to the

amount of the city's lien was based on the testimony of the city assessor, tax and license collector as "the amount necessary to redeem said property on the date of trial."

The parties do not dispute that the respective tax liens of plaintiff and the city are on a parity. Rev. & Tax.Code, sec. 3900; Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995. It has been generally held that where liens carried into deeds have passed into private hands, each tax purchaser is entitled upon sale to receive the price paid for his interest plus half of the excess proceeds consistent with ownership of an undivided one-half interest in the property as a tenant in common. Monheit v. Cigna, supra; Cate v. Bourzac, 74 Cal.App.2d 422, 168 P.2d 971; Security Investment Co. v. Douglas, 76 Cal.App.2d 592, 173 P.2d 672; Oswald v. Salter, 77 Cal.App.2d 599, 176 P.2d 425. This situation must be distinguished from that in Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537, where the action for partition involved the opposing claims of the holder of an unforeclosed improvement bond and the state tax deed purchaser. There this court held that under the parity principle, upon distribution of the excess proceeds from the sale of the property, the maximum interest of the holder of the unforeclosed bond lien would be the amount due on his bond without right to share in any excess proceeds, while the holders of the tax deeds would be entitled to the amount paid for their respective deeds, plus the balance of the excess proceeds. 32 Cal.2d at pages 618–619, 197 P.2d 537.

Relying on these principles, plaintiff claims that the court erred here in fixing the quantum of the respective liens to be satisfied before the parties are entitled to any pro-rata share in the excess proceeds—with plaintiff's liens limited by the court to the amounts paid for the respective tax deeds from the state, and the city's liens held by the court to include not only the delinquent amounts for which the parcels were deeded to the city but also the full amount of taxes and penalties to which the parcels would have been subject had the conveyances to the city not been made. In other words, plaintiff argues that the city was given "the privilege of being a property owner and collecting taxes also." In contending that the city should be limited as a deed holder to a lien for its delinquent taxes and assessments up to the date of its deed, plus one-half of the excess proceeds, if any, upon sale of the property, plaintiff would treat the city in the same manner as a private purchaser from a taxing agency. However, it is this precise difference in the status of the parties that is determinative here. In this regard the city correctly relies on its tax ordinances in reference to property redemption rights and conditions to sustain the court's holding that the quantum of the city's lien is the amount necessary to redeem each of the parcels at the date of partition.

Section 15 of article 12 of the Pasadena city charter provides that the city shall have such rights, claims and liens for the amount of municipal taxes as has the state for state and county taxes levied in the county; and that the manner of collecting such municipal taxes and enforcing the tax lien, and the proceedings thereafter, shall be prescribed by ordinance and shall conform as nearly as practicable to the general laws governing county taxes. Section 16 provides that all sales for delinquent taxes shall be made to the city unless otherwise regulated by ordinance.

When Parcel 1 was sold to the city, Ordinance No. 490, then in effect, provided that upon the date fixed for the sale of delinquent property by the city tax collector, all such property by operation of law and the declaration of the city tax collector should be sold to the city. Section 44 of the ordinance provided that a redemption might be made by the owner or any person in interest within five years from the date of sale to the city, "or at any time prior to the entry upon or sale of said land by the city." Section 45 provided that if the property was not redeemed within the time allowed, the tax collector must convey the property to the city. Section 54 provided: "In case property assessed for taxes is purchased by the city pursuant to the provisions of this ordinance, *it shall be as-*

sessed each subsequent year for taxes until a deed is made to the city therefor in the same manner as if it had not been purchased." (Emphasis added.) Section 55 provided that no sale should be had in case of assessment under section 54 if the land was not redeemed from the previous sale. Section 56 provided: "In case property is sold to the city pursuant to the provisions of this ordinance, and is subsequently assessed pursuant to Section 54 of this ordinance, no person shall be permitted to redeem from such sale except upon payment also of the amount of such subsequent assessment costs, fees, penalties and interest."

Ordinance No. 3108, adopted in 1933, superseded Ordinance No. 490 except as to proceedings theretofore had. This later ordinance provided that property on which taxes were delinquent should be sold "by operation of law and the declaration of the * * * tax collector" to the city. Section 47 provided that "where property has been sold or may hereafter be sold" to the city for delinquent taxes, redemption may be had at any time after the sale and *before the city shall have disposed of or made entry upon the property,* by paying to the city controller; (1) the amount of taxes, penalties for delinquencies and costs due on the property at the date of sale; (2) all taxes that were a lien upon the property at the time they became delinquent; and (3) all unpaid city taxes assessed against or which are a lien against the property for each year since the sale and all penalties and costs, and if not so assessed, then such taxes as may be fixed by the city tax collector at the time of redemption for each of the years not so assessed.

Under section 53 of Ordinance No. 3108, if the property is not redeemed within five years after sale to the city for nonpayment of taxes, the city tax collector must deed the property to the city. Under section 57, when the city has by deed become the owner of the property sold for taxes pursuant to section 53, the legislative body *may* direct the sale of the property or any part thereof, and the right of redemption terminates at the time fixed for sale, whether a sale is effected or not, unless the sale is legally postponed pursuant to section 57(a). If the sale is not legally postponed, the right of redemption is terminated, and the city may thereafter deal with the property as its own.

It is apparent, therefore, that the right of redemption does not terminate upon execution of a deed to the city, but continues until the city has disposed of the property by sale, or has entered for a public purpose, or has given notice as provided in subdivision (g) to (k) of section 57 of Ordinance No. 3108. Section 57 further provided that when the city has become the owner of property sold for taxes and a deed has been filed and recorded, the legislative body may direct the tax collector to sell the property at public auction. But, no bid shall be accepted for less than the amount of all the taxes levied upon the property and all costs and penalties for every year delinquent, all tax liens up to the date of execution of the deed to the city, all expenses to date of sale, and also the redemption penalties required under section 47 of the ordinance. The legislative body, however, may declare by resolution that the property is not of sufficient value to be sold for the amount of all taxes and other specified charges, and that it would be in the best interest of the city to sell the property for a lesser sum.

Thus it appears that if the city had sold the property, it could not, in the absence of a special resolution, have sold it for an amount less than the lien here asserted. Under the parity principle of Monheit v. Cigna, supra, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995, that purchasers from taxing agencies are entitled to a lien against the property for the amount paid for their deeds, the purchaser would have been able to assert a lien in the same amount as here asserted by the city.

Since the right to redeem the property had not been terminated, plaintiff's rights should be no greater than a redemptioner's under the city's tax ordinances. It appears to be the policy of the city, pursuant to its tax ordinances, to retain possession of property deeded to it for delinquent city taxes, with the view that the owner will eventually redeem it upon payment of the prescribed amounts, rather than to terminate such right of redemption upon execution of the tax deed to itself. Consistent with this policy, there would seem to be no reason why the state tax sale for delinquent county taxes should provide a means to extinguish the city's claim for all but a small portion of its city taxes accumulated over the years. It may be conceded that taxation for municipal purposes is not purely a "municipal affair" when questions of overlapping tax liens arise. Brewer v. Feigenbaum, 47 Cal.App. 2d 171, 174–175, 117 P.2d 737, and cases cited. However, neither the decisions nor independent research have revealed any authority for the proposition that the mode of taxation provided in the city ordinances pursuant to its charter is in conflict with superseding general law. Rev. & Tax. Code, div. 1, pt. 6, chs. 8–9.

The case of Imperial Irrigation District v. Varney, 87 Cal.App.2d 264, 265, 196 P.2d 820, cited by plaintiff, has no particular significance. There an irrigation district, holding deeds issued to it for the nonpayment of assessments it had levied, sought to enjoin the defendant county treasurer from foreclosing certain improvement bonds upon the property and to quiet its title against the bond liens. It was held that the foreclosure should proceed and upon receiving his deeds, the bondholder was entitled to hold the property as a tenant in common with the irrigation district "under an ownership now known as the parity rule." See Monheit v. Cigna, supra, 28 Cal.2d 19, 168 P.2d 965, 165 A.L.R. 995. Passing reference was made to the fact that whether or not nonoperative property acquired by such taxing agency for purposes of revenue under a mere tax title may be subsequently assessed for general taxes, was in no way controlling on the question there involved. Here the point is likewise immaterial as the liability of such property to subsequent taxation after deed to the taxing agency for its delinquent taxes has no bearing on the problem of the correlation of the city's lien with the redemption provisions of its ordinances.

The city's claim is supported by the case of Sutter-Yuba Investment Co. v. Waste, 21 Cal.2d 781, 136 P.2d 11. There the purchaser of a deed from a reclamation district contended that in redeeming from county tax delinquency, no taxes should be included for the period during which the district held the property after deed to it for delinquent district assessments, upon the premise that the property owned by the district was exempt from taxation under section 1, article XIII of the California Constitution. The contention was rejected because it ignored "the distinction between the right of a taxing agency to exemption from taxation on its property and the right of a former owner or his successor in interest to redeem that property from the lien of another taxing agency. The exemption of the taxing unit does not enable the redemptioner to obtain title to the property free from the conditions and for less than the price that the State sets." 21 Cal.2d at page 785, 136 P.2d at page 13. In sustaining the validity of the statutes requiring an estimate of redemption to include an amount equivalent to taxes for the unassessed years while the property was held by the district, the court stated, 21 Cal.2d at pages 784–785, 136 P.2d at pages 13–14: "The immunity of such property from taxation does not preclude, any more than the immunity of property deeded to the state, the imposition of such conditions to redemptions as the state deems advisable. * * * In the interest of returning tax delinquent property to the tax rolls, the State has enacted liberal provisions for the redemption of such property, so designed as to discourage tax avoidance. If they did not require that redemption take into account the taxes that would be imposed had the property not been deeded to the state, owners would find it advantageous to allow their property to be deeded to the state with the intention of delaying redemption as long as possible to escape the taxes that attend ownership, secure in the knowledge that the state must give them notice before disposing of the property. * * * The right of redemption until the disposal of the property by the state serves the taxpayer's convenience but does not enable him to escape taxes for the period intervening between the deed to the state and redemption while others pay their taxes conscientiously year by year. Likewise he cannot escape such taxes by allowing his property to be deeded to any other taxing unit such as a reclamation district and subsequently regaining the title free of intervening taxes."

Similar reasoning answers plaintiff's contention that it is inequitable to allow the city to have the property deeded to it for delinquent taxes, then await a sale for delinquency of county taxes, and thereafter be reimbursed in an amount representing the taxes which would have been due the city for intervening years if the property had been on the tax rolls. Such procedure involves no inequity, for otherwise the property owner could permit his city taxes to become delinquent, then permit the county taxes to become delinquent, await an eventual sale of tax-deeded property and purchase from the state, thus extinguishing the city's claim for its unpaid taxes. The inequity of such a situation is recognized by section 3695 of the Revenue and Taxation Code, which provides for the preservation of the liens of all taxing agencies which object to sale by the state. There is no showing in the record here that the city did not so object, as it had a right to do. Under the circumstances, the determination that the amount of the city's lien should be the amount necessary to redeem the property on the date of partition appears to be a logical consequence of the parity rule as reasonably applied to the particular facts of this case.

[3, 4] Likewise without merit is plaintiff's final argument with respect to the allowance of attorney fees for quieting title to the property here involved. It is well settled that a party is not entitled to attorney fees except where authorized by statute or by contract. Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 107, 239 P. 847. Section 796 of the Code of Civil Procedure authorizes the allowance of the "costs of partition, including reasonable counsel fees, * * * for the common benefit" to be included in the judgment. Elbert, Ltd. v. Nolan, supra, 32 Cal. 2d 610, 618, 197 P.2d 537. Plaintiff contends that this provision would include attorney fees as an expense of the quiet title aspect of this litigation, since prosecution of a partition action requires the determination of the rights of all persons allegedly having an interest in the property and the conduct of the sale. Code Civ.Proc. secs. 753, 759, 775. Section 798 of the Code of Civil Procedure, however, expressly nullifies the force of plaintiff's contention by providing that if "other actions or proceedings have been necessarily prosecuted or defended * * * for the protection, confirmation, or perfecting of the title * * * the court shall allow to the parties to the action * * * all the expenses necessarily incurred therein, *except counsel fees,* which shall have accrued to the common benefit". (Emphasis added.)

Plaintiff contends that the latter section contemplates only separate actions rather than a quiet title proceeding in conjunction with a partition suit. However, he cites no case supporting his argument, and independent research has not revealed any. In view of the explicit statutory language with its distinct exception of "counsel fees," it would appear that such item is not an expense chargeable as plaintiff contends, and that the court properly declined to allow attorney fees so far as the quiet title aspect of this action is concerned. See Deacon v. Deacon, 101 Cal.App. 195, 202, 281 P. 533.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

38 Cal.2d 119

SCHEAS v. ROBERTSON et al.

L. A. 21357.

Supreme Court of California, in Bank.
Dec. 11, 1951.

Evelyn Scheas brought action against Earl T. Robertson and G. V. Williams for partition of realty subject to the lien of an improvement bond held by the plaintiff. The Superior Court, Los Angeles County, Arthur S. Guerin, Judge assigned, rendered a judgment for the defendants and the plaintiffs appealed. The Supreme Court, Spence, J., held that evidence established that defendants were bona fide purchasers for value of realty within Civil Code, § 2911, providing that any lien on realty to secure the payment of a public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of such assessment or last installment thereof, or four years after date lien attaches, or on January 1, 1947, whichever is later, and that such presumption shall be conclusive in favor of a bona fide purchaser for value.

Judgment affirmed.

Prior opinion, 224 P.2d 760.

1. Taxation ⚷695, 778, 785

Effect of deed to the state of realty which had been purchased by state for delinquent taxes, gave the state absolute title free of all encumbrances except, among other things, liens for special assessments, subject to right of redemption. Revenue and Taxation Code, § 3520.

2. Taxation ⚷695, 731

The sale by the state to individual of realty which had been deeded to the state and which the state had purchased at sale for delinquent taxes, passed the title of the state to the individual and eliminated right of redemption. Revenue and Taxation Code, § 3712.

3. Partition ⚷14

Where owner of bond issued by city treasurer under Improvement Act acquired the bond in 1929, and in 1930 the realty, which was subject to the lien of the bond, was sold to the state, and in 1935 the realty was deeded to the state, and in 1939 the realty was sold by the state to an individual, from time that individual acquired title from the state until January 1, 1947, the title of the individual and of the bond lien were on a parity and owner of bond lien had a right to maintain an action for partition. Code Civ.Proc. § 752; Streets and Highways Code, § 5000 et seq.

4. Limitation of Actions ⚷4(2)

The legislature may enact a statute of limitations applicable to existing causes of action or shorten a former limitation period if the time allowed to commence the action is reasonable.

5. Constitutional Law ⚷143, 300
Municipal Corporations ⚷408(1)

The 1945 enactments providing that liens to secure payment of public improvement assessments would be presumed extinguished after four years from date of assessment of last installment thereof, or four years after date lien attached, or on January 1, 1947, which was 15½ months after effective date of the enactments, whichever was the latter, as applied to assessment bonds and liens in existence prior to effective date of the legislation, satisfies requirements of due process of law and does not impair obligation of contract. Civ.Code, § 2911; Code Civ.Proc. § 330.

6. Limitation of Actions ⚷5(3)

Where the 1945 statute of limitations limiting time within which to bring action to enforce liens of street improvement bond against realty applies, the statute will operate to prevent the bondholder from enforcing his lien in any manner, whether the remedy pursued is an action for partition or foreclosure. Civ.Code, § 2911; Code Civ.Proc. § 330.

7. Municipal Corporations ⚷519(5)

A "bona fide purchaser" within meaning of statute providing that any lien on realty to secure payment of public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of such assessment or last installment thereof, or four years after date lien attaches, or January 1, 1947 whichever is later and that such presumptions shall be conclusive in favor of a "bona fide purchaser" for value of such property after such dates, is one who takes in good faith and for value in reliance upon presumptions afforded by the statute. Civ.Code, § 2911.

See publication Words and Phrases, for other judicial constructions and definitions of "Bona Fide Purchaser".

8. Municipal Corporations 🔑519(5)

A purchaser for value is presumed, prima facie, to be an innocent purchaser in good faith within meaning of statute providing that any liens on realty to secure payment of a public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of assessment or last installment thereof, or four years after date lien attaches, or January 1, 1947, whichever is later, and that such presumptions shall be conclusive in favor of a bona fide purchaser for value of such property after such dates. Civ.Code, § 2911.

9. Municipal Corporations 🔑519(5)

Fact that those who purchased realty which had been sold to the state for delinquent taxes, had actual or constructive notice of recorded status of bond which had been issued by city treasurer under the Improvement Act, and which was a lien on the realty in question, did not mean that they were not "bona fide purchasers" within meaning of statute providing that any lien on realty to secure payment of a public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of assessment or last installment thereof or four years after date lien attaches, or on January 1, 1947, whichever is later, and that such presumptions shall be conclusive in favor of a "bona fide purchaser" for value of such property after such date. Civ.Code, § 2911; Streets and Highways Code, § 5000 et seq.

10. Municipal Corporations 🔑519(5), 521

The obligation and lien of a street improvement bond may be extinguished by payment or merger. Streets and Highways Code, § 5000 et seq.

11. Municipal Corporations 🔑519(5)

Even though a purchaser may have notice that improvement bond is unpaid of record, yet if he does not have actual notice that lien is existent, he is nevertheless "bona fide purchaser" within meaning of statute providing that any lien to secure payment of a public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of such assessment or last installment thereof, or four years after date lien attaches, or January 1, 1947, whichever is later, and that such presumptions shall be conclusive in favor of a "bona fide purchaser" for value. Civ.Code, § 2911; Streets and Highways Code, § 5000 et seq.

12. Municipal Corporations 🔑519(5)

In action by holder of improvement bond for partition of realty subject to lien of the bond, evidence established that defendants were bona fide purchasers for value within meaning of statute providing that any lien to secure payment of a public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of such assessment, or last installment thereof, or four years after lien attaches, or on January 1, 1947, whichever is later, and that such presumptions shall be conclusive in favor of a bona fide purchaser for value. Civ. Code, § 2911; Streets and Highways Code, § 5000 et seq.

13. Municipal Corporations 🔑519(5)

A bona fide purchaser for value may rely on presumption under statute providing that any lien on realty to secure payment of a public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of such assessment, or last installment thereof, or four years after date lien attaches, or on January 1, 1947, whichever is later. Civ.Code, § 2911.

Robt. E. Rosskopf, Beverly Hills, John F. Bender and Gizella M. Allen, Los Angeles, for appellant.

Cyril A. Walton, Los Angeles, for respondents.

Harold W. Kennedy, County Counsel, John D. Maharg, Deputy County Counsel, Los Angeles, Solon S. Kipp and W. N.

Starke, San Diego, amici curiae on behalf of respondents.

SPENCE, Justice.

Plaintiff brought this action for partition asserting the lien of an unforeclosed street improvement bond against a certain parcel of realty. The trial court determined from the undisputed facts that plaintiff's action was not commenced within the time allowed by applicable legislation enacted in 1945, and that defendants, as bona fide purchasers for value, took title to the property free from the alleged lien. Accordingly, judgment was entered for defendants, and plaintiff appeals.

As grounds for reversal, plaintiff contends that the trial court erred in holding: (1) that the action was not commenced within the time allowed; and (2) that defendants are bona fide purchasers for value within the meaning of the statute, and, as such, entitled to the conclusive presumption that plaintiff's lien was extinguished. Consideration of the applicable statutory law, however, demonstrates the propriety of the assailed judgment.

Plaintiff owns a street improvement bond issued in 1929 as a lien against a vacant lot in the city of Manhattan Beach pursuant to the Improvement Act of 1911. Stats. 1911, p. 730; Deering's Gen.Laws, 1937, Act 8199; now Sts. & Hys.Code, §§ 5000–6794. The bond was issued in the amount of $220.84, payable in ten annual installments commencing January 2, 1930, with semi-annual interest. The last principal coupon thereon was payable January 2, 1939. The bond was in default in the sum of $132.48 principal, together with interest and penalties from July 2, 1933. It had not been foreclosed either by court action or through the city treasurer's office, and no foreclosure proceedings were pending at the time the present action was instituted on November 16, 1948.

The property which was subject to the lien of the bond became delinquent for city and county taxes for the fiscal year 1929–1930. It was sold to the state in 1930, and was deeded to the state in 1935. On June 21, 1939, the state sold the property to one Bennett, from whom defendants purchased it on January 25, 1947. The court found that defendants were "bona fide purchasers for value," and that "the lien of plaintiff, if any, and any and all right, title and interest claimed by plaintiff" 224 P.2d 760, 762, in the property "is barred by the provisions of section 2911 of the Civil Code and section 330 of the Code of Civil Procedure." The court concluded that defendants "are the owners [of the property] in fee simple"; and that "plaintiff has no right, title, interest or lien in, to or upon [the] property."

The judgment for defendants is based upon the trial court's determination: (1) that under the applicable 1945 legislation plaintiff was required to enforce the lien before four years had elapsed after the due date of the last installment of the bond or by January 1, 1947, whichever was later, and (2) that defendants were bona fide purchasers for value of the property after these periods had elapsed, and, as such, were entitled to the conclusive presumption that plaintiff's lien had been extinguished. In attacking the judgment, plaintiff argues that the bond was a valid and subsisting lien "until paid"; that it stood "on a parity" with the delinquent tax lien; that by deed from the state in 1939, Bennett acquired "tax title" to the property "subject to the parity bond lien"; that all subsequent transferees took "tax title" subject to the same obligation; and that defendants, even though they purchased after January 1, 1947, "were not in fact, and could not in law be, *bona fide* purchasers for value of said property, as against said bond lien." Under the uncontroverted facts, however, plaintiff cannot prevail.

[1–3] Plaintiff's bond was issued March 18, 1929, as a lien on the property. Section 23 of the Improvement Act of 1911 (now Sts. & Hys. Code, § 5372) provided at that time that "such lien shall so continue until it be discharged of record." Stats. 1927, ch. 745, § 1, p. 1407; see, also, § 63 of the Act; now Sts. & Hys.Code, § 6460. The tax lien arose in March, 1929, and continued as a lien when the property was conveyed to the state in 1935. The deed to the state gave it absolute title, free of all encumbrances except certain specified liens, including those for special assessments, Rev. & Tax.Code, § 3520, subject to the right of redemption. People v. Maxfield, 30 Cal.2d 485, 487, 183 P.2d 897. The state by sale in 1939 passed its title to Bennett, and eliminated the right of redemption. However, such acquisition of the state's title did not ipso facto destroy plaintiff's rights flowing from the bond lien, but left them intact. Rev. & Tax.Code, § 3712. From 1939, when Bennett acquired title from the state, until January 1, 1947, the title of Bennett as a tax deed purchaser and the unforeclosed bond lien were on a parity, and the owner of the bond lien had the right to maintain an action for partition. Code Civ.Proc. § 752, as amended in 1943; Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 613, 615, 197 P.2d 537; Munden v. Hayes, 89 Cal.App.2d 772, 774–776, 202 P.2d 112.

The enforcement of bond liens through foreclosure has been the subject of considerable legislative regulation over the years. In case of default, the sole remedy given the bondholder by the Improvement Act of 1911 as originally enacted, was the right to have the treasurer sell the property in foreclosure of the lien. Stats.1911, p. 730, § 67 et seq. In 1921, a "separate, distinct and cumulative remedy" was given, whereby the bondholder might bring an action to forclose the bond. Stats.1921, p. 297, § 76. In 1927 said section 76 was amended to provide that the action to foreclose the bond could only be filed after six months and not more than four years from the date of the last delinquency. Stats.1927, p. 1411. Even though the period during which a bondholder could bring an action to foreclose the lien had expired, the lien itself was not terminated but continued to exist as a basis for an action for partition. Elbert, Ltd. v. Nolan, supra, 32 Cal.2d 610, 197 P.2d 537; also Raisch v. Myers, 27 Cal.2d 773, 167 P.2d 198; Ward v. Chandler-Sherman Corp., 76 Cal.App.2d 373, 172 P.2d 900; Munden v. Hayes, supra, 89 Cal.App.2d 772, 202 P.2d 112.

In 1945 the Legislature enacted extensive changes affecting the duration and enforcement of assessment liens. Prior to that year, section 2911 of the Civil Code read: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." (But for inapplicability of the general section to certain special assessment bonds, see Raisch v. Myers, 27 Cal.2d 773, 778–779, 167 P.2d 198.) In 1945, the section was amended to read as follows:

> "A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, either:
>
> "1. An action can be brought upon the principal obligation, or
>
> "2. A treasurer, street superintendent or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent such assessment and which assessment is secured by a lien upon said real property; whichever is later.
>
> "Anything to the contrary notwithstanding, any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment shall be presumed to have been extinguished at the expiration of four years after the due date of such assessment or the last installment thereof, or four years after the date the lien attaches, or on January 1, 1947, whichever is later, or in the event bonds were or shall be issued to represent such assessment, the lien shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates."

Section 330 of the Code of Civil Procedure was added by the Legislature in 1945, and thereby additional limitations were imposed. This section limited the power of a treasurer, street superintendent or other public official to foreclose a public improvement bond to a period of "four years after the due date of said bond or of the last installment thereof or of the last principal coupon attached thereto, or prior to January 1, 1947, whichever is later," and no sale could be made thereafter.

The reasons which prompted the Legislature to enact the 1945 changes as a method of relieving special assessment districts from long-accumulated and pyramiding delinquencies and the chaotic economic conditions arising therefrom, are stated at length in Rombotis v. Fink, 89 Cal.App.2d 378, 390, 201 P.2d 588, 591. In that case the court recognized these comprehensive enactments as constituting a "revision of the entire subject", and noted that the Legislature thereby plainly manifested its purpose to and "did provide a definite statute of limitations and a definite period of time upon the expiration of which *street improvement liens* would be not only unenforceable by foreclosure but also *would be presumed to have been extinguished*"; that the "enactments" were "intended * * * to apply retrospectively, giving the holders of liens which had theretofore attached either four years or until January 1, 1947, whichever was later, in which to take action"; and that the "legislation took effect September 15, 1945, thus giving the holders of old liens 15 1/2 months in which to act." 89 Cal.App.2d at page 384, 201 P.2d at page 591. (Emphasis added.)

[4] It is settled that the Legislature may enact a statute of limitations "applicable to existing causes of action or shorten a former limitation period if the time allowed to commence the action is reasonable." Mercury Herald Co. v. Moore, 22 Cal.2d 269, 275, 138 P.2d 673, 676, 147 A.L.R. 1111; also, Security-First National Bank v. Sartori, 34 Cal.App.2d 408, 414–415, 93 P.2d 863. Statutes of limitation are "within the constitutional power of the legislature of a state", Saranac Land & Timber Co. v. Comptroller of N. Y., 177 U.S. 318, 324, 20 S.Ct. 642, 645, 44 L.Ed. 786; they are "vital to the welfare of society and are favored by the law * * * to be viewed as statutes of repose, and as such constitute meritorious defenses." Fontana Land Co. v. Laughlin, 199 Cal. 625, 636, 250 P. 669, 674, 48 A.L.R. 1308.

[5] The 1945 enactments come within the legislative prerogative and are not constitutionally objectionable. The court in Rombotis v. Fink, supra, 89 Cal.App.2d 378, at pages 386–392, 201 P.2d 588, 592, fully discussed the question of the constitutionality of these limitations on the rights of bondholders to enforce their liens created by bonds issued before the 1945 legislation. The court stated: "In our opinion, the legislation here in question satisfies the requirements of due process and does not impair the obligation of contracts within the meaning of the constitutional inhibitions. It is to be noted that the Legislature did not *ipso facto* extinguish any substantial right. The remedy of foreclosure in court or through sale by a city or county treasurer or other official was preserved by granting what the Legislature deemed a reasonable time after the effective date of the legislation for the bondholder or lienholder to take action * * * the parties have no vested right in a statute of limitations * * * they contract in the light of the power of the Legislature to modify or change existing remedies or prescribe new modes of procedure, provided a substantial and efficacious remedy remains * * *. So here, adequate time was allowed any bondholder to preserve any right which he might have. Adequate protection was afforded all who had not in fact abandoned their rights, but had merely delayed in perfecting them. The only rights sought to be extinguished were those where the inference could reasonably be drawn from inaction that the rights had been abandoned. The extinguishment resulted, not from the legislation itself, but from the conduct of the bondholder in continuing to fail to assert his right after due notice. The legislation in question does no more than recognize the logical inference to be drawn from long inaction on the part of the bondholder —that the claim has been paid, abandoned or otherwise extinguished. * * * The solution to this problem, as attempted by the 1945 Legislature, is a reasonable one. As heretofore pointed out, under the authorities cited and many others which could have been cited, the Legislature may require that the holder of a right take action to enforce it within a specified time, and such requirement does no violence to the due process or contract clauses of the state

or federal constitutions, so long as a reasonable time is allowed. * * * [U]nder section 2911 of the Civil Code as amended in 1945, the lien is 'presumed to have been extinguished', and so far as the plaintiff in the present cause is concerned, the trial court having found him to be a 'bona fide purchaser for value', the presumption is 'conclusive.' * * * Whatever may be the situation as between the holder of an outlawed bond and the original owner of the property who seeks to avoid payment, a bona fide purchaser is entitled to a decree quieting his title."

It is apparent, therefore, that the Rombotis case clearly held that section 2911 of the Civil Code was a valid statute of limitations. Plaintiff argues, however, that the present situation is distinguishable from the Rombotis case in that: (1) the Rombotis case involved the right of foreclosure rather than the right of partition as a means of enforcing an outstanding bond lien, Elbert, Ltd. v. Nolan, supra, 32 Cal.2d 610, 197 P.2d 537; and (2) the purchaser of the property seeking to quiet title against the lien of a bond some fourteen years in default indisputably held the "fee" rather than "tax" title to the realty, and his status as a "bona fide purchaser for value" in August, 1947, was not attacked.

[6] The rule of Elbert, Ltd. v. Nolan—that the bond lien continued to exist so as to support an action for partition although it could not be enforced through foreclosure proceedings by reason of the running of the statute of limitations—is inapplicable here. In that case the partition action was commenced in 1946 and was decided under the statutes in force prior to January 1, 1947, the date fixed in the 1945 legislation. Since the 1945 legislation embraced a "complete revisory plan with reference to the duration and extinction of assessment liens", and provided "a definite statute of limitations and a definite period of time upon the expiration of which street improvement liens would be *not only* unenforceable by foreclosure *but also* would be presumed to have been extinguished" (Rombotis v. Fink, 89 Cal.App.2d 378, 384, 201 P.2d 588, 591; emphasis added), the rule of Elbert, Ltd. v. Nolan is not controlling in cases involving facts arising subsequently to the limitation date of January 1, 1947. Accordingly, where the 1945 legislation applies, it will operate to prevent the bondholder from enforcing his lien in any manner, whether the remedy pursued be an action for partition or foreclosure. To hold otherwise, and thus permit the bondholder's lien to be enforced through one remedy but not the other, would manifestly frustrate the purpose of the 1945 legislation which was designed to preclude in any manner the enforcement of stale claims outstanding against property after the expiration of a reasonable time.

The second alleged ground for distinguishing the Rombotis case is likewise without merit. Plaintiff claims that the evidence does not support a finding that defendants are "bona fide purchasers for value." It appears that defendant Robertson paid the following sums on purchase of the property: $125 for the tax deed; $203.77 for a certificate issued on a foreclosed bond; and $211.30 for miscellaneous fees, making a total of $540.07 paid for a marketable title. He testified that at the time of his purchase, January 25, 1947, it was his "opinion [that] the lot was worth * * * possibly $750." He further testified that he knew at that time that he was buying a "tax title"; that he had "access to a title report on the property"; that he had taken into consideration the fact that "there were existing bonds against the * * * property" and had consulted a lawyer before purchasing; that he had "anticipated paying off the certificate" on the foreclosed bond, but that he "had advice to the effect that it would not be necessary to pay [the unforeclosed] bond off, therefore that was [the] reason for paying that much for the deed, and buying it."

[7-9] Within the meaning of the 1945 amendment to section 2911 of the Civil Code, a "bona fide purchaser is one who takes in good faith and for value and in reliance upon the presumptions afforded by [that] section". Rombotis v. Fink, supra, 89 Cal.App.2d 378, 392, 201 P.2d 588, 596. "A purchaser for value is presumed *prima facie* to be an innocent purchaser in good

faith." Fly v. Cline, 49 Cal.App. 414, 423, 193 P. 615, 619. It is evident from the record that defendants were purchasers for value. Plaintiff argues that the title report disclosed that plaintiff's bond had been issued and was unpaid of record. But the fact that defendants had actual or constructive notice of the recorded status of plaintiff's bond does not establish that they were not bona fide purchasers within the meaning of the 1945 amendment to section 2911. To so construe that section would make the concluding sentence thereof inoperative—"The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates"—and completely frustrate the purpose of the Legislature in enacting the 1945 legislation to remedy a widespread, serious economic condition in land titles throughout the state. See Rombotis v. Fink, supra, 89 Cal.App.2d 378, 390, 201 P.2d 588.

All street assessment liens for which bonds were issued under the Improvement Act of 1911 were recorded, and the act provided that the lien continued until it and any bonds issued to represent the assessment were discharged of record. Sts. & Hy. Code, sec. 5372. All persons were deemed to have notice of the record. Sts. & Hy. Code, sec. 5373. Therefore, in every case in which the 1945 amendment to section 2911 would apply, the record would show that the assessment lien had not been discharged of record. It therefore seems clear that the Legislature must have intended that the phrase "bona fide purchaser for value", as used in the 1945 amendment to section 2911, should have a different meaning from that usually attributed to it by the law governing conveyances of real property.

Ordinarily one may not be classified as a "bona fide purchaser for value" if he has constructive notice of an outstanding interest, and constructive notice is imparted to the public at large by the record of muniments of title. Upon this premise, then, no one could have such status if the record is sufficient to impart notice to him of the existence of an unextinguished assessment lien. It cannot be assumed that the Legislature indulged in an idle act by creating the conclusive presumption under the 1945 amendment to section 2911. It should also be noted that the presumption of extinguishment of an assessment lien is accorded by the statute "anything to the contrary notwithstanding," thus resolving any conflict with the recording provisions of sections 5372 and 5373 of the Streets and Highways Code. Accordingly, and in line with the manifest purpose of the 1945 legislation to supply "certainty, finality and security of title", Rombotis v. Fink, supra, 89 Cal.App.2d 378, 389, 201 P.2d 588, 594, it is reasonable to conclude that mere notice of the record, actual or constructive, cannot be considered as showing a want of good faith in the purchaser of property.

[10–12] Plaintiff does not claim that defendants had actual knowledge that the obligation evidenced by plaintiff's bond and the lien securing such bond had not been extinguished. Such obligation and lien could have been extinguished by payment or merger. 10 Cal.Jur., sec. 10, p. 606. The need for the remedial legislation in question has been discussed above, and it would appear that one of the problems toward which the 1945 amendment of section 2911 was directed was the inability of a prospective purchaser of property to ascertain the present existence of the bond and the identity of its holder, and the abandonment or extinguishment in fact of the bond. It follows, therefore, that although one may have notice that the improvement bond is undischarged of record, he is nevertheless within the meaning of the phrase "bond fide purchaser", as contemplated by the 1945 amendment to section 2911, where he has no actual, as distinguished from constructive, knowledge that the assessment lien is not in fact extinguished. Here the evidence, together with the presumption created by the 1945 amendment, sustain the finding that defendants were "bona fide purchaser[s] for value." Plaintiff's bond lien is conclusively presumed to have been extinguished, and the parity principle has no application.

[13] Plaintiff argues that since defendants knew that plaintiff's bond was unpaid of record, and that a predecessor in in-

terest acquired title through a tax deed, they were under the duty to ascertain whether the lien securing the bond was in fact abandoned or otherwise extinguished. There is no force to this argument in view of the declaration of the 1945 amendment that "anything to the contrary notwithstanding" the lien of the bond is "presumed to have been extinguished". Defendants, as bona fide purchasers for value of the tax title, were entitled to rely on that presumption. Rombotis v. Fink, supra, 89 Cal.App.2d 378, 392, 201 P.2d 588.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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38 Cal.2d 131

SIPE v. CORREA et al.

L. A. 21421.

Supreme Court of California, in Bank.

Dec. 11, 1951.

Action in partition by Frank R. Sipe against Delfino Correa, Maria Correa, and others. The Superior Court of Los Angeles County, Daniel M. Stevens, Judge assigned, rendered judgment for defendants, and plaintiff appealed. The Supreme Court, Spence, J., held that, where property was sold to state for delinquent county taxes in 1931 and was deeded to state in 1936, and state issued to defendant a tax deed dated March 17, 1941, and plaintiff's ten year street improvement bonds matured in 1938 and 1941, the 1945 statute limiting time within which to bring action to enforce lien of bonds and creating a 15½ months period of grace was constitutionally applicable to the bonds and barred plaintiff's partition action of June 18, 1947.

Judgment affirmed.

Prior opinion, 227 P.2d 59.

1. Municipal Corporations 🔑519(5)

Where purchasers at tax sale learned in June, 1947, some three months after tax sale, of existence of unforeclosed ten year street improvement bonds issued in 1928 and 1931, purchasers were bona fide purchasers for value within statute providing that any liens on realty to secure payment of public improvement assessment shall be presumed to have been extinguished at expiration of four years after due date of such assessment or last installment thereof, or four years after date lien attaches, or on January 1, 1947, whichever is later, and that such presumptions shall be conclusive in favor of a bona fide purchaser for value, and hence purchasers were entitled in bondholder's partition action to the benefit of the conclusive presumption that the liens of the owners of the bonds had been extinguished. Civ.Code, § 2911; Gen. Laws, Act 8199.

2. Constitutional Law 🔑307
Partition 🔑11

The remedy of partition as means of enforcing lien of 1928 and 1931 street improvement bonds, having been first conferred in 1943 statute, was subject to abolishment by legislature, and hence 1945 statute depriving a bondholder of such remedy did not deny bondholder due process of law. Gen.Laws, Act 8199; Civ.Code, § 2911; Code Civ.Proc. § 752.

3. Limitation of Actions 🔑6(10)

Where property was sold to state for delinquent county taxes in 1931 and was deeded to state in 1936, and state issued to defendant a tax deed dated March 17, 1941, and plaintiff's ten year street improvement bonds matured in 1938 and 1941, the 1945 statute limiting time within which to bring action to enforce lien of bonds and creating a 15½ month period of grace was constitutionally applicable to the bonds and barred plaintiff's partition action of June 18, 1947. Gen.Laws, Act 8199; Civ.Code, § 2911; Code Civ.Proc. § 752; Streets and Highways Code, § 6500 et seq.; Revenue and Taxation Code, § 4101; Const. art. 20, § 6.

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Robt. E. Rosskopf, Beverly Hills, John F. Bender and Gizella M. Allen, Los Angeles, for appellant.

David C. Marcus, Los Angeles, for respondents.

Harold W. Kennedy, County Counsel, John D. Maharg, Deputy County Counsel, Los Angeles, Solon S. Kipp, W. E. Starke, San Diego, O'Melveny & Myers, Louis W. Myers, Sidney H. Wall and Ernest M. Clark, Jr., all of Los Angeles, amici curiæ on behalf of respondents.

SPENCE, Justice.

Plaintiff brought this action for "partition and declaratory relief," asserting the lien of two unforeclosed street improvement bonds against a certain parcel of realty. Defendants Correa had purchased the property at a tax sale, and claimed that the tax deed passed title to them free from the lien of the bonds. After judgment for defendants Correa, quieting their title against plaintiff and the other defendants, plaintiff appeals.

The issue here involves the validity of certain 1945 legislation relating to assessment liens as applied to the undisputed facts of this case. Plaintiff contends that the trial court erred in concluding that plaintiff's liens were no longer enforceable because of the legislation, and further erred in concluding that defendants Correa, as "bona fide purchasers for value" at the tax sale, were the "owners in fee" of the property. It appears, however, that plaintiff's contention cannot be sustained, and that the challenged judgment should be affirmed.

Plaintiff owns two 10-year bonds issued under the County Improvement Act of 1921, Stats.1921, ch. 872, p. 1658, Gen.Laws, Act 8199, respectively dated July 19, 1928, and January 29, 1931, on which the sums of $93.15 and $393.79 are due. The property became delinquent for county taxes in the fiscal year 1930–1931. It was sold to the state in 1931, and was deeded to the state in 1936. The bonds matured in 1938 and 1941, respectively, while title was in the state. Defendants Correa purchased the property at a tax sale for $380, the tax deed being dated March 17, 1947. This action was commenced on June 18, 1947.

[1] Plaintiff contends that the title conveyed by the state was subject to the parity lien of his bonds, and that although the lien was no longer enforceable in 1947 through foreclosure proceedings because of the running of the statute of limitations, the parity principle operated to sustain the availability of this partition action. Code Civ.Proc. sec. 752; Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 197 P.2d 537. This precise point was decided adversely to plaintiff's position in an opinion this day rendered, Scheas v. Robertson, Cal.Sup., 238 P.2d 982, wherein the rule of the Elbert case was declared to have been changed by the complete revisory plan of the 1945 legislation. Stats.1945, ch. 360, sec. 1; ch. 361, sec. 1, Civ.Code, § 2911. It was there decided that a purchaser after January 1, 1947, could be a "bona fide purchaser for value", and, as such, entitled to the conclusive presumption that the lien had been extinguished upon the expiration of the statutory period, where, although he had knowledge of the recorded status of the bond, he had no actual knowledge that the lien still existed as a subsisting obligation against the property. It appears here that defendants Correa first learned of the existence of plaintiff's bonds in June, 1947, about the time this action was commenced, some three months after the date of the tax sale. Accordingly, defendants Correa correctly assert that they acquired the property as bona fide purchasers for value, and that they are entitled to the benefit of the conclusive presumption that plaintiff's liens had been extinguished.

[2] Plaintiff contends that the 1945 amendment to section 2911 of the Civil Code may not be constitutionally applied here so as to bar the present partition action, because plaintiff had no prior effective opportunity to bring such an action. Under the sovereign immunity rule, Cal. Const. art. XX, sec. 6, plaintiff could not bring an action in partition as long as the state held title to the property. Since the property was not deeded to defendants Correa until after the period established by the 1945 amendment had expired, plaintiff claims that the application of the amended

section 2911 here would constitute a denial of due process. It appears, however, that this constitutional objection is without merit.

Plaintiff had no vested right in the remedy of partition as a means of enforcing the lien of his bonds issued in 1928 and 1931. That remedy was first provided in 1943 by amendment of section 752 of the Code of Civil Procedure, and was in addition to other remedies previously and then existing. This 1943 amendment conferred no substantive rights, and did not guarantee the perpetual enforceability of any unforeclosed liens existing at that time. As a remedy created solely by statute, and dependent upon the statute alone, it was subject to abolishment by the legislature. Callet v. Alioto, 210 Cal. 65, 67–68, 290 P. 438, and cases cited; Coombes v. Franklin, 213 Cal. 164, 166, 1 P.2d 992; cf. Carpenter v. Pacific Mutual Life Insurance Co., 10 Cal.2d 307, 335, 74 P.2d 761. Therefore, the fact that plaintiff could not pursue the remedy of partition as against the state during the years it held title to the property will not sustain a constitutional objection of lack of due process.

[3] In any event, plaintiff could have preserved his right to seek partition against the ultimate purchaser by tax deed from the state if he had taken proper steps to perfect his liens and carry them into title before the expiration of the time limits specified in the 1945 legislation creating a 15–½ months period of grace. September 15, 1945, to January 1, 1947. After default on the bonds, and during the period the state held title to the property, plaintiff, by reason of the parity existing between the bond and tax liens, could have demanded that the county treasurer sell the property. Sts. & Hys.Code, sec. 6500 et seq.; La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Hornbeck, 216 Cal. 730, 732, 17 P.2d 143. Then if plaintiff or some other person had bought the property at such sale, the liens of the bonds would have been carried into title to establish a tenancy in common with the state, as holder of the tax title, under the parity principle declared in Monheit v. Cigna, 28 Cal.2d 19, 27, 168 P.2d 965, 167 A.L.R. 995. As such tenant in common, the plaintiff or other purchaser would have avoided the conclusive presumption of extinction of liens as provided in the 1945 legislation, and would have been in a position to seek partition when the property was acquired from the state by a private purchaser such as defendants Correa.

This procedure would have satisfied the purpose of the 1945 legislation, which was designed to give certainty, finality and security to land titles. Rombotis v. Fink, 89 Cal.App.2d 378, 389, 201 P.2d 588. Plaintiff would have placed his claim on record by his application for sale by the county treasurer. The identity of the purchaser at the sale would likewise have been made a matter of record, and the difficulty of discovering and locating holders of stale bond liens or claims based thereon would have been eliminated. A subsequent tax deed purchaser from the state would, therefore, have been in a position to ascertain that a bond lien was still being asserted against the property, and could have sought partition or attempted to quiet title. A purchaser at the treasurer's sale, having carried his lien into title, would have had the same relief of partition open to him within a reasonable time. See Akley v. Bassett, 189 Cal. 625, 647–648, 209 P. 576.

In addition to partition, plaintiff had a remedy of foreclosure through judicial action. It is true that the plaintiff could not have foreclosed the bond liens against the tax title held by the state because of the sovereign immunity doctrine, and because of the parity existing between the state's tax title and plaintiff's bond liens. Rombotis v. Fink, supra, 89 Cal.App.2d 378, 393, 201 P.2d 588. However, plaintiff could have foreclosed his bond liens against the former owner's right of redemption within four years after the maturity of the bonds in 1938 and 1941. Rev. & Tax. Code, sec. 4101; People v. Maxfield, 30 Cal. 2d 485, 487, 183 P.2d 897. While the holder of the fee is an indispensable party to a foreclosure action seeking to bind his interest in the property, Lee v. Silva, 197 Cal. 364, 368, 375, 240 P. 1015, a valid judgment of foreclosure may be had against other persons interested in the property without joining the owner of the fee. District Bond Co. v. Pollack, 19 Cal.2d 304, 306, 121 P.2d 7. Upon foreclosing against the former owner's right of redemption, plaintiff either would have had the bond liens satisfied or would have stepped into the shoes of the former owner, in which latter case he could have redeemed the property from the state at any time prior to the tax sale.

It follows that the 1945 legislation in question is constitutionally applicable to plaintiff's bonds so as to preclude his maintenance of the present partition action, and that defendants Correa were entitled to have their title quieted against plaintiff's asserted claims.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

38 Cal.2d 879

Samuel J. GORDON, Plaintiff and Respondent, v. Robert L. ROMBOTIS, Elbert, Ltd., a corporation, et al., Defendants. Elbert, Ltd., a corporation, Appellant.

L. A. 21703.

Supreme Court of California, in Bank.

Dec. 11, 1951.

Appeal from Superior Court, Los Angeles County; Roger Alton Pfaff, Judge.

Prior opinion, 227 P.2d 548.

John F. Bender and Gizella M. Allen, Los Angeles, for appellant.

Chas. I. Rosin, Los Angeles, for respondent.

O'Melveny & Myers, Louis W. Myers, Sidney H. Wall and Ernest M. Clark, Jr., all of Los Angeles, amici curiæ on behalf of respondent.

SPENCE, Justice.

This is a quiet title action presenting questions similar to certain questions determined in two cases this day filed, Scheas v. Robertson, Cal.Sup., 238 P.2d 982, and Sipe v. Correa, Cal.Sup., 238 P.2d 989. Upon the authority of and for the reasons stated therein, plaintiff was correctly adjudicated a "bona fide purchaser for value" and entitled to rely on the conclusive presumption found in the 1945 amendment of section 2911 of the Civil Code.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

38 Cal.2d 242

In re HAROOTENIAN'S ESTATE.

S. F. 18116.

Supreme Court of California, in Bank.

Dec. 27, 1951.

Proceedings in the matter of the estate of Kazar Harootenian, deceased. Jean Harootenian, also known as Jean Harrison, filed a petition for revocation of the probate of the will on behalf of her son, Haig Harootenian, also known as Haig Harrison, as guardian ad litem. Judgment was entered dismissing the petition, there was no appeal from such judgment and it became final. Jean Harootenian, also known as Jean Harrison, wife of George Harootenian, also known as George Harrison, filed a complaint in intervention for contest of the will. The demurrer to her complaint was sustained. She filed an amended complaint, and Syble Janigan and Samuel A. Harootenian, and George Harootenian, also known as George Harrison, and Agnes Philliposian, interposed a general and special demurrer to the amended complaint and moved for dismissal. The Superior Court, Fresno County, Ernest Klette, J., entered an order dismissing the complaint in intervention, sustained a demurrer to the amended complaint, and Jean

Harootenian, also known as Jean Harrison, appealed. The Supreme Court held that a judgment lien creditor is entitled to contest a will disinheriting a judgment debtor.

Judgment reversed with directions.

Edmonds and Spence, JJ., dissented.

Prior opinion 228 P.2d 595.

Wills ⚿229

A judgment creditor who has perfected a lien at time property would devolve to heir if will be set aside is an "interested person" who may contest will. Probate Code, §§ 370, 380; Code of Civ.Proc. § 387.

See publication Words and Phrases, for other judicial constructions and definitions of "Interested Person".

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Philander Brooks Beadle and Morton L. Silvers, San Francisco, for intervener and appellant.

Leon A. Blum, San Francisco, David E. Peckinpah and L. N. Barber, Fresno, for respondents.

SHENK, Justice.

This is an appeal from a judgment of dismissal after an order sustaining a demurrer to and an order granting a motion to dismiss an amended complaint in intervention in a will contest. The judgment followed the final order in proceedings to revoke the probate of the will and is appealable. Sec. 1240, Prob.Code; sec. 963, Code Civ.Proc.; In re Estate of Baker, 170 Cal. 578, 583, 150 P. 989; In re Estate of Katz, 49 Cal.App.2d 82, 120 P.2d 896.

The record shows the following: Kazar Harootenian, a widower, died on March 3, 1947. A brief instrument designated as his last will and testament was dated February 27, 1947. It mentioned his four adult children George, Samuel, Agnes and Syble. They survived the decedent. The decedent bequeathed $1,500 to the son Samuel, all the rest of his estate to the daughter Agnes, and expressly disinherited George and Syble. George was named executor without bond and with power to dispose of the property without order of court. Some illegible marks or writing appeared with the decedent's name at the end of the will followed by an attestation clause subscribed by two witnesses.

On March 24, 1947, George filed a petition for probate of the will and for letters testamentary. On April 5th Samuel and Syble filed a contest resisting the probate of the will on the grounds that the instrument was not signed by the decedent but by another; that the formalities of execution were not complied with; that the decedent was then suffering from a broken spine, fractures and contusions, was confined to bed in a hospital, was physically helpless, feeble and infirm in mind and body, and was not of sound and disposing mind; that the attempted signing of the instrument was not his free and voluntary act but was procured by the undue influence of George and Agnes with the intent to obtain the greater part of the estate for themselves. George and Agnes filed an answer to the contest admitting the alleged physical condition of the decedent but denied other allegations. On May 9, 1947, the contest was withdrawn and dismissed with prejudice pursuant to a stipulation and agreement among all the heirs. Thereby Samuel remitted the bequest which became a part of the residue. Agnes as residuary legatee agreed to the distribution to Samuel and Syble jointly of a one-half interest in the Harootenian ranch property in Fresno county, or one-half the proceeds of the sale thereof, and all agreed that the ranch be sold as soon as possible. Assets of the estate were listed as the ranch property, an apartment house in San Mateo County, a bank account of approximately $8,600, furniture and personal belongings. Property thereafter discovered was to be divided one-half jointly to Samuel and Syble, the other half to Agnes. The attorneys acting for Samuel and Syble were nominated to act for George in the sale of the ranch.

Upon the filing of the agreement and on May 12, 1947, the court admitted the will to probate and appointed George as executor. On November 19, 1947, George tendered his resignation dated in Nevada because of his removal to that state, and Agnes and Syble were appointed administratrices with the will annexed.

Within the six months limitation period of section 380 of the Probate Code, and on November 10, 1947, Haig Harootenian, minor son of George and Jean Harootenian, through the latter as his guardian ad litem, filed a contest of the will and a petition to revoke probate. The contestant alleged that he was a legatee under a prior valid will of the decedent, that the prior will was left in the possession and custody of George and Agnes who concealed the instrument, that the will admitted to probate was not the will of the decedent, was not executed in accordance with the required formalities, and was otherwise invalid on the same grounds as alleged in the contest of Samuel and Syble. George, Agnes, Samuel and Syble filed an answer containing denials of all allegations with the exception that they admitted the relationship and that at the time of the execution of the probated will the decedent was suffering from a broken spine, fractures and contusions and was confined to bed in a hospital.

On March 28, 1949, by leave of court, a complaint in intervention on the same grounds of contest was filed by Jean Harootenian as a judgment creditor of George. On April 5, 1949, the trial commenced. At the close of the contestant Haig's evidence as to the existence of the alleged prior concealed will, the proponents moved to dismiss on the ground that the evidence was insufficient to support Haig's claim of interest, namely, that there was a prior will in which he was named as legatee. The motion to dismiss Haig's contest was granted and the order thereon entered on April 16, 1949.

The amended complaint in intervention was filed by leave of court on August 8, 1949. Proponents filed a demurrer thereto and moved for dismissal on the grounds that there was not pending a contest in which the contestant could intervene and that the intervention was barred by the time limitation of section 380 of the Probate Code. As first indicated herein the trial court sustained the demurrer, granted the motion, and dismissed the proceedings in intervention.

The first question is whether the complaint in intervention was filed within the six months limitation of section 380 of the Probate Code. There is no question as to the timely filing of the contest initiated by Haig as an alleged legatee under a prior will. Nor may it be questioned that the allegations of Haig's petition showed him to be an interested person who may contest the validity of the will. The pleadings filed by him alleged a prima facie cause entitling him to contest the probated will as a legatee under a prior will. In re Estate of Land, 166 Cal. 538, 137 P. 246; In re Estate of Plaut, 27 Cal.2d 424, 164 P.2d 765, 162 A.L.R. 837. It is the settled law of this state that an interested person may intervene on the same grounds of contest at any time before the trial of a pending proceeding to revoke probate of the will initiated by another interested person. A will contest is in the nature of a proceeding in rem. It is immaterial that the intervention in a pending timely contest occurs after the lapse of the limited period, and the party's voluntary dismissal of the pending contest will not affect the right of the intervenor to a trial on the issues raised by him. Sec. 387, Code of Civil Procedure; sec. 1233, Probate Code; Voyce v. Superior Court, 20 Cal.2d 479, 127 P.2d 536; In re Estate of Butzow, 21 Cal.App.2d 96, 68 P.2d 374. The proponents do not seriously question these principles, but contend that they are inapplicable because on the trial Haig was unable to produce sufficient evidence of the existence of the alleged prior will and his contest was dismissed for failure to prove his interest. Thus the dismissal was not a voluntary dismissal by the party but was a dismissal by the court after trial on the merits of the preliminary issue. A voluntary dismissal by a party will not be permitted to defeat the statutory right of intervention by preventing trial on the grounds of the contest. But to give the claimed effect to the court's judgment of dismissal would likewise nullify the statutory right. That right inheres at any time before trial. An intervention which is timely and proper before trial cannot be defeated after trial by the finding on an issue which does not dispose of the merits of the issues tendered by the intervenor. If the contestant by a voluntary dismissal may not defeat the intervenor's right to a trial of the cause, there is likewise no reason why a dismissal entered by the court should have that adverse effect, and the proponents present no case in point so declaring. In the only case relied on the non-interest of the original contestant was shown on the face of the pleadings. See Russell v. Nelson, 317 Mo. 148, 295 S.W. 118. That case is distinguishable for that reason. The policy underlying the rule that the dismissal of the cause as to one party will not affect the rights of a party not yet heard is that which permits all persons entitled to a hearing to have their day in court. True the court does not have jurisdiction to entertain a proceeding to revoke probate which is barred by the time limitation, and will be restrained from exercising jurisdiction in such a case. In re Estate of Smith, 214 Cal. 50, 3 P.2d 921; Scott v. Superior Court, 125 Cal.App. 513, 516, 14 P.2d 99. But that is not to say that when jurisdiction once attaches the court may be halted before all parties are heard because pursuant to its discretion relating to the order of proof, cf. In re Estate of Land, 166 Cal. 538, 540, 137 P. 246, the original contestant's evidence on the issue of his interest was deemed insufficient. The court did not lose jurisdiction of the entire contest and other parties by the dismissal of one, the original contestant, on a partial trial. The contest was unadjudicated at the time the intervention was filed and the court had jurisdiction to try all of the issues of the contest on behalf of all the parties before it, in whatever order of proof it might specify. That jurisdiction continued until the entire controversy was finally disposed of as to all of the contestants. It follows that the judgment of dismissal of the complaint in intervention is insupportable on the ground of the alleged bar of section 380 of the Probate Code.

The pleadings disclose that the plea of laches interposed by demurrer and motion is also unavailing. Nothing is thus shown by which the rights of the proponents could be prejudiced on account of the delay in filing the complaint in intervention. The lapse of time alone is not sufficient to support the plea. No change affecting the legal rights of the parties nor any financial loss is indicated. No circumstances or facts are alleged which would sustain the judgment of dismissal on that ground. Cahill v. Superior Court, 145 Cal. 42, 47, 78 P. 467; Thornton v. Middletown Educational Corp., 21 Cal.App.2d 707, 711, 70 P.2d 234. The intervenor is therefore entitled to a trial on the merits of the contest if she is an interested person who may contest the will.

It is also alleged that prior to the events hereinabove related George and Jean, the parents of Haig, had been separated, that the wife had been awarded support by court decree, and that on January 27, 1947, which was prior to the death of George's father, Jean obtained a judgment against George for unpaid support. An execution which issued in March 1949 indicated that there was then due on the judgment $8,668.82.

Section 370 of the Probate Code provides that before probate "any person interested" may contest the will. Section 380 provides that "any interested person" other than a party to a contest before probate and a person who had actual notice of such previous contest in time to have joined therein, may contest the will at any time within six months after probate. The proponents do not contend that the order on the demurrer or on the motion to dismiss is supported on the ground that the intervenor had actual notice of or opportunity to participate in the shortlived contest before probate. The question then is whether a judgment creditor of a disinherited heir of the decedent is a person interested within the meaning of the sections. That question does not appear to have been directly involved in previous cases in this state.

It has been declared as settled that an interested person is one who has an interest of a pecuniary nature which may be impaired or defeated by the probate of the will or benefited by setting it aside. In re Estate of Plaut, supra, 27 Cal.2d 424, 425–426, 164 P.2d 765, 162 A.L.R. 837. The interest is not necessarily confined to that of an heir who would take by succession if the will be set aside. In Estate of Plaut and in Re Estate of Land, supra, 166 Cal. 538, 137 P. 246, it was recognized that a legatee under a prior will, not an heir, was a person who might be benefited by setting aside the will. Nor is it necessary that the impairment or benefit be established as a certainty. A prima facie showing of an interest is enough. In re Estate of Plaut, supra, 27 Cal.2d at pp. 427–428, 164 P.2d 765, 162 A.L.R. 837. However, a remote possibility of escheat is insufficient to support a claim of interest by the state. State v. Superior Court, 148 Cal. 55, 82 P. 672, 2 L.R.A.,N.S., 643. Nor is a debtor of the estate a person whose pecuniary interest would be affected by the probate of the will. In re Estate of Bily, 96 Cal.App.2d 333, 215 P.2d 78, 15 A.L.R.2d 861.

In Sparks v. De la Guerra, 14 Cal. 108, 18 Cal. 676, the plaintiff, a judgment creditor of an heir, by actions against the executors, unsuccessfully attempted to reach the assets of an alleged secret trust created in the executors for the benefit of the heir. The cases did not involve a contest of the will.

In San Diego Trust, etc., Bank v. Heustis, 121 Cal.App. 675, 10 P.2d 158, the testatrix created a spendthrift trust for her son, obviously to protect him from a judgment held by his wife. Execution issued and was levied on the assets in possession of the executor-trustee. The latter filed an action for declaratory relief to determine whether the wife could satisfy the judgment from the trust property. By answer filed more than six months after probate the wife sought to attack the will as invalid on various grounds. On her appeal from an adverse judgment on the pleadings it was correctly determined that the answer as an attack on the validity of the will was too late. The court also stated that since the wife was not an heir of the deceased nor a legatee under the will, she was a mere stranger, not entitled to notice of the probate proceedings, and therefore not an interested person, citing State v. Superior Court, supra, 148 Cal. 55, 82 P. 672, 2 L.R.A.,N.S., 643. The question of the pecuniary interest of a judgment creditor of the heir was not considered.

Authorities with little conflict agree that a general creditor of a disinherited heir has not sufficient interest to contest the will; that there must have been created some right or interest in the creditor which will attach to the property on devolution to the heir if the will be invalid. The authorities are divided as to whether a judgment creditor of the heir has such an interest. None questions that a parent has the right to make a valid will disinheriting a child. But if through fraud or undue influence or other circumstance the will is not the product of the mind of the putative testator, or is not a validly executed will, a judgment lien creditor of the disinherited heir is in the majority of the cases held to be a person who has a pecuniary interest which will be impaired by admitting the instrument to probate or be benefited by setting aside the probate thereof.

In Bloor v. Platt, 1908, 78 Ohio St. 46, 84 N.E. 604, 605, 14 Ann.Cas. 332, it was stated that a lien creditor could not with justice or reason be denied his day in court to prove that a paper purporting to be a will and obviously designed to defeat creditors of the heir is not in fact a valid testament. It was held that "any interested person" meant interested persons in addition to devisees, legatees, heirs, executors and administrators, and included any person who has such a direct, immediate and legally ascertained pecuniary interest in the devolution of the estate as would be impaired or defeated by the probate of the will or be benefited by setting it aside, and that a judgment creditor was such a person. That and other cases establish the distinction between the right of contest of a general creditor of an heir who has no vested right, claim or interest to be defeated or established by the probate or rejection of the will, and the right of a judgment lien creditor who generally is entitled to assail or defend against anything that may divest his lien. Although the lien creditor has no interest in the estate of the decedent as such, his lien attaches the moment title is vested in the heir by descent. It is not interest in the estate as such which determines his right. It is his interest in the devolution of the estate which establishes the right of contest. In Re Duffy's Estate, 1940, 228 Iowa 426, 292 N.W. 165, 167, 128 A.L.R. 943, it was pointed out that if the common law still prevailed, in ejectment a lien creditor could defeat a title under an invalid will; and that there should exist no good reason why he could not do so under the statutory proceeding. After reviewing numerous conflicting cases the court held the lien creditor to be a person interested in accord with what was deemed the weight of authority. The common law method of contest available to a judgment creditor of an heir was also noted in Watson v. Alderson, 146 Mo. 333, 48 S.W. 478, where it was held that a lien creditor of the heir was entitled to contest a will disinheriting the heir since there was no difference in principle between the right of the heir and that of his judgment creditor. In Smith v. Bradstreet, 1833, 16 Pick., Mass., 264, it was also said that the interests of the heir and his judgment creditor in the probate of the will were identical. As observed in Re Van Doren's Estate, 1935, 119 N.J.Eq. 80, 180 A. 841, obviously it could not be said that a judgment creditor of an heir would not be injured by the probate of an invalid will disinheriting the heir.

In 68 Cor.Jur. 906, the general rule with citation of cases is stated as above, viz.: that the creditor of the heir has not such an interest as will entitle him to contest the will except where he is an attachment or judgment creditor whose lien will attach when title vests in the heir. In 57 Am.Jur. p. 551, it is stated that the well-considered cases hold that a judgment creditor of an heir has a sufficient interest to contest a will under which the heir is to take nothing, if the judgment lien would attach on the property's passing under the laws of succession. See also cases collected in Notes 46 A.L.R. 1490 and 128 A.L.R. 963.

It follows from the foregoing authorities and the statutes giving "any interested person" the right of contest, that a judgment creditor who has perfected a lien at the time the property would devolve to the heir if the will be set aside is an interested person who may contest the will.

The record on this appeal shows that if the will be held invalid there is real property title to which would pass by devolution under the laws of succession. A judgment lien may be established on the real property of a judgment-debtor by filing an abstract of the judgment or decree "with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire." Section 674, Code of Civil Procedure. Under the laws of succession the title to real property devolves on the heirs at law as of the time of the death of the decedent. Section 300, Probate Code. The contestant alleged generally that she was a judgment creditor of the disinherited heir at the time of the death of the decedent. The motion to dismiss was made on the grounds that there was no contest pending in which the contestant could intervene and that the complaint in intervention was filed too late. That motion was granted. The dismissal on the stated grounds foreclosed the request for permission to allege by amendment additional facts relating to the specific lien required to bring the contestant within the class declared to be interested persons who might contest the will. The absence of such request is deemed not to affect the proper judgment of this court based on the conclusion that the trial court erred in dismissing the complaint in intervention. The cause should be reinstated with an opportunity to the plaintiff by amendment to bring herself, if she can do so, within the class of judgment lien creditors entitled to contest a will disinheriting a judgment debtor.

The judgment is reversed with directions to the trial court to proceed in accordance with the views herein expressed.

SCHAUER, J., concurs.

CARTER, Justice.

I concur in the judgment of reversal but do not agree with the reasoning in the majority opinion that the right of a creditor of an heir to contest a will is limited to a judgment creditor whose judgment may be a lien upon real property which would descend to the heir in case the will is set aside.

The question of whether a creditor of an heir may contest a will of the testator was settled recently by this court in Re Estate of Kalt, 16 Cal.2d 807, 108 P.2d 401, 133 A.L.R. 1424, a case which is not mentioned in the majority opinion. There we were considering whether the creditor of a legatee under a will could prevent the renunciation of the legacy by the legatee. We held he could and in so doing held that the case was analogous to a contest of a will by a creditor of an heir, stating, 16 Cal.2d at page 814, 108 P.2d at page 404, 133 A.L.R. 1424: "A creditor *who is legally entitled to set aside a fraudulent conveyance may exercise the debtor's right to contest a will even though the debtor himself does not wish to do so.* Brooks v. Paine, 123 Ky. 271, 90 S.W. 600; In re Langevin's Will, 45 Minn. 429, 47 N.W. 1133; Bloor v. Platt, 78 Ohio St. 46, 84 N.E. 604, [605], 14 Ann.Cas. 332. If the creditor contested the will successfully it would be ironic to leave the debtor free to renounce the ensuing benefits. A debtor may be compelled not only to retain his property for the benefit of his creditors, but to dispose of it for the same purpose. There is a like obligation upon him of which he may acquit himself without hardship, to avail himself of a bequest. The denial to the debtor of the right to renounce as against his creditors in fact benefits his own economic interests as well as those of his creditors." (Emphasis added.) It will be noted in the foregoing that a creditor who is legally entitled to set aside a fraudulent conveyance may contest a will. In the forepart of the opinion it is stated that under the Uniform Fraudulent Conveyance Act (Civil Code, §§ 3439–3440.5) the creditor who may set aside a fraudulent transfer *need not* be a judgment creditor *nor have* a lien. It follows, therefore, that, contrary to the majority opinion, a general creditor may contest a will. Furthermore, it will be noted that the Kalt case cites Brooks v. Paine, 123 Ky. 271, 90 S.W. 600, for its statement to this effect. It was there held that a general creditor of an heir may contest a will which disinherits the heir.

I can see no justification for requiring that the judgment creditor of an heir must have a lien on real property before he can contest the will, thus placing personal property beyond his reach. There may be policy reasons for requiring that the creditor have a judgment, such as, that the probate court is an inappropriate forum to litigate the question of whether the creditor is in fact such, and the heir, his alleged debtor, is not a party to the contest proceeding. There is no reason, however, for the lien requirement. The lien is tenuous at the best as it may be wiped out if the property is sold during probate.

Finally, the holding by the majority can be made meaningless by simple action by the creditor. The right to contest a will being a chose in action, is transferable. In re Estate of Baker, 170 Cal. 578, 586, 150 P. 989; In re Estate of Clark, 94 Cal.App. 453, 271 P. 542. It would appear, therefore, that a creditor may commence an action against the heir and attach his right to contest the will (Code of Civil Procedure, § 542b) which would be substantially the same as a lien.

I would therefore hold that both a judgment creditor and a creditor of an heir who has brought an action and effected a valid attachment of the interest of the heir in his share of the assets of an estate has such an interest that he may contest a will which is so drawn as to deprive an heir of property that would have descended to him in the event of intestacy.

TRAYNOR, J., concurs.

EDMONDS, Justice (dissenting).

Courts have expressed many divergent conclusions in determining the "interest" which one must have to give him the right to contest a will. In my opinion, to allow either a creditor or a judgment creditor of a disinherited heir to maintain such a contest, places an obstacle in the way of the prompt settlement of estates which cannot be justified upon any sound legal principle.

A will contest is entirely the creature of statute. The sole standard established by the Legislature to determine the necessary qualifications of the person who may contest the probate of a will is stated in two phrases in the Probate Code. Section 370 permits "any person interested" to contest the will before probate. Section 380 allows "any interested person" to maintain a contest after probate if he has had no notice of a prior proceeding. No standard could be more vague and lacking in definition. What sort of interest must there be, and in what?

The Legislature might well have used the word in the sense of a property right. Or did it limit the proceeding to a person with an expectation of pecuniary benefit? Giving effect to a broader connotation of the term, should it be construed as authorizing legal action by one who believes that the testator did not follow the highest moral principles in making provision for the devolution of his property? By common definition, interest in an estate, without qualification of the term, may mean almost anything. It could include the motivation of one of asserted good purpose having no relationship to the deceased, nor the possibility of sharing in the estate, who believes that the property should be divided differently than the will specifies.

Depending upon the phase of the law in which it is used, "interest" or "interested" assumes a multitude of meanings. "The word 'interest' is used throughout the Restatement of this Subject to denote the object of any human desire." Restatement of Torts, § 1. "The word 'interest' is used in the Restatement of this Subject both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them. The creation of interests may be either the creation of a new interest or the change or abolition of an existing interest." Restatement of Conflict of Laws, § 42b.

"In its ordinary signification among men of all classes [the word 'interest'] is broad enough to include any right, title, or estate in, or lien upon, real estate. One who holds a mortgage upon a piece of land for half its value is commonly and truthfully said to be interested, to have an interest, in it * * *." Ormsby v. Ottman, 8 Cir., 85 F. 492, 497. Definitions of "interest" or "interested" could be multiplied seemingly without end. See 22 Words and Phrases, page 38 et seq.; Black's Law Dictionary [3d Ed., 1933] 996; Ballentine's Law Dictionary [1930] 670.

Even when applied to the comparatively narrow field of probate of an estate, the term has been given a variety of meanings. "It is an elementary proposition that the only persons authorized to contest or seek revocation of the probate of a will are those who, but for the will, would succeed in some degree to the decedent's estate." In re Peppin's Estate, 53 Mont. 240, 163 P. 104, 105. A purchaser of an interest in the lands of the decedent was held to be a person interested in the estate. McCarthy v. Texas Co., Tex. Civ.App., 235 S.W. 679, 681. An administrator de bonis non is a party interested in the estate. Balch v. Hooper, 32 Minn. 158, 20 N.W. 124, 125.

"The word 'interest,' in its ordinary, accepted meaning, embraces both a vested and a contingent interest, and the word 'interested' is defined as 'having an interest; having a share or concern in some project or affair; involved; liable to be affected or prejudiced; * * * not disinterested * * *.'" In re Brown's Estate, 24 Cal. App.2d 573, 575, 75 P.2d 658, 659. "A 'per son interested,' within the contemplation of this statute, undoubtedly means a person who has such a direct pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the will, or be benefited by setting it aside." Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364, 366, L.R.A.1918D, 575.

The standard adopted by Mr. Justice Shenk is that "It is his interest in the devolution of the estate which establishes the right of contest". But with the restriction that the contestant must be one having a judgment lien, this means that, *if* the contest is successful, and *if* the real estate distributable to the debtor has not been sold during administration, and *if* that real estate is finally distributed to the debtor, the creditor then will have a property interest in the estate of the decedent. The qualification to maintain the proceeding can be determined only after a successful contest of the will and at the time the estate is ready for distribution. Authority to intrude upon the administration of an estate, with the consequent delays and unrecoverable expense, should not rest upon such an uncertain basis.

A lien on the real property of a judgment debtor located in a particular county may be obtained by recording an abstract of the judgment in that county. Section 674, Code Civ.Proc. But that right does not extend to one who has obtained his judgment in another state. And no lien is obtainable upon the personal property of a debtor. To allow one to contest a will solely upon the ground that he is a judgment creditor is wholly arbitrary and rests upon a construction of "any interested person" unjustified by fundamental principles governing probate procedure. The further requirement that the judgment must be a lien upon real property which might be distributed to the heir, is a distinction which has no rational basis in either probate law or the law governing creditors' rights.

Mr. Justice Shenk says "The interest is not necessarily confined to that of an heir who would take by succession if the will be set aside". But in every California case cited by him, the contestant was one who, upon a successful contest, would take directly from the testator, either by the terms of a former will or by succession.

In Re Estate of Land, 166 Cal. 538, 137 P. 246, the contestant was a beneficiary under a former will. Even then, contest was denied because the pleadings established that he stood to gain no more under the former will than by the one he attacked.

The contestant in Re Estate of Plaut, 27 Cal.2d 424, 164 P.2d 765, 162 A.L.R. 837, was a beneficiary under a former will. In Re Estate of Bily, 96 Cal.App.2d 333, 215 P.2d 78, 15 A.L.R.2d 861, a debtor of the estate was denied the right to contest.

In San Diego Trust & Savings Bank v. Heustis, 121 Cal.App. 675, 10 P.2d 158, the appellant stood in exactly the same position as Jean Harootenian. Although the decision was not based upon "the pecuniary interest of a judgment creditor of the heir". the court said: "Appellant has no standing to contest the will because she is not a party interested as specified by the Code section 370 of the Probate Code, formerly section 1307, Code of Civil Procedure. See State v. Superior Court, 148 Cal. 55, 82 P. 672, 2 L.R.A.,N.S., 643. If she could not contest the will before probate, of course she could not afterwards. Appellant was not an heir of deceased nor legatee under the will. She was a mere stranger, and was not entitled to any notice of the probate proceedings." 121 Cal.App. at page 681, 10 P.2d at page 160.

The Heustis case cites with approval State v. Superior Court, 148 Cal. 55, 82 P. 672, 2 L.R.A.,N.S., 643, which was a proceeding in mandamus to compel the superior court to permit the state to contest a will. The state claimed under a right of escheat. It was held that the possibility of escheat was too indirect an interest upon which to base a contest.

The right to contest a will is simply a cause of action to invalidate a testamentary disposition which bars the contestant from sharing in the estate of the decedent. In re Estate of Baker, 170 Cal. 578, 585-586, 150 P. 989; In re Estate of Clark, 94 Cal. App. 453, 461, 271 P. 542; In re Estate of Morrison, 125 Cal.App. 504, 507, 14 P.2d 102; In re Estate of Anthony, 127 Cal.App. 186, 189, 15 P.2d 531. I would construe "any interested person" as meaning one who, if the will of the testator were set aside, would receive directly, and not through any third person, a part of the property of the estate. If the term is to be more broadly applied, the Legislature should specifically define the qualifications of a contestant.

For these reasons, in my opinion, the judgment should be affirmed.

SPENCE, J., concurs.

PEOPLE v. CHESSMAN.

Cr. 5006.

Supreme Court of California, in Bank.

Dec. 18, 1951.

Rehearing Denied Jan. 15, 1952.

Caryl Chessman was convicted in the Superior Court, Los Angeles County, Charles W. Fricke, J., for seventeen felonies consisting of first degree robbery, grand theft of automobile, kidnaping for purpose of robbery with infliction of bodily harm, violation of § 288a of the Pen.Code, attempted robbery, attempted rape, and kidnaping for the purpose of robbery. Two death sentences were imposed for kidnaping for purpose of robbery with infliction of bodily harm. From the judgments of conviction and from an order denying the defendant's motion for new trial, the defendant appealed. The Supreme Court, Schauer, J., held that attempted forcible rape and compelling violation of Pen. Code, § 288a, relating to sex perversions, are "bodily harm" within Pen.Code, § 209 prescribing the punishment if person kidnaped suffers bodily harm.

Judgments and order affirmed.

Carter and Edmonds, JJ., dissented.

1. Criminal Law ⚷590(1), 641(1)

Where defendant refused trial court's offer to appoint counsel and trial court set dates for trial and warned defendant that no continuance based on defendant's decision to represent himself would be granted, and deputy public defender was present throughout trial and his legal ability and experience were available to defendant, defendant voluntarily waived assistance of counsel with full knowledge of what he was doing, and trial court's denial of continuance which defendant requested to prepare his case and to obtain witnesses was not error.

2. Criminal Law ⚷641(1)

A defendant who intelligently refuses counsel and insists upon personally conducting and controlling his defense does not lose the status of prisoner and become entitled to extraordinary privileges not accorded defendants who are represented by counsel, nor does he become entitled to proceed in a manner different from that permitted to attorneys.

3. Criminal Law ⚷1035(2)

The objection that the trial court erred to defendant's prejudice by consolidating for trial the crimes charged in one information with the crimes charged in the other information could not be urged for the first time on appeal.

4. Criminal Law ⚷620(1)

Defendant's request, after trial court ordered cases against the defendant consolidated for trial, that the cases be returned to the Master Calendar court for reassignment was not an objection to the consolidation.

5. Criminal Law ⚷132

Where deputy public defender whose legal ability and experience were available to defendant conducting his own defense stated to court immediately before jury were impaneled that defendant wished to move for change of venue and trial court told defendant to state orally the grounds and defendant did so and trial court denied motion and gave no indication that denial was on ground that motion was not in proper form and defendant had ample time to prepare a proper application, defendant could not complain that he was not given opportunity to prepare a written verified application as required by statute since the motion came too late and should have been denied even if it had been in writing. Pen.Code, § 1034.

6. Criminal Law ⚷637

Where defendant, who had suffered previous convictions of crimes of violence, undertook to conduct his own defense, trial court's refusal to permit defendant to approach jury box during voir dire examination of prospective jurors or to approach witnesses on stand during trial, was within trial court's discretion. Pen.Code, § 688.

7. Criminal Law ⚷637

A defendant undertaking to conduct his own defense retains the status of a defendant on trial for the crimes charged against him and he does not attain the status of an attorney at law who is an officer of the court and responsible to it.

8. Criminal Law 🔑1186(4)

The denial of defendant's motion for daily transcript did not result in miscarriage of justice, notwithstanding that prosecuting attorney obtained transcription of certain portions of the trial which he used in his argument to the jury, where defendant was not prejudicially handicapped by want of daily transcript and defendant, who was conducting his own defense, presented his case and delivered his argument without any indication of confusion or uncertainty. Const. art. 6, § 4½.

9. Criminal Law 🔑1171(1)

The improprieties of prosecuting attorney in addressing jury and in improperly bringing in evidence of misconduct of defendant for which defendant was not on trial were not prejudicial to defendant, where defendant undertook to conduct his own defense, and the technique of his representation was the studied omission to interpose objections, the frank admission that he was a criminal, and the argument that the crimes charged were committed by a blundering person rather than a clever professional such as the evidence indicated he was.

10. Criminal Law 🔑531(3)

Evidence was insufficient to require finding that confessions were involuntary and coercive.

11. Criminal Law 🔑1172(2)

Instruction that confession, even if false, was nevertheless evidence for jury's consideration, followed by instruction correctly explaining the evidentiary value or immateriality of false statements, was not error, where there was ample evidence of guilt apart from the confession.

12. Criminal Law 🔑763(19)

An instruction that "if under my instructions you find that a voluntary confession was made" and that jury must disregard the asserted confession entirely unless jury should conclude that the alleged confession not only was made but was voluntary, did not take from the jury the question whether a confession was in fact made.

13. Criminal Law 🔑781(4)

The subject of defendant's mental condition at time of making of confession was adequately covered by the instructions, which included the specific direction that the jury in deciding whether the confessions were true "should consider all the circumstances connected with the making of the statement, as shown by the evidence."

14. Criminal Law 🔑1173(2)

The refusal to instruct that if jury had reasonable doubt as to whether any confession was voluntary the jury should resolve such doubt in favor of defendant was not prejudicial, notwithstanding that requested instruction correctly stated the law and might well have been given, where the jury were fully and correctly instructed as to the burden of proof and the doctrine of reasonable doubt as governing all issues of fact, and failure to give requested instruction did not result in verdict different from that which would have been reached if the instruction had been given.

15. Criminal Law 🔑822(6)

Instructions that jury must determine whether the persons subjected to kidnaping for purpose of robbery suffered bodily harm, were not error as informing the jury that kidnaping for the purpose of robbery was established as a matter of law, where the instructions, considered as a whole, could not lead the jury to believe that the court was of the opinion that the crime of kidnaping for the purpose of robbery had been established. Pen.Code, § 209.

16. Criminal Law 🔑772(5)

In prosecution for kidnaping for purpose of robbery, general instructions that to constitute criminal intent it is merely necessary that a person intend to do an act which if committed will constitute a crime and that intent with which an act is done is manifested by the circumstances attending the act and the manner in which it is done and the discretion of the person committing the act, were not error as causing the jury to misunderstand the correctly given instruction as to the specific intent to rob. Pen.Code, § 209.

17. Kidnapping 🔑5
Larceny 🔑65
Rape 🔑54(1)
Robbery 🔑24(1)

In prosecutions for first degree robbery, attempted robbery, kidnaping for purpose of robbery with infliction of bodily harm, kidnaping for robbery, attempted rape, and grand theft of automobile, corroboration of prosecuting witnesses was not required. Pen.Code, § 209.

18. Sodomy 🔑6

Where defendant's female victims were acting in fear of their lives in the violations of the provision of the Penal Code relating to sex perversions, corroboration of the testimony of the victims was not required. Pen.Code, § 288a.

19. Criminal Law 🔑763(8)

Correct instruction that corroboration of prosecuting witnesses was not required was not equivalent to a direction to convict of the crimes charged, including those requiring specific intent, if the jury believed that defendant committed the overt acts to which the prosecuting witnesses testified.

20. Criminal Law 🔑778(11)

Slight variations between the language of instruction given and language of statute providing that where evidence of flight is relied upon the court shall instruct the jury substantially in the language there set out, were not error. Pen.Code, § 1127c.

21. Criminal Law 🔑1172(1)

Instruction that applicability of some of instructions will depend upon the conclusions which the jury would reach as to what the facts were, and that as to any such instruction the fact that it had been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are, and that jury should disregard an instruction applying only to a state of facts which the jury finds does not exist, was not prejudicially erroneous as permitting jury to disregard any of the other instructions if they concluded that such instructions did not apply to the facts whether such facts were legally proven or were the mere opinion of the jurors.

22. Kidnapping 🔑6

Attempted possible rape and compelling violation of statute relating to sex perversions are "bodily harm" within statute prescribing the punishment if person kidnaped suffers bodily harm. Pen.Code, §§ 209, 288a.

See publication Words and Phrases, for other judicial constructions and definitions of "Bodily Harm".

23. Kidnapping 🔑5

Evidence relating to robbery or attempted robbery of female victims, asportation of victims and commission of sex crimes, supported conviction of defendant of kidnapings for purpose of robbery. Pen. Code, §§ 209, 288a.

24. Robbery 🔑24(1)

Evidence warranted convictions for first degree robbery and attempted robbery.

25. Criminal Law 🔑824(3)

In prosecution for grand theft of automobile, the omission to instruct as to lesser offense of taking automobile with intent merely to deprive owner of possession temporarily was not error, where defendant did not request such instruction. Vehicle Code, § 503.

26. Criminal Law 🔑710

Where defendant conducted his own defense and deputy public defender acted only as legal adviser and not as counsel, ruling permitting only defendant and not deputy public defender to address the jury was not in violation of statute providing that if the indictment or information is for an offense punishable with death two counsel on each side may argue the cause to the jury. Pen.Code, § 1095.

27. Criminal Law 🔑717

It is for the court to decide questions of law and although the court may permit counsel in argument to state correct law and to discuss the application of the law to the facts, the court may also refuse him permission to argue law. Pen.Code, §§ 1093, par. 6, 1124, 1126, 1127.

28. Criminal Law 🔑641(1)

Unless a party authorizes an attorney to represent him, he is not entitled to have the attorney speak for him.

29. Criminal Law ⚷710

Where defendant conducted his own defense and deputy public defender acted only as legal adviser and not as counsel, the refusal to permit deputy public defender to argue certain aspects of the facts as related to the law was not error.

30. Criminal Law ⚷1171(1), 1174(1)

In prosecution for kidnaping for robbery with infliction of bodily harm, argument of prosecuting attorney that punishment of life imprisonment without possibility of parole were the words used in statute defining punishment for offense, but that the words did not mean what they said because of pardon, commutation or Legislature's changing the penalty, and trial court's instruction, in response to jury's request, as to meaning of life imprisonment without possibility of parole and his statement therein of possibility of commutation, pardon or legislative change in punishment, were not prejudicial, where punishment was a question addressed to discretion of jury and jury exercised their discretion with discrimination. Pen.Code, § 209.

31. Kidnapping ⚷1

It is the fact, not the distance, of forcible removal which constitutes kidnaping and the fact that the person being kidnaped or carried away is forced to move only 22 feet does not make her abduction any the less kidnaping. Pen.Code, § 209.

32. Criminal Law ⚷1183, 1186(1)

Where defendant, prior to 1951 amendment to statute prescribing punishment for kidnaping, by threat of force transported female victims pursuant to plan which purposed the commission of robberies and the infliction of bodily harm consisting of sex crimes, and such conduct remained punishable by death at discretion of jury after the 1951 amendment providing that detention of victim during commission of armed robbery is not punishable under such statute, the amendment did not require reversal or modification of death sentences imposed on defendant. Pen.Code, §§ 209, 288a.

33. Criminal Law ⚷163

The doctrine of double jeopardy has no application to a defendant who is tried but once on several counts.

34. Criminal Law ⚷1209

Punishing defendant separately for violations of the kidnaping statute and for robberies and sex crimes, which are essential parts of the kidnaping, amounts to double punishment which is forbidden by statute. Pen.Code, §§ 209, 288a, 654.

35. Criminal Law ⚷1177

Where defendant was subject to two validly imposed death sentences, other judgments of conviction which may have amounted to double punishment would not be reversed. Pen.Code, § 654.

Caryl Chessman, in pro per.

Edmund G. Brown, Atty. Gen., Frank Richards, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Los Angeles County, Jere J. Sullivan, Robert Wheeler, and J. Miller Leavy, Deputies Dist. Atty., all of Los Angeles, for respondent.

SCHAUER, Justice.

Defendant appeals from judgments of conviction of 17 felonies, rendered pursuant to jury verdicts, and from an order denying his motion for new trial. For convenience of discussion the crimes are listed in chronological order and numbered. Each paragraph indicates a separate general criminal enterprise, in each of which one or more offenses were committed.

January 3, 1948: (1) First degree robbery of McCullough.

January 13, 1948: (2) Grand theft of an automobile, which was used in perpetrating subsequent crimes and in which defendant was fleeing when he was apprehended.

January 18, 1948: (3) First degree robbery of Bartle.

January 18, 1948: (4) First degree robbery of Ballew.

January 19, 1948: (5) First degree robbery of Lea. (6) First degree robbery of Regina. (7) Kidnaping Regina for the purpose of robbery, with infliction of bodily harm; punishment fixed at death. (8) Violation of section 288a of the Penal Code, committed against Regina.

January 20, 1948: (9) First degree robbery of Stone.

January 22, 1948: (10) Attempted robbery of Hurlburt. (11) Kidnaping Mary for the purpose of robbery, with infliction of bodily harm; punishment fixed at death. (12) Attempted rape of Mary. (13) Violation of section 288a of the Penal Code committed against Mary.

January 23, 1948: (14) First degree robbery of Waisler. (15) First degree robbery of Lesher. (16) Kidnaping Waisler for the purpose of robbery, with infliction of bodily harm; punishment fixed at life imprisonment without possibility of parole. (17) Kidnaping Lesher for the purpose of robbery.

The jury further found that defendant was armed at the time of the commission of each of the crimes except that of grand theft, numbered (2) above; that he was armed at the time of his arrest; and that he had suffered two previous convictions of robbery and one of assault with a deadly weapon. Defendant was acquitted of one count of burglary. We have concluded that no prejudicial error is shown and that the judgments and order should be affirmed.

Sufficiency of Transcript

Defendant argues questions as to the correctness and validity of the reporter's transcript which were finally decided against him by this court in People v. Chessman (1950), 35 Cal.2d 455, 218 P.2d 769, 19 A.L.R.2d 1084. Re-examination of these arguments and of the transcript leaves us convinced that the transcript permits a fair consideration and disposition of the appeal.

Denial of Continuance to Enable Defendant to Obtain Counsel, or to Interview and Subpena Witnesses and Prepare His Case in Propria Persona

[1, 2] Defendant complains that he was forced to go to trial unprepared. The situation on which this claim is based resulted from the fact that he insisted upon representing himself. The informations against defendant (numbered 11793 and 11794) were filed on February 18, 1948. On February 20, 1948, defendant, represented by private counsel Morris Lavine, was arraigned and the causes were continued to February 27. On February 27 amended informations were filed and the causes continued to March 5. On March 5 defendant, represented by private counsel V. L. Ferguson, appeared and was arraigned on amended informations; time to plead was continued to March 9. On March 9 defendant and Mr. Ferguson appeared and Mr. Ferguson was relieved as counsel. Defendant now asserts: "one of those counsel wanted more money than appellant believed his services were worth and appellant and his father could not agree with the other counsel as to the conduct of the defense, so both were relieved and appellant determined to represent himself."

On March 12, 1948, defendant appeared without counsel. The public defender was present and announced, "We have been relieved, your Honor." Defendant stated that he wished to represent himself. After a colloquy with the court during which defendant repeated his insistence on representing himself, the court said, "What will probably happen, if we set this case down for trial, you will want a lawyer and then ask for a continuance. If you want to try your own case, there is no way we can tell you not to. You will have to try it or have somebody hired to represent you in plenty of time to try the case at the time it is set.

"The Defendant Chessman: I understand that.

"The Court: Because many times men with past experiences such as you have had—you know the tricks of the trade, and they get a lawyer at the very last minute. You really want to try your own case?

"The Defendant Chessman: That is correct."

Defendant pleaded not guilty; the court set April 26 and 29 as the dates for trial on the respective informations and again explained to defendant that no continuance based on his decision to represent himself would be granted. "Sometime during the middle of March" Mr. Al Matthews, deputy public defender, called on defendant at the county jail and offered his services; defendant refused them. On April 26 all charges against defendant were continued to April 29 for trial. On April 29 defendant appeared without counsel, moved for another continuance, and complained that because of his confinement in the county jail he had been unable to obtain law books and interview witnesses. The trial court explained to him that his decision to represent himself did not entitle him to greater privileges than other prisoners; defendant again repeatedly refused the offer of counsel; and a continuance was denied.

Defendant summarizes the trial court's position as follows: "That the calendar judge in assigning the case for trial had warned the defendant that he must be ready and that he would be allowed no continuance. That the trial court offered to appoint counsel who could have prepared a defense for the defendant. That because the defendant refused the appointment of counsel it was the defendant's own fault that he was not prepared, that he could not consequently complain of his lack of preparation, that the sheriff's regulations [of the privileges accorded prisoners in the county jail] could not be interfered with by the court, and that, therefore, the defendant must go to trial, prepared or not." This is a fair summary of the court's position; that position appears correct; and defendant cites no authority to the contrary.

Defendant argues that the denial of a continuance deprived him of the right to select counsel of his choice and deprived such counsel of the opportunity to prepare. The answer to this contention is factual and appears from the above summarized history of the proceedings prior to trial. Defendant was entitled to waive assistance of counsel, and it is clear that he did so of his own volition and with full knowledge of what he was doing (Adams v. U. S. ex rel. McCann (1942), 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268; cf. People v. Chesser (1947), 29 Cal.2d 815, 822, 178 P.2d 761).

Furthermore, defendant did not go to trial without the services of an attorney at law. Immediately before the jury were impaneled, defendant announced to the court that he intended to accept the services of Mr. Matthews as legal adviser (not counsel) and throughout the trial Mr. Matthews was present and his legal ability and experience were available to defendant. These circumstances will be material to our disposition of certain contentions of defendant hereinafter discussed, and it will be necessary for us to refer again to the following proposition: A defendant who intelligently refuses counsel and insists upon personally conducting and controlling his defense does not lose the status of prisoner and become entitled to extraordinary privileges not accorded defendants who are represented by counsel, nor does he become entitled to proceed in a manner different from that permitted to attorneys.

Consolidation of Counts

[3] Defendant contends that the trial court erred to his prejudice by consolidating for trial the crimes charged in Information 117963 with the crimes charged in Information 117964. This type of objection cannot be urged for the first time on appeal. (People v. Pearson (1940), 41 Cal.App.2d 614, 619, 107 P.2d 463; People v. Johns (1945), 69 Cal.App.2d 737, 740, 160 P.2d 102; People v. Beck (1945), 71 Cal.App.2d 637, 641, 163 P.2d 41.)

[4] Defendant asserts that he objected to the consolidation in the trial court but the record[1] shows that he did not. Originally the case of Information 117963, by which defendant and David Knowles were jointly charged with crimes described in People v. Knowles (1950), 35 Cal.2d 175, 217 P.2d 1 (grand theft of an automobile, above numbered (2), and two robberies and two kidnappings, above numbered (14) through (17)), was set for trial on April 26, 1948; the case of Information 117964, which charged defendant alone with the

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[1] The pertinent portion of the transcript was prepared by the original reporter and defendant does not challenge its accuracy.

remaining crimes of which he has been convicted, was set for trial on April 29. When the first group of charges came on for trial defendant's motions for a trial separate from that of Knowles and a continuance were granted. All charges against defendant came on for trial on April 29. At this time the court ordered the cases against defendant consolidated for trial. Defendant asked "that these cases be returned to the Master Calendar court for reassignment" and stated at length his reasons for this request, but he did not suggest that the cases should not have been consolidated.

Motion for Change of Venue

[5] Immediately before the jury were impaneled, Mr. Matthews stated to the court that defendant wished to move for change of venue, on grounds unknown to Matthews, and that he could have the application prepared later in the day. The trial court told defendant to state orally the grounds on which he sought change of venue. Defendant stated that he could not obtain a fair trial in the county because a prejudicial article about him had appeared in a local publication, and because the district attorney planned to prosecute another person for crimes which were similar to some of those charged against defendant and which had been committed at times when defendant was in prison. The court ruled, "The motion will be denied."

Defendant complains that he was not given opportunity to present a written, verified application as required by section 1034 of the Penal Code. There is no indication that the denial of the motion was on the ground that it was not in proper form. Defendant had had ample time to prepare a proper application, and the motion came too late and should have been denied even if it had been in writing. Furthermore, the trial court was well within its discretion in denying the motion on the merits.

Requirement that Defendant Remain at Counsel Table

[6, 7] During voir dire examination of the prospective jurors defendant was not allowed to approach the jury box and during the trial he was not allowed to approach witnesses on the stand. Defendant urges that he was hampered in the presentation of his case and unfairly discriminated against, since the prosecuting attorney moved about the courtroom and dramatically approached witnesses and jury, whereas defendant, in violation of section 688 of the Penal Code, was subjected to "more restraint than * * * [was] necessary for his detention to answer the charge." The trial court's ruling was within its discretion. Defendant, whether or not he was guilty of the crimes charged in this proceeding, was a defendant on trial for these charges. In representing himself he retained this status and did not attain that of an attorney at law who is an officer of the court and responsible to it. Furthermore, the defendant had suffered previous convictions of crimes of violence. Neither the presumption of innocence as a rule of proof in relation to the crimes charged nor the elements of a fair trial under due process required the court to conduct the trial proceedings oblivious to the facts mentioned. Considerations for the safety and security of all persons present in the courtroom, including the defendant, and for the judicial process itself, justified the trial judge in feeling that it was unwise to allow defendant to wander freely about the courtroom.

Denial of Defendant's Motion for Daily Transcript

[8] Although the trial judge knew that the trial would be long, the factual issues numerous, and the death penalty would be sought, he denied defendant's motion for a daily transcript. The prosecuting attorney did not request or receive a daily transcript but he did obtain, apparently without court order, transcription of certain portions of the trial which he used in his argument to the jury. The reason for this seeming discrimination does not appear. But neither does it appear that defendant was prejudicially handicapped by want of a daily transcript. He presented his case and delivered his argument without any indication of confusion or uncertainty;

accordingly, no miscarriage of justice on this account is established. (Cal.Const. art. VI, § 4 1/2.)

Misconduct of Prosecuting Attorney not Controlled by the Trial Court

[9] Regretably the prosecuting attorney presented his case in an overzealous manner, both in addressing the jury[2] and in improperly bringing in evidence of misconduct of defendant for which he was not on trial.[3] But the improprieties of the prosecuting attorney could have been corrected had there been objection thereto in the trial court. Defendant now complains that the trial court of its own motion should have interposed objections and, in effect, undertaken defendant's representation. But defendant deliberately (and not naively) determined to represent himself; part of the technique of his representation appears to have been the studied omission to interpose objections, the frank admission that he was a criminal, and the argument that the crimes charged were committed by a blundering person rather than a clever professional such as the evidence indicates he was; he followed this technique while requiring a skilled defense attorney to sit silently at his side. We are not disposed to permit a defendant who thus develops a record to claim prejudice from it, although the cumulative instances of misconduct might in other circumstances constitute ground for reversal. It is because of defendant's purposeful and informed failure to have this case tried in a different fashion that such cases as People v. Orcalles (1948), 32 Cal.2d 562, 572, 197 P.2d 26; People v. Hardy (1948), 33 Cal.2d 52, 62, 198 P.2d 865; and People v. Lynch (1943), 60 Cal.App.2d 133, 143, 140 P.2d 418, are not controlling here.

Admissibility of Confessions

[10] Defendant urges that the admission in evidence of assertedly coerced confessions was not merely error but deprived him of due process. The evidence as to the circumstances under which the confessions were obtained was in conflict as to whether defendant was beaten by the police but, defendant urges, there is sufficient uncontradicted evidence to overcome, as a matter of law, the People's prima facie showing that the confessions were voluntary. The evidence in this respect is as follows:

On Friday evening, January 23, 1948, police officers in a patrol car observed an automobile which corresponded to the description of the one which had been used in certain of the crimes here charged. When the officers turned on their red spotlight the car, which was driven by defendant, fled. There was a lengthy chase, first in the automobiles, then on foot. Defendant was captured and handcuffed after a struggle. He was taken to the Hollywood police station and held there until Monday evening, January 26, 1948, when he was taken to the Los Angeles county jail.

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[2] The prosecuting attorney on voir dire examination of the prospective jurors said, "I do not believe the evidence will show that the defendant has murdered or killed anyone yet." On the voir dire examination and in argument he emphasized his belief that defendant should receive the death penalty. He commented that defendant was representing himself in order to gain the sympathy of the jury.

The prosecuting attorney in argument was summarizing evidence of one of the robberies when a juror asked, "Isn't that grand theft when it is over $500?" He replied, "It is true, Mrs. Vamos, that I could from the penal code give you at least a half dozen particular crimes that I know he has committed that he is not charged with here. * * * You are correct. It is grand theft, because the amount taken was over $500. But robbery is a different character of crime than grand theft, although we could charge him, we just didn't do it. * * * It is a violation of the deadly weapons act for * * * a man who has been previously convicted of a felony, to * * * have in their possession this gun. He is not charged with it. It is just one of the other things. I can think of some other crimes which he has committed such as assault with a deadly weapon. We did not charge it. I would have to stop some place or we would be talking here all day. I do not want to do that. Don't let those things bother you too much."

[3] Officer Forbes, who gave proper evidence of admissions and confessions made by defendant, was also permitted, without objection, to testify to statements of defendant which disclosed what defendant now aptly characterizes as his "self-admitted violent criminal past and present dangerous, antisocial state of mind." These later statements were introduced by the prosecution under the guise of impeaching defendant's testimony as to the context of his conversations with Forbes.

On the night of January 23 defendant was questioned by police officers from about 8:30 to 10:30. On the morning of January 24 Officer Forbes commenced to question defendant at about 8 o'clock. Defendant first denied participation in any of the crimes here concerned. Forbes told defendant, "you can't beat us on this particular job" (the crimes committed with Knowles), and pointed out that defendant had been driving a stolen car which contained loot from those crimes; defendant then confessed those crimes. Forbes and other officers continued the interrogation, particularly concerning the sex crimes. The officers testified that they made no promise of reward or inducement. Defendant asserts that he confessed to the sex crimes only after the officers said they would charge him solely with robbery.

On January 24 defendant was taken to the home of a victim of some of the crimes. She identified him. Defendant testified that during this trip the officers' conduct made it clear to him that they hoped he would attempt to escape. That this conduct was for the purpose of putting defendant in fear, he argues, is shown by the testimony of one of the officers who accompanied defendant that he had another officer "tail us in case anything happened in our car."

The asserted confessions of the sex crimes were made on the afternoon of January 24, after defendant had talked to a police psychiatrist with whom he refused to discuss such crimes. Defendant argues that it is inherently improbable that he would refuse to discuss the matter with the psychiatrist and would shortly thereafter voluntarily confess the crimes to the police.

Officer Forbes, one of the officers who questioned defendant, testified that a bulletin to the effect that defendant had confessed to the sex crimes was sent on the police teletype at 9:15 a. m. on January 24, although defendant did not confess until after 3 o'clock of that afternoon. This premature release of the bulletin (assuming Officer Forbes' statement of the time of release to be correct), says defendant, shows that the officer anticipated that, although a voluntary confession was not forthcoming, a confession would in some manner be obtained.

Officer Forbes testified that it was usual police practice to have a defendant who admitted his guilt sign a written confession but that he did not request defendant to do so because "I thought it would be useless" and that he made no written notes while talking with defendant because "Some suspects will relate it and let you write it down as you take it; other suspects wouldn't tell you anything if they know you are taking notes." Yet another police officer who, with Forbes, questioned defendant testified that he made a list of crimes (not the crimes charged here) to which defendant confessed and that he wrote the list in defendant's and Forbes' presence after defendant said, "Get your pencil and paper." This contrasting testimony, says defendant, shows that his confessions to the crimes charged were not free.

Further showing that his mentality was not free when he confessed, says defendant, is Forbes' testimony that "[W]hen we were thumbing through the crime sheets, anything that we thought might fit the description of Chessman, he would say, '* * * If you want to clear your books just mark them off. I'll take credit for them.'"

The above recited arguments of defendant as to the asserted involuntariness of his confessions relate to conflicting inferences of fact which could be drawn from the testimony. Those inferences were tentatively drawn against defendant by the trial judge when he admitted the confessions in evidence and, presumptively, were finally drawn against defendant by the jury in the light of all the evidence. This is not a case where the confessions are shown, on the face of the record, to have been given in circumstances inherently coercive.

Instructions as to False Confession

[11] The jury were instructed that "If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence. *But even if you should find that a confession was false, either entirely or in part, it remains, nevertheless evidence for your consideration, to be given such significance as your judgment may determine under instructions that I shortly shall give concerning false statements made by a person accused of crime.*" (Italics added.) The italicized portion of this instruction was held ground for reversal in People v. Ford (1948), 89 Cal.App.2d 467, 473, 200 P.2d 867, on the ground that "If the jury had believed that defendant lied to the officers when he admitted the theft, he should have been acquitted. How they could have started with the premise that he was innocent and ended with a conclusion that he was guilty because he had lied to the officers is something we are unable to comprehend. But if this could not have been done the instruction was confusing and impossible of rational application to the evidence." In the Ford case, however, "there was only slight circumstantial evidence of defendant's guilt aside from the confession" (page 471 of 89 Cal.App.2d, page 870 of 200 P.2d) and the trial court gave no explanatory instructions concerning false statements by one accused of crime. Here there is ample evidence of guilt apart from the confessions; the declarations of the defendant in making the confessions may have been in part true and in part false; the statements assertedly made by defendant, as related above, were to some extent self-contradictory; and the following instruction correctly explaining the possible evidentiary value or immateriality of false statements was given: "If you should find from the evidence that there was an occasion when the defendant, under conditions which fairly afforded him an opportunity to reply, * * * made false, evasive or contradictory statements, in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which he now is on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, * * * his * * * conduct may be considered against him as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only to explain the conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement." (See also People v. Woods (1950), 35 Cal.2d 504, 510, 218 P.2d 981, and People v. Liss (1950), 35 Cal.2d 570, 574, 219 P.2d 789, pointing out the dangers of an instruction such as the italicized portion of the instruction quoted on page 1010 of 238 P.2d, supra, but holding such instruction not reversible error in the circumstances.)

Contention that the Instructions Took From the Jury the Question Whether a Confession Was in Fact Made

[12] Defendant contends that the instructions assume that defendant in fact confessed. The instruction quoted supra, page 1010 of 238 P.2d, commences, "If under my instructions you find that a voluntary confession was made * * *," and the jury elsewhere were told that they "must disregard the asserted confession entirely unless you * * * conclude that the alleged confession not only was made, but was voluntary." Thus it was made clear to the jury that the question whether a confession was made, as well as its character as voluntary or involuntary, if made at all, was for them to determine.

Omission to Instruct that Jury Should Consider Defendant's Mental Condition at the Time He Made Any Confession

[13] Defendant contends that the trial court should have instructed the jury that, in determining the weight and effect of any confessions, they should consider the question of defendant's mental condition at the time of such confessions. In the light of the entire record the subject was adequately covered by the instructions, which include the specific direction that the jury, in deciding whether the confessions were true, "should consider all the circumstances connected with the making of the statement, as shown by the evidence."

Omission to Instruct that if the Jury Had a Reasonable Doubt as to Whether Any Confession Was Voluntary, They Should Resolve Such Doubt In Favor of Defendant

[14] The trial court rejected defendant's requested instruction to the above effect. The refusal of the instruction, says defendant, improperly placed on him the burden of proving that the confessions were involuntary and was contrary to the general statement, quoted in People v. Ralph (1944), 24 Cal.2d 575, 581, 150 P.2d 401, that "the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute." The requested instruction correctly states the law and might well have been given but, on the other hand, the jury were fully and correctly instructed as to the burden of proof and the doctrine of "reasonable doubt" as governing all issues of fact, and it cannot be reasonably concluded that the failure to give this particular instruction, specifically applying the general principles which were explained, resulted in a verdict different from that which would have been reached if the instruction had been given.

Contention that the Instructions Assume that Defendant Committed Kidnaping for the Purpose of Robbery

[15] As to the counts which charge kidnaping for the purpose of robbery the court instructed the jury that "it will be your duty to determine whether the person or persons subjected to such kidnaping suffered bodily harm." These instructions, defendant urges, improperly assume and inform the jury that kidnaping for the purpose of robbery was established as a matter of law. If we were to consider the isolated portions of the instructions just quoted. they would be subject to this criticism. But, considering the instructions as a whole —and the jury were told to so consider them—it does not appear that they could lead the jury to believe that the court was of the opinion, or intimated an opinion, that the crimes of kidnaping for the purpose of robbery had been established.

Claimed Inadequacy of Instructions as to Specific Intent

[16] Defendant urges that the trial court, of its own motion, should have given more detailed instructions as to the specific intent to commit robbery which is an essential element of the crime of kidnaping for the purpose of robbery. The following adequate instructions were given: "In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed. * * *

"[I]n the crime of Kidnapping for the Purpose of Robbery, a necessary element is the existence in the mind of the perpetrator of the specific intent to commit robbery and unless such intent so exists that crime is not committed, but

"No actual robbery need be committed, as the Kidnapping is complete once the individual is seized for the purpose of robbery."

Defendant, relying upon People v. Snyder (1940), 15 Cal.2d 706, 708, 104 P.2d 639, urges that the instructions were insufficient because the jury were also instructed generally that "To constitute criminal intent it is merely necessary that a person intend to do an act which, if committed, will constitute a crime," and that "The intent with which an act is done is manifested by the circumstances attending the act, the manner in which it is done, the means used, and the sound mind and discretion of the person committing the act." It is not reasonably probable that the latter instructions caused the jury to misunderstand the instruction as to the specific intent to rob. The Snyder case, which concerned materially different instructions and a materially different crime, does not apply here.

[17-19] The trial judge instructed the jury that in prosecution for the various crimes here charged corroboration of the prosecuting witnesses was not required. This instruction was correct. The undisputed evidence shows that the female victims were not accomplices, but were acting in fear of their lives, in the violations of section 288a; therefore, corroboration of their testimony was not required. (People v. Featherstone (1945), 67 Cal.App.2d 793, 796, 155 P.2d 685.) But, defendant argues, the instruction that corroboration was not required was equivalent to a direction to convict of the crimes charged, including those requiring specific intent, if the jury believed that defendant committed the overt acts to which the prosecuting witnesses testified; therefore, he says, the instruction permitted conviction without proof of specific intent. On no rational view of the instruction, either in or out of its context, could it have the meaning attributed to it by defendant.

Instruction as to Flight

[20] Section 1127c of the Penal Code provides that, where evidence of flight is relied upon, the court shall instruct the jury substantially in language there set out. The trial court did so. Defendant argues that slight variations between the language of the statutory instruction and the language of the instruction here given are significant. This argument is elaborate but insubstantial.

Instruction that Jury Disregard Instructions which Apply to Facts which They Find Do Not Exist

[21] The court told the jury that "The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist you will disregard the instruction."

Defendant relies upon People v. Bodey (1928), 94 Cal.App. 420, 423, 271 P. 203, where it is said that a similar instruction should not have been given; that it was confusing but not reversible error. It is defendant's position that under this instruction the jury could disregard any of the other instructions if they concluded that such instructions did not apply to the facts, whether such facts were legally proven or were the mere opinion of the jurors.

It does not appear that the instruction complained of is susceptible to an interpretation which would make it prejudicially erroneous. In People v. Casey (1926), 79 Cal.App. 295, 302, 249 P. 525, it was said of a similar instruction that "Although more apt language might well have been used, it appears that the meaning intended to be conveyed was merely this: That while certain rules of law had been stated, the court did not wish to be understood as expressing any opinion upon matters of fact. It is obvious that whether or not legal principles announced are applicable to the facts of a particular case will often depend upon the jury's interpretation of the evidence." (See also People v. Palmer (1946), 76 Cal.App.2d 679, 686, 173 P.2d 680.)

Attempted Rape and Forcing Victim to Violate Section 288a of the Penal Code as Infliction of Bodily Harm

[22] Bodily harm under section 209 of the Penal Code is defined in People v. Tanner (1935), 3 Cal.2d 279, 297, 44 P.2d 324: "*Bodily harm* is generally defined as 'any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person.'" The trial court so instructed the jury; it

further instructed them that both attempted forcible rape and compelling a violation of section 288a are "bodily harm."

Statements in People v. McIlvain (1942), 55 Cal.App.2d 322, 332, 130 P.2d 131, which tend to support defendant's argument that the commission of the sex crimes by threat of force did not amount to the infliction of bodily harm were disapproved in People v. Brown (1947), 29 Cal.2d 555, 560, 176 P.2d 929. In the Brown case we reiterated the definition of bodily harm as quoted above from the Tanner case and declared that "The forcible rape itself was bodily harm." We note that the facts of the Brown case differ from those of defendant's case in that Brown actually struck his victim as well as raping her, but we hold that the rule of the Brown case is equally applicable here. It would belie sensibility and defame the mores of our age to hold that such treatment as the female victims rceived here is not the infliction of "bodily harm" within the meaning of section 209 of the Penal Code.

Defendant's Contention that the Evidence Does Not Support the Determination that Crimes (8) and (11), Kidnapings, Were for the Purpose of Robbery

[23] On January 19, 1948, defendant stopped a car driven by him near a parked car occupied by Lea and Regina. He displayed a .45 automatic pistol and during the ensuing events repeatedly threatened to kill his victims if they did not obey his commands. Defendant took Lea's wallet, the keys to Lea's car, and Regina's purse. He then forced Regina to walk 22 feet to the car he was using, to enter the car, and to violate section 288a. Another automobile approached. Defendant took $5 from Regina's purse, handed her the purse and Lea's keys, permitted her to get out of his car, and drove swiftly away.

On January 22, 1948, defendant approached a parked car occupied by Hurlburt and Mary, pushed a .45 automatic pistol through the door, and said, "This is a stick-up." Both victims replied that they had no money. Defendant then forced Mary to enter his car, drove to an isolated place, and compelled her to submit to sex crimes.

Defendant argues that the above summarized evidence at the most shows that he first robbed Regina and attempted to rob Mary, then abandoned his intent to rob and abducted the women with the sole intention of committing sex crimes against them. This argument is without merit. A defendant who engages in a course of conduct toward a female victim which includes robbery or attempted robbery, asportation of the victim, and the commission of sex crimes may present such argument to the trier of fact. But we cannot say as a matter of law that at some point of time during the abductions of his female victims defendant ceased to be a robber and became a kidnaper whose sole purpose was to inflict bodily harm by forcibly committing sex crimes. (See the following cases in which the described series of related criminal transactions were held to support a conviction of violation of section 209 of the Penal Code [kidnaping for the purpose of robbery in which the person kidnaped suffered bodily harm]: People v. Kristy (1935), 4 Cal.2d 504, 507, 50 P.2d 798 [robbery followed by abduction for the primary purpose of escape, during which the kidnaped persons suffered bodily harm]; People v. Dugger (1936), 5 Cal.2d 337, 339, 54 P.2d 707 [defendant beat his female victim, dragged her around her house, attempted to rape her, and ransacked bureau drawers]; People v. Brown (1947), supra, 29 Cal.2d 555, 558, 176 P.2d 929 [defendant abducted a woman, raped her, then took her watch and automobile; in the language of People v. Knowles (1950), supra, 35 Cal.2d 175, 185, 217 P.2d 1, 7, "the taking of the wrist watch made the abduction kidnapping to commit robbery, even if the original objective were rape and the intent to rob was only an afterthought"]; cf. People v. Welsh (1936), 7 Cal.2d 209, 212, 60 P.2d 124 [forcible abduction and attempted rape; the defendant took a package of cigarettes from the woman's purse without taking the money which was in it or disturbing its contents; held, this was not kidnaping for the purpose of robbery].)

Defendant urges that the words "This is a stick-up" do not show an intent to rob. This is their normal implication. Defendant's contention that in their context in the crimes against Hurlburt and Mary they show an intent to commit sex crimes is one of fact which should not be addressed to this court. In this connection defendant presents an elaborate discussion of the question whether it is permissible to base an inference on an inference. As stated in Vaccarezza v. Sanguinetti (1945), 71 Cal.App.2d 687, 698, 163 P.2d 470, "The statement appearing in some cases that an inference cannot be based upon an inference, usually without citation and certainly without adequate discussion does not and cannot mean that an inference cannot be based upon a fact which is itself based upon circumstantial evidence. * * * The true rule is and should be that an inference cannot be based on an inference that is too remote or conjectural."

Sufficiency of Evidence of Crimes (1), (9), and (10)

[24] Defendant's arguments in this connection can be answered by briefly stating the evidence which he says is insufficient. As to crime (1), robbery, the victim testified that defendant, displaying a .45 automatic, ordered him to surrender money and he, against his will, did so. The victim of crime (9), robbery, was unable to identify defendant positively; however, the crime was committed in a manner strikingly similar to that of other crimes where defendant was positively identified; furthermore, defendant confessed to this robbery. That the evidence of crime (10), attempted robbery, was sufficient appears from our summary thereof in connection with the kidnaping of Mary.

Omission to Instruct as to Section 503 of the Vehicle Code (Taking an Automobile Without Owner's Consent)

[25] As to crime (2), grand theft of an automobile, there is ample evidence (the length of time and manner in which defendant used the car) to show that he intended to steal it. But, defendant says, the evidence would also permit the inference that he took the car with intent merely to deprive the owner of possession temporarily; i. e., the lesser offense of violation of section 503 of the Vehicle Code; and the jury should have been so instructed. In support of this contention defendant refers to the prosecuting attorney's argument that "There are fellows like Chessman who are scouting around looking for a particular kind of car which they want to steal for a few days." If defendant wished to raise this contention, he should have requested an instruction as to the lesser offense and argued the matter to the jury. Furthermore, it does not appear that defendant returned, or at any time intended to return, the car to its owner.

Asserted Violation of Section 1095 of the Penal Code

[26] Section 1095 provides, "If the indictment or information be for an offense punishable with death, two counsel on each side may argue the cause to the jury." After the prosecuting attorney concluded his opening argument the trial court of its own motion said, "So there will be no misunderstanding I am only going to allow one counsel to address the jury on each side * * * I am not going to permit * * * [Mr. Matthews] to argue, and then the defendant." This ruling was not literally a violation of section 1095, for defendant was not represented by counsel; he had conducted his own defense and Mr. Matthews had acted only as "legal adviser," not counsel.

[27] Defendant contends that the ruling was prejudicial error because he wished to argue the facts to the jury but he wished Mr. Matthews, an attorney who could do so more effectively, to argue the law. It is for the court to decide questions of law and although it may permit counsel in argument to state correct law, and to discuss the application of the law to the facts, it may also refuse him permission to argue law. (See Pen.Code, §§ 1124, 1126, 1127, 1093, par. 6; People v. Denomme (1899), 6 Cal.Unrep.Cas. 227, 231, 56 P. 98; People v. Treadwell (1886), 69 Cal. 226, 238, 10 P. 502; People v. Haney (1920), 46 Cal. App. 317, 324, 189 P. 338; and cases col-

lected in 7 McKinney's New Cal.Dig., Criminal Law, §§ 624, 625.)

[28, 29] Furthermore, even if we assume that Mr. Matthews might have argued certain aspects of the facts as related to the law more skillfully than defendant, it appears that defendant by his insistence upon conducting his own case and refusing to appear by counsel has put himself in a position where he cannot complain of the trial court's ruling. He made no objection thereto in the trial court; also, as stated, he was not represented by "counsel" at all. Unless a party authorizes an attorney to represent him he is not entitled to have the attorney speak for him. There was no error in refusing to permit the consulting but non-representing attorney to argue the case.

Argument of Prosecuting Attorney and Instructions to Jury as to Meaning of Life Imprisonment without Possibility of Parole

[30] The prosecuting attorney argued that "punishment for life imprisonment without possibility of parole does not mean what it says. Those are the words that are used in the statute defining the punishment, but that is not what it means," because of the possibility of pardon, commutation or the Legislature's changing the penalty. Furthermore, he repeatedly commented that defendant "hasn't much to lose if you just convict him of robbery. Robbery doesn't mean a thing to him. No. To convict him of robbery is just like you going home. Time means nothing to him."

The jury were apparently impressed by this argument, for after they had deliberated for a time they returned into court and requested instruction as to the meaning of life imprisonment without possibility of parole. The trial court said, "that primarily means that the person committed to prison under such a sentence will be required to serve life imprisonment in prison, and can not be paroled," and explained that a person sentenced to life imprisonment for murder, for example, could be paroled. It went on to say further, however, as the prosecuting attorney had in his argument, that there was always a possibility of commutation, pardon, or a legislative change in punishment.[4] A juror asked whether, if the punishment of life imprisonment without possibility of parole were imposed, "would there be any assurance that that party would never be free again?" and the court again pointed out the possibility of action by the governor or the Legislature.

This insistence of the trial court in emphasizing such possibilities operated to his prejudice, defendant says, and resulted in the imposition of the death penalty. He relies upon such cases as People v. Ramos (1935), 3 Cal.2d 269, 272, 44 P.2d 301, and People v. Letourneau (1949), 34 Cal.2d 478, 494, 211 P.2d 865, in support of his contention that the trial court should not have discussed the matter with the jury and should not have permitted the prosecuting attorney to argue it.

The statements of which defendant complains relate solely to the question of punishment for the crime of kidnaping for the purpose of robbery where the victim suffers bodily harm, a question which is addressed to the discretion of the jury. (Pen. Code, § 209.) It is clear from the colloquy between the jurors and the judge, and from the verdicts subsequently arrived at, that it was this question which they were considering when they returned to court for further instructions. They must already have tentatively determined that the kidnaping victims had correctly identified defendant and drawn the permissible inferences that the kidnapings were within section 209 before they reached the question of the meaning of imprisonment without possibility of parole. Thereafter they exercised their discretion with discrimination, for they determined that the type of bodily harm inflicted upon defendant's female victims deserved a more severe punishment than the type of bodily harm inflicted on Waisler, victim of the ordinary kidnaping-robbery which constituted crime (16). "It is understandable that jurors, who are charged with the duty of fixing the penalty in the event that they find a defendant guilty * * *, should be interested in knowing the nature and effect of the penalties which they may impose; and neither reason nor authority indicates that the trial court should be prohibited from enlightening the jurors when questions are asked upon that subject." (People v. Osborn (1951), 37 Cal.2d 380, 231 P.2d 850.) Upon the circumstances shown here, there was no error in this respect.

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[4] As will appear infra, page 1016 of 238 P.2d, the Legislature since the date of trial of this case, has made such a change in punishment.

The Holding of People v. Knowles (1950), supra, 35 Cal.2d 175, 179, 217 P.2d 1, that Detention During Armed Robbery is Kidnaping for the Purpose of Robbery as Defined by Section 209 of the Penal Code, and the 1951 Amendment of Section 209

Defendant asks that this court re-examine its holding in People v. Knowles and overrule that case. His arguments are those advanced in the dissenting opinions of the Knowles case, and those rejected in People v. Tanner (1935), supra, 3 Cal.2d 279, 293–298, 44 P.2d 324. They were ably presented in those cases, we considered them with care, and we view the question as resolved insofar as concerns the statute as it was cast prior to the 1951 amendment.

As stated in the Knowles case (pages 180, 183, of 35 Cal.2d, 217 P.2d 1), if section 209 was regarded as too harsh, the remedy was for the Legislature to change it, not for this court to change the plain language of the section by "interpretation." The Legislature has seen fit to make such a change. At the time of the Knowles decision section 209 (as amended in 1933 to define detention for armed robbery as kidnaping) provided in material part that "Every person who * * * holds or detains * * * [another person] to commit * * * robbery * * * shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person * * * subjected to such kidnaping suffers * * * bodily harm * * *." As amended in 1951 section 209 provides in material part, "Any person * * * who kidnaps or carries away any individual to commit robbery * * * shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person * * * subjected to such kidnaping suffers * * * bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

[31, 32] The detention of the victim during the commission of armed robbery, if committed since the 1951 amendment, is not punishable under section 209. Furthermore, under that amendment, all persons (such as Knowles) held under sentences of life imprisonment without possibility of parole for violations of section 209 prior to the amendment, are not eligible for parole. Defendant urges that the 1951 amendment also shows a legislative intent that the crime of armed robbery, committed after the 1933 amendment and prior to the later amendment, should not be punishable under section 209; that this legislative intent applies retrospectively to offenses which were committed before the 1951 amendment, but as to which judgment of conviction has not yet become final. If defendant were sentenced to suffer the death penalty for conduct amounting to no more than robbery with infliction of bodily harm, his argument would be relevant. (See Sekt v. Justice's Court (1945), 26 Cal.2d 297, 305, 159 P.2d 17, 167 A.L.R. 833, citing cases from other jurisdictions which hold that, where a statute mitigating punishment is enacted after commission of the offense but before final judgment of conviction, "the offender who commits an offense before the amendment of the statute imposing the lighter sentence gets the benefit of the lighter punishment, upon the ground that it must have been the intention of the Legislature that the offender should be punished, and, since he can be

constitutionally punished under the new statute, that should be done"; cf. In re Fisher (1934), 1 Cal.App.2d 449, 36 P.2d 841; In re Eyre (1934), 1 Cal.App.2d 451, 36 P.2d 842, which hold that an amendment reducing punishment was prospective in its operation and did not aid a prisoner as to whom judgment of conviction became final before the amendment.) But the offenses for which defendant received the death penalty here were not mere armed robberies. Defendant by threat of force transported his female victims—Mary for a considerable distance in defendant's car, Regina from the car of Lea to the car of defendant—pursuant to a plan which purposed the commission of robberies and the infliction of bodily harm (the sex crimes). The fact that Regina in being kidnaped or carried away was forced to move only 22 feet does not make her abduction any the less kidnaping within the meaning of the statute. She was taken from the car of her chosen escort, and from his company, to the car of defendant and into the latter's company and there detained as a virtual prisoner and forced to submit to his demands. It is the fact, not the distance, of forcible removal which constitutes kidnaping in this state. (People v. Raucho (1935), 8 Cal.App.2d 655, 665, 47 P.2d 1108 [held, as alternate ground of decision, that forcing victims to cross street and enter automobile constituted "kidnaping and carrying away"]; People v. Cook (1937), 18 Cal.App.2d 625, 627, 64 P.2d 449 [dragging victim from sidewalk into adjacent house constituted kidnaping]; People v. Melendrez (1938), 25 Cal.App.2d 490, 494, 77 P.2d 870 [defendants forced victim to walk 50 to 75 feet; held, they "committed an act of kidnaping"]; People v. Shields (1945), 70 Cal.App.2d 628, 630, 161 P.2d 475 [evidence that defendant carried child from front of house to roof supported conviction of kidnaping]; People v. Oganesoff (1947), 81 Cal.App.2d 709, 711, 184 P.2d 953 [evidence that defendant forcibly carried victim from automobile in front of his house into the house supported conviction of kidnaping]; see Cox v. State (1931), 203 Ind. 544, 550, 177 N.E. 898, 181 N.E. 469 [carrying child 90 feet was within statute which denounced forcibly carrying a person "from any place within this state"]; State v. Taylor (1940), 70 N.D. 201, 209, 293 N.W. 219 [victim compelled to drive defendant in victim's car for a very short distance; "Where asportation is charged, the distance removed is not material"].)

Because the conduct which resulted in the two death sentences is conduct which remains punishable by death, at the discretion of the jury, since the 1951 amendment of section 209, there is no occasion for reversal or modification of those sentences because of that amendment.

Double Punishment and Double Jeopardy

[33–35] Defendant has not been put twice in jeopardy for any offense. The doctrine of double jeopardy has no application to a defendant who is tried but once on several counts. (People v. Amick (1942), 20 Cal.2d 247, 251, 125 P.2d 25.) Defendant is correct in his contention that punishing him separately for the violations of section 209 of the Penal Code (kidnaping) and for the robberies and sex crimes which, under the circumstances here, are essential parts of those violations, would amount to double punishment, which is forbidden by section 654 of the Penal Code. (People v. Knowles (1950), supra, 35 Cal.2d 175, 189, 217 P.2d 1; In re Shull (1944), 23 Cal.2d 745, 750, 146 P.2d 417.) However, since defendant is subject to two validly imposed death sentences, no purpose would be served by reversal of other judgments of conviction. (People v. Smith (1950), 36 Cal.2d 444, 448, 224 P.2d 719.)

For the reasons above stated, the judgments and order appealed from are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

Because, as was pointed out in the dissenting opinions of Mr. Justice Edmonds and myself in People v. Chessman, 35 Cal.2d 455, 468, 469, 218 P.2d 769, 19 A.L.R.2d 1084, there is no adequate record upon which this court may review the judgments of conviction against the defendant, I would reverse said judgments and order denying defendant a new trial on that ground alone. A reading of the majority opinion, however, convinces me that many flagrant errors were committed during the trial which would ordinarily be held to be prejudicial and require the reversal of a judgment of conviction. In fact, the only way I can rationalize the majority opinion is that those concurring therein feel that a person charged with seventeen felonies of the character of those charged against the defendant, and who represents himself, is not entitled to a trial in accordance with the rules applicable to the ordinary criminal case. I cannot subscribe to this doctrine.

EDMONDS, Justice (dissenting).

The judgments of conviction, including two which carry a sentence of death, are affirmed upon a record which, admittedly, is not a complete transcript of the proceedings before the trial court. As I pointed out in People v. Chessman, 35 Cal.2d 455, 470, 218 P.2d 769, 19 A.L.R.2d 1084, the transcript omits certain pertinent testimony and was made up in a manner which does not comply with the Rules on Appeal. It was certified by the trial judge as a substitute for a correct record and was considered by him "* * * as the basis of establishing a transcript on appeal".

Manifestly, this court could not make "an examination of the entire cause, including the evidence" as required by the Constitution, Const. art. VI, § 4½, without "the entire record of the action" to which the appellant is entitled. Rules on Appeal, rule 33, subd. c. Notwithstanding these provisions, in the absence of a showing by the appellant that he has been prejudiced by omissions and inaccuracies in the record, the approximate and inexact transcript is held to be a sufficient basis for reviewing the judgments of conviction. Such procedure, in my opinion, has taken from Chessman a substantial right.

For these reasons, and without considering other points presented by the appellant, I would reverse the judgments of conviction and remand the cause for a new trial.

Rehearing denied; EDMONDS and CARTER, JJ., dissenting.

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108 Cal.App.2d 538

JEFFERSON v. CHRONICLE PUB. CO.

Civ. 18613.

District Court of Appeal, Second District, Division 3, California.

Jan. 4, 1952.

Hearing Denied March 3, 1952.

James Monroe Jefferson sued the Chronicle Publishing Company, a corporation, for libel. From a judgment of the Superior Court of Los Angeles County, Julius V. Patrosso, J., for defendant, plaintiff appealed. The District Court of Appeal, Vallée, J., held that it was bound to follow a Supreme Court decision that the statute requiring a demand for correction in order to recover more than special damages for libel is not invalid under the due process clause or equal protection clause of the 14th amendment to the federal Constitution.

Judgment affirmed.

Courts ⚷91(1)

The District Court of Appeal is bound to follow state Supreme Court's decision that statute requiring demand for correction in order to recover more than special damages for libel is not invalid under due process clause or equal protection clause of Fourteenth Amendment to federal Constitution. Civ.Code, § 48a; U.S.C.A.Const. Amend. 14.

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Clyde Thomas, Los Angeles, for appellant.

Cooper, White & Cooper, Sheldon G. Cooper, and Robert M. Raymer, all of San Francisco, for respondent.

VALLÉE, Justice.

Plaintiff sued defendant, a newspaper publisher, for libel. He did not allege that he had suffered special damage, and admittedly could not cure the omission by amendment. The court sustained defendant's demurrer to the complaint without leave to amend on the specific ground it was not alleged that a correction had been demanded as required by section 48a of the Civil Code. Plaintiff appealed from the judgment which followed.

Plaintiff contends section 48a of the Civil Code is violative of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The point has been settled contrary to plaintiff's contention. Irrespective of our view as to the constitutionality of section 48a, we are bound to follow the decision of the Supreme Court in Werner v. Southern Cal., etc., Newspapers, 35 Cal.2d 121, 216 P.2d 825, 13 A.L.R.2d 252. In the Werner case it was held that section 48a is not invalid under either the due process clause or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

As this point was the only one considered by the trial judge, and as it is decisive of the appeal, it is unnecessary to consider other points made by respondent in support of its contention that the complaint does not state facts sufficient to constitute a cause of action. Duncan v. Ledig, 90 Cal.App.2d 7, 14, 202 P.2d 107; Estate of White, 69 Cal.App.2d 749, 759, 160 P.2d 204; Carter v. Blenkiron, 46 Cal.App. 425, 429, 189 P. 305.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; SCHAUER and CARTER, JJ., dissenting. For dissenting opinion of SCHAUER, J., see 241 P.2d 20.

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108 Cal.App.2d 343

PEOPLE v. AIKEN.

Cr. 2313.

District Court of Appeal, Third District, California.

Dec. 26, 1951.

Hearing Denied Jan. 24, 1952.

Russell Andrew Aiken was charged with driving a vehicle while intoxicated and a prior conviction for a like offense, and from an order of the Superior Court, Shasta County, Albert F. Ross, J., dismissing the complaint, the People appealed. The District Court of Appeal, Peek, J., held that a justice court's order dismissing a previous complaint, charging the same offense, but not the prior conviction, "on account of the filing of another action," barred further prosecution for such offense, as such order was not explicitly made for the purpose of amending the complaint.

Order appealed from affirmed.

1. Criminal Law 🔑178

A justice court's order dismissing complaint, charging misdemeanor of driving vehicle while intoxicated, "on account of the filing of another action," wherein complaint charged defendant with high grade misdemeanor of same offense and prior conviction of like offense, barred further prosecution for offense as order was not explicitly made for purpose of amending complaint. Pen.Code, §§ 1385, 1387; Vehicle Code, § 502.

2. Criminal Law 🔑178

The statute providing that order dismissing action for misdemeanor bars any other prosecution for same offense, unless order is explicitly made for purpose of amending complaint, applies to dismissals under statute authorizing dismissal of action or indictment on court's own motion or district attorney's application in furtherance of justice, as well as to dismissals under statute requiring dismissal of prosecution for delay in filing information or bringing defendant to trial. Pen.Code, §§ 1382, 1385, 1387.

Doris H. Maier, Deputy Atty. Gen., for appellant.

Daniel S. Carlton, Redding, for respondent.

PEEK, Justice.

This is an appeal by the prosecution from an order of the Superior Court of Shasta County setting aside an information and dismissing an action against the respondent arising out of an alleged violation of Section 502 of the Vehicle Code.

On May 12, 1951, a complaint was filed in the Justice's Court of Township Number Four, County of Shasta, charging respondent with a violation of Section 502 of the Vehicle Code, said violation having occurred in said county on May 11, 1951. On May 15, 1951, a second complaint was filed in the same Justice's Court charging respondent with the same violation of Section 502 of the Vehicle Code, and in addition charging him with a prior conviction for the violation of the said section, thereby making the offense a high grade misdemeanor. On May 16, 1951, the Justice's Court dismissed the first complaint, its order reading as follows: "On account of the filing of another action this action is dismissed (see No. F–126 this court). Bail posted hereunder is transferred to case No. F–126." At the hearing in the Justice's Court on the second complaint, counsel for respondent moved to dismiss the action under the provisions of Section 1387 of the Penal Code, which motion was denied. The hearing then proceeded and at the conclusion thereof defendant was bound over to the Superior Court. A like motion was filed in the Superior Court and after a hearing thereon the motion was granted and the complaint was dismissed.

The basis for the order was that the dismissal of the first complaint, which charged only a low grade misdemeanor, operated as a bar to any further proceeding for the same offense under the provisions of Sections 1385 and 1387 of the Penal Code.

Two questions are now presented to this court. However, since it appears that the first—whether or not the dismissal was proper under Section 1387 of the Penal Code—must be answered in the affirmative it is unnecessary to discuss the second question raised by the state.

Section 1385 provides as follows: "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

Section 1387 provides as follows: "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor, unless such order is explicitly made for the purpose of amending the complaint in such action, in which instance such order for dismissal of the action shall not act as a bar to a prosecution upon such amended complaint; but an order for the dismissal of the action is not a bar if the offense is a felony."

[1] There can be no question, and in fact the parties have so stipulated, that the two actions here considered were based on the same offense, that offense being the driving of a vehicle while intoxicated. Nor can there be any question that the prior conviction charged in the second complaint served only to increase the penalty which might be imposed. Likewise it is clear that both actions involved a misdemeanor, the second being a high grade misdemeanor outside the jurisdiction of a Class B Justice Court. It follows, then, under Section 1387, that the dismissal under Section 1385 is a bar to any other prosecution for the same offense, unless it may be said that "such order [was] explicitly made for the purpose of amending the complaint." People v. Smith, 143 Cal. 597, 77 P. 449; Donati v. Righetti, 9 Cal.App. 45, 97 P. 1128; People v. Brown, 42 Cal.App. 462, 464, 183 P. 829. However, as the order "explicitly" states it was made because "of the filing of another action" obviously it cannot be said to have been made "explicitly" for the purpose of amending the original complaint.

[2] Appellant further contends that Section 1387 applies only to dismissals under Section 1382 and in support thereof relies upon People v. Hrjak, 85 Cal.App. 301, 259 P. 353 and People v. Zadro, 20 Cal.App.2d 320, 66 P.2d 1204. However, we are of the opinion that Section 1387 applies equally to dismissals under Section 1385. In People v. Brown, supra [42 Cal.App. 462, 183 P. 830.], although the opinion therein does not expressly state that the dismissal was pursuant to Section 1385, it appears safe to so assume, since the dismissal was on the motion of the prosecution following the return of an indictment for a felony based on the same assault, the court stated, "Hence, under the plain reading of the statute, the dismissal would have barred further prosecution upon a new charge for

the commission of such misdemeanor." See also People v. Smith, supra; People v. Banat, 39 Cal.App.2d Supp. 765, 100 P.2d 374, and People v. Ring, 26 Cal.App.2d Supp. 768, 70 P.2d 281.

The order is affirmed.

ADAMS, P. J., and VAN DYKE, J., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

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108 Cal.App.2d 417

GARDNER v. HORRALL, Chief of Police, et al.

Civ. 18350.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1951.

Aileen Flaven Gardner brought action against C. B. Horrall, Chief of Police of the City of Los Angeles, the National Surety Corporation, a corporation, R. T. Reid and C. MacClendon to recover damages for alleged false imprisonment. The Superior Court of Los Angeles County, Arnold Praeger, J., entered an order dismissing the action, because of the failure of plaintiff to file an amended complaint within 30 days allowed plaintiff to amend the complaint, and the plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that plaintiff's attorney was authorized in relying on alleged oral agreement of one of the attorneys of the defendants, that plaintiff should have an indefinite extension of time to amend the complaint, and that therefore it was reversible error to refuse to permit plaintiff to amend the complaint.

Judgment reversed.

1. Appeal and Error 🔑78(4)

Order dismissing action constituted a "final judgment" from which appeal would lie.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

2. Appeal and Error 🔑1061(2)
Pleading 🔑356(4)

Where demurrer of defendant to complaint was sustained with 30 days to plaintiff to amend, and about eight months later defendants moved for dismissal because no amendment had been filed, and affidavit of plaintiff's attorney stated that one of defendants' attorneys had orally agreed that plaintiff should have an indefinite time to amend, and affidavit of one of attorneys for defendants stated that attorney alleged to have orally agreed to indefinite extension had no recollection of alleged agreement, it should have been determined as a matter of law that there was an oral agreement for indefinite extension, with a promise that no advantage would be taken of plaintiff and that plaintiff was justified in believing and relying on promise, and it was reversible error to dismiss action and deny plaintiff permission to refile amended complaint. Code Civ.Proc. § 581, subd. 3.

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Marshall Stimson, Noel Edwards and Charles Murstein, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., Los Angeles, for respondents.

SHINN, Presiding Justice.

Aileen Gardner appeals from a judgment dismissing her action for false imprisonment. The sole question presented is whether the court abused its discretion when it struck out on motion of defendants an amended complaint filed ten months after demurrers had been sustained with leave to amend within 30 days.

[1] On December 21, 1948, plaintiff filed a complaint for false imprisonment against Los Angeles Police Chief Horrall and two policemen, Reid and MacClendon. Defendants demurred on July 8, 1949. On July 15th the parties stipulated in writing that the demurrers of the defendants be sustained with thirty days to amend, and a minute order to this effect was entered July 21, 1949. Plaintiff did not file an

amended complaint until nine months thereafter. On April 24, 1950, defendants noticed a motion to dismiss the action under section 581(3) of the Code of Civil Procedure (failure to amend within time allowed). On May 1st by stipulation this motion was ordered off calendar. An amended complaint was filed May 17, and general demurrers to this complaint were filed May 29, accompanied by a notice of motion to strike the amended complaint. Defendants' motions to restore to calendar the motion to dismiss the action, the motion to dismiss itself, and the motion to strike the amended complaint, came on for hearing and were granted and the demurrers ordered off calendar. A motion by plaintiff for permission to re-file the amended complaint was denied at the same time. Plaintiff appeals from the order of dismissal, which constitutes a "final judgment." Commins v. Guaranty Oil Co., 29 Cal.App. 139, 154 P. 882; Southern Pac. R. R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526.

Appellant contends that in view of the established policy which favors trials on the merits it was an abuse of discretion for the court to dismiss the action, inasmuch as the neglect of counsel, if any, was excusable. In his affidavit, Mr. Edwards, one of the attorneys for appellant, stated that he was ill at the time the demurrers were sustained and it was orally agreed between deputy city attorney Feldmeier and himself that, if necessary, appellant might take more than thirty days to file the amended complaint; that Mr. Feldmeier stated that the city attorney's office was not interested in the amount of time taken to amend the complaint and that no advantage would be taken of plaintiff.

The motion to dismiss was heard on affidavits. Mr. Feldmeier filed no affidavit, and the court had before it only the affidavit of Mr. Edwards and counter affidavits of Mr. Wilson, a deputy city attorney, who averred that Mr. Feldmeier had stated that he had no recollection of having given an oral extension of time. The case came to Mr. Wilson from Mr. Feldmeier with a notation to move for a dismissal if the complaint were not amended within the 30-day period. Mr. Wilson waited for some eight months before moving for a dismissal.

We cannot decide the question before us upon the assumption that the court disbelieved the statements of Mr. Edwards' affidavit. The very circumstance of the delay indicated that he was relying upon some arrangement which he believed would protect his client. For all the court knew it may have been the intention of Mr. Feldmeier to warn Mr. Edwards before he took any adverse action. The fact that Mr. Feldmeier made no notation in his file of an oral agreement is understandable in view of his inability to remember whether he had made the arrangement claimed by Mr. Edwards. It was to be presumed that all parties were acting in good faith, and the trial court no doubt believed they were. Certainly Mr. Wilson was indulgent in waiting so long before taking any action. It is clear from the record that he had no knowledege of an oral stipulation.

[2] The facts of the case are unique but the governing principles are well known to practicing members of the profession. A reputable member of the bar made oath to an oral agreement with a deputy city attorney of equally good standing. In the press of business of his office the latter, eight or nine months later, had no recollection as to whether the oral arrangement had been made. Consequently he properly declined to make an affidavit as to matters not within his recollection. Under these circumstances a finding against the truth of the facts stated under oath would amount to a finding of an attempt to perpetrate a gross fraud upon the court. We are satisfied that under these circumstances the learned trial judge would not have found fraud and gross violation of professional duty on the part of Mr. Edwards. The question presented therefore is one of law. It may be stated as follows: Where, under oral agreement, an attorney has been granted an indefinite extension of time to amend a pleading with a promise that no advantage will be taken of him, is he justified in believing and relying upon the promise that no adverse action will be taken without prior notification and an opportunity to protect the interests of his client. The

question calls for an affirmative answer. Therefore, if through the forgetfulness or inadvertence of his adversary adverse action is taken against the promisee, due regard for the principles which guide the profession in such matters, and the interests of justice, require that relief be granted upon the ground of excusable neglect. But we should emphasize that had Mr. Edwards' affidavit been controverted in material respects the decision of the trial judge would have been final as one based upon conflicting evidence. We do not hold that the long delay in filing an amended complaint was free from neglect. It is only by giving full effect to the evident good faith of the parties that we differ with the trial court upon a question of law, and hold the neglect to have been excusable.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

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108 Cal.App.2d 514

PEOPLE v. FOLEY.

Cr. 4716.

District Court of Appeal, Second District,
Division 3, California.
Jan. 2, 1952.

Robert Phillip Foley was convicted in the Superior Court of Los Angeles County, Otto J. Emme, J., of unlawfully keeping and occupying a room with paraphernalia to record bets on horse races, and of unlawfully recording a bet on a horse race, and he appealed. The District Court of Appeal, Wood, J., held that evidence justified the conviction.

Affirmed.

1. Criminal Law 🔑1023(10)

A defendant convicted of unlawfully keeping and occupying a room with paraphernalia to record bets on horse races, and of unlawfully recording a bet on a horse race, could not appeal from the verdict. Pen.Code, § 337a, subds. 2, 4.

2. Gaming 🔑98(3, 5)

Evidence justified conviction for unlawfully keeping and occupying a room with paraphernalia to record bets on horse races, and for unlawfully recording a bet on a horse race. Pen.Code, § 337a, subds. 2, 4.

◆

Joseph T. Forno, Los Angeles, for defendant and appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for plaintiff and respondent.

WOOD, Justice.

[1] Defendant was accused in count I of violating section 337a, subdivision 2, of the Penal Code, in that, he unlawfully kept and occupied a room with paraphernalia for the purpose of recording bets on horse races. In count II he was accused of violating subdivision 4 of said section, in that, he unlawfully recorded a bet on a horse race. Trial by jury was waived. He was adjudged guilty on both counts. His motion for a new trial was denied. Probation was granted and proceedings were suspended. The notice of appeal recites that he appeals from the judgment, verdict, sentence, and the "denial" of his motion for a new trial. Since there is no judgment or sentence, the purported appeals from judgment and sentence will be dismissed. Since an appeal from a verdict is not authorized, People v. D'Elia, 73 Cal.App.2d 764, 766, 167 P.2d 253, the purported appeal therefrom will be dismissed.

Appellant contends that the evidence is insufficient to support the conviction.

By stipulation the case was submitted upon the testimony and stipulations shown in the transcript of the preliminary examination, the exhibits referred to therein, and the additional testimony given by a deputy sheriff at the trial. Defendant did not testify and no evidence was offered in his behalf.

Defendant owned and operated a pool hall, in which there were two telephones—

one on the cigar counter and the other, without a number on it, on a shelf under the counter. A deputy sheriff entered the pool hall about 3 p. m. on April 6, 1951, and saw the defendant, who was behind the counter, talking on the telephone which was on the counter, and he saw the defendant, at that time, put a magic slate on the counter and write on the slate. When defendant finished that conversation he talked on the telephone which was under the counter, and then he lifted the two top sheets of the magic slate. According to testimony, when the top sheets of the magic slate are lifted the writing on the slate disappears. During the half hour the deputy sheriff was there, he saw the defendant answer the counter telephone about five times and each time the defendant looked at a scratch sheet which was on the counter, and on two of those occasions he wrote on the slate. After each of the calls, the defendant called someone on the telephone which was under the counter. About 3:30 p. m., the officer saw the defendant talking on the counter telephone and moving a pencil over the slate, and when he hung up the receiver and reached for the telephone under the counter, the officer approached the defendant. Then the defendant walked toward the officer, and the officer arrested him and picked up the slate upon which there was writing as follows: "715–IXX" and "595–IXX" and "Wilmos." The slate with that writing on it was received in evidence. About five minutes after the arrest, the officer answered the counter telephone, and someone asked for Phil. The officer replied that Phil had gone to the rear of the room, that it was Frank speaking, and everything was all right. The caller said, "This is Lou. I want 67, one to win, and I want 96, two to win." Soon thereafter he answered the telephone again, and someone asked for Phil. The officer replied that Phil had gone, that he was Frank and that everything was all right. The caller said, "I want the 7th race at Bay Meadows, 15, four to win."

Another deputy sheriff, who had entered the room about 3:30 p. m., answered the telephone, and the caller said, "Give me two to win on Hygro's Wonder in the 7th race at Santa Anita." That deputy took a sheet of paper from defendant's person, upon which paper there were four names and opposite each name there was a number.

One of the officers, who had been attached to the vice detail four years, testified that he had made thousands of bookmaking investigations and that he was familiar with the paraphernalia used by bookmakers in Los Angeles County and with their practices and manner in keeping bookmaking records; that in his opinion the writing which was on the magic slate was the recordation of wagers on horses; that in his opinion the name "Wilmos" on the slate was the name of the bettor; that a magic slate is commonly used by bookmakers to temporarily record a bet and then when the bet is telephoned to a phone spot the top portion of the slate is lifted and there is no evidence of a bet on the slate; that the scratch sheet (taken from the counter) showed that in the 7th race at Bay Meadows the 15th horse listed was "Hygro's Wonder"; that in his opinion the sheet of paper, which was taken from defendant, was a payoff sheet indicating the names of persons who had won wagers and the amounts of money to be paid to them. He also testified that defendant said that he did take some telephone action bets over the telephone, that the magic slate and scratch sheet were his, that the writing on the slate was his writing, that he got his results by radio, and that the bets he handled amounted to approximately $100 a day. He also testified that there was a radio in the pool hall, and that the only betting marker he found was the magic slate.

[2] The evidence is clear that the defendant occupied a room with paraphernalia for the purpose of recording and registering bets on horse races, as charged in count I. It is also clear that he recorded a bet on a horse race, as charged in count II. The appeal is wholly without merit.

The purported appeals from a judgment, sentence, and verdict are dismissed. The order denying the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

108 Cal.App.2d 510

PERCIN et al. v. EASLEY.

Civ. 18522.

District Court of Appeal, Second District,
Division 1, California.
Jan. 2, 1952.

Action by Ben Percin and others against Louis L. Easley for damages sustained when an automobile driven by the defendant struck the named plaintiff's automobile. From a judgment of the Superior Court of Los Angeles County, Wilbur Curtis, J., for defendant, plaintiffs appealed. The District Court of Appeal, Drapeau, J., held that the verdict was supported by substantial evidence.

Affirmed.

1. Automobiles ⚷245(54)

In automobile collision action where it appeared that defendant had been drinking prior to the accident and had pleaded guilty of charge of driving while intoxicated, whether defendant's intoxication was a factor which contributed to the accident was for the jury.

2. Automobiles ⚷244(44)

In action to recover for damage sustained when plaintiffs' automobile was struck from rear by defendant's automobile while both were traveling in same direction on multi-lane highway, notwithstanding showing that defendant had been drinking prior to accident, evidence sustained jury's verdict and judgment for defendant, based on implied finding that plaintiff had been contributorily negligent in crossing over dividing line into path of defendant's automobile.

3. Appeal and Error ⚷996, 1001(1), 1002

An appellate court has no power to disturb a judgment when conclusion reached by jury is supported by substantial evidence, contradicted or uncontradicted, or by reasonable inferences from the evidence.

4. Appeal and Error ⚷1001(1)

The rule that an appellate court has no power to disturb the judgment when the conclusion reached by the jury is supported by substantial evidence applies with equal force to verdicts in favor of a defendant as well as to those in favor of a plaintiff.

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Flaum & Hecker and Eugene L. Wyman, all of Beverly Hills, for appellants.

DeForrest Home, Los Angeles, for respondent.

DRAPEAU, Justice.

This action arose out of a collision between two automobiles being operated by plaintiff Ben Percin and the defendant. It occurred at about 1:20 A.M. on November 28, 1949, as both cars were traveling southerly on Cahuenga Freeway in Cahuenga Pass near the Highland Avenue cutoff.

Cahuenga Freeway merges from a three to a four lane highway about a mile north of the place of the collision. These lanes are herein referred to as numbers one, two, three and four from east to west respectively. At the cutoff Cahuenga Boulevard and Highland Avenue separate into two two-lane highways running generally north and south, Cahuenga lying to the east of the dividing fork in lanes one and two, and Highland to the west of the fork in lanes three and four.

Approaching the cutoff there is a group of painted arrows on the highway pointing first one way and then the other dividing said four lanes in the middle, two for Cahuenga and two for Highland. These arrows extend for several hundred feet to a row of metal buttons which continue for about two hundred fifty feet to a concrete curb extending for about one hundred fifty feet which completes the separation of the two highways.

At the time of the accident the visibility was good and traffic was light.

The jury returned a verdict in favor of defendant; plaintiffs' motion for new trial was denied, and they here appeal from the judgment entered pursuant to the verdict. Appellants' main point on appeal is insufficiency of the evidence to support the judgment.

Appellant Ben Percin testified that, accompanied by his wife and the latter's uncle, Morris Rosen, he was driving from Studio City to his home in Los Angeles; that when he reached Cahuenga Pass, he was traveling south at about 35 miles per hour; that for about a mile north of the point where the highway divides, he was in lane two, to-wit: the right-hand lane of Cahuenga next to the markers and the buttons; that he remained in that lane continuously until his car was struck in the rear, suddenly and without warning. He fixed the point of impact as several hundred feet "past the beginning of the markers."

Mr. Percin admitted that he made a report of the accident to his insurance company, in which he made the following statements: "As we approached the point where the Freeway forks, Cahuenga left and Highland right, I was on the right hand side or south side of the highway which is all one way east bound, and about twenty feet out or north of the curb on my right. * * * Just before I came to where there are dividing arrows painted on the center of the highway to show that Cahuenga and Highland divide, I pulled over to my left and into the nearest or most southerly east bound lane on Cahuenga. As I pulled over into the left side of the highway, there was no other traffic around me that I could see. I did, however, give a left hand signal out my left window from force of habit. When I had completed turning over to the Cahuenga side and going east in a straight line for about a hundred yards, my car was suddenly struck from the left."

While the directions referred to in the statement appear to be inconsistent with the testimony produced at the trial, it was explained by the trial judge that "I think at that point it is more east than south. Highland, after you get into it, runs north and south, but it comes into the Pass there almost at right angles."

Respondent Easley testified that he entered Cahuenga Pass at Vineland and continued southerly at 35 or 40 miles per hour; that there are three lanes on Cahuenga at this point; that he was traveling in the left-hand lane toward Hollywood, to-wit: in lane one, and increased his speed to 50 miles per hour; that visibility was from 100 to 200 feet, and through his rear view mirror he saw traffic following him at a distance of about 300 feet. He was familiar with the highway, traveling it every day; that from Barham Boulevard the three lanes divide into four, and approaching the cutoff of Highland Avenue and Cahuenga Boulevard "there is a group of arrows pointing first one way and then the other, dividing the four lanes in the middle." Mr. Easley further testified that he continued south in lane one until immediately prior to the collision; that for about 300 feet north of the separation of the highway, his lights were on low beam so "that actually nothing came within a range of my lights for more than two hundred feet", but "I believe I could have seen an automobile" beyond the two hundred feet because of the lighting conditions in the area. Also, that as he came up to the painted arrows on the highway dividing Cahuenga and Highland, he noticed the headlights of a car to his right; that he was then in lane one (the inside lane) and about opposite the point where the highway began to separate; that he continued for two or three hundred feet to the point of the accident. He first saw appellants' car when it was about one hundred feet ahead; that it was in front of him but not directly ahead; it was between lanes two and three traveling toward lane one; that it was not going very fast but was moving in the direction of lane one. Respondent immediately applied his brakes and swerved his car in an effort to miss appellants' car. His car skidded approximately twenty feet head-on and thirty feet sidewise, the front pointing toward lane two. He was going about fifty miles per hour when he applied his brakes, and was then between seventy-five and one hundred feet back of appellants' car. The roadway was downhill and his car was rolling; his foot was on the brake pedal and not on the accelerator. As soon as he saw appellants' car he applied his brakes, but the left side of his car skidded sidewise into the rear of appellants' car. Respondent estimated that his speed at the moment of impact was 20 miles per hour, and that the speed of appellants' car was 10 to 15 miles an hour.

According to respondent's version of the accident, when he first saw appellants' car it was crossing from lane three (Highland Avenue side) across the separating markers into lane two (the Cahuenga side), and that it continued toward lane one in which respondent was then driving.

The map of the scene which was used at the trial shows that the point of impact was well south of the place where the dividing markers commenced. Officer Bornish fixed it at five hundred fifty-two feet south of the start of the markers, in lane one, ten feet west of the east curb of Cahuenga. He also measured respondent's skid marks and found them to be thirty feet in length.

Respondent's testimony tended to establish that he was traveling at a lawful rate of speed in lane one, i. e., the inside lane on Cahuenga, until suddenly confronted by an automobile coming from the right across the separating strip of the highway directly into his path; that he immediately applied his brakes, resulting in a thirty-foot skid, and collided with the rear of appellants' car at a point within respondent's lane of travel. This version is directly corroborated by appellant Ben Percin's statement, hereinbefore referred to, that "I pulled over to my left and into the nearest or most southerly eastbound lane on Cahuenga" and gave a left-hand signal from force of habit.

[1] It is argued by appellants that respondent was negligent in traveling fifty miles per hour in an intoxicated condition. Evidence was presented that respondent had been drinking prior to the accident and that he pleaded guilty to a charge of driving while intoxicated. However, it was for the jury to determine therefrom whether respondent's intoxication was a factor which contributed to the collision. Drury v. Hagerstrom, 68 Cal.App.2d 742, 745, 157 P.2d 878. The jury impliedly found that respondent was free from negligence and that appellant Ben Percin was contributively negligent when he crossed over the dividing line into the path of respondent's automobile.

[2-4] The evidence produced by respondent and corroborated by appellant Ben Percin was sufficient to sustain the verdict and the judgment based thereon. Under the substantial-evidence rule "An appellate court has no power to disturb a judgment when the conclusion reached by the jury is supported by substantial evidence, contradicted or uncontradicted, or by reasonable inferences from that evidence. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. This rule applies with equal force to verdicts in favor of a defendant as well as to those in favor of a plaintiff." Rivera v. Goodenough, 71 Cal.App.2d 223, 230, 162 P.2d 498, 502.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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108 Cal.App.2d 269

LINCOLN v. DREHER.

Civ. 4418.

District Court of Appeal, Fourth District, California.

Dec. 18, 1951.

Proceeding by Walter Gould Lincoln against W. F. Dreher on an order directing defendant to show cause why an execution upon a judgment against him should not be issued and directing that he appear and be examined in supplementary proceedings concerning his property. The Superior Court, Riverside County, John G. Gabbert, J., made an order directing issuance of a writ of execution upon the judgment, and defendant appealed. The District Court of Appeal, Griffin, J., held that an order on an ex parte application without notice for revival of the judgment in its full amount was unauthorized.

Order reversed.

1. Judgment ⚿868(2)

Order made eighteen years after judgment was partially satisfied by execution, purporting to vacate credit applied to judgment and revive judgment in its full amount because sheriff's deed was subsequently held ineffective and inferior to deed of trust previously executed on same property was void because made without notice. Code Civ.Proc. § 708.

2. Judgment ⚿386(1, 3)

Trial court cannot set aside on motion a judgment or order not void on its face unless motion is made within reasonable time and it has been definitely determined that time will not extend beyond limited time fixed by statute except where party in whose favor judgment or order valid on its face runs admits facts showing invalidity, or, without objection evidence is admitted which clearly shows existence of such facts. Code Civ.Proc. § 473.

3. Judgment ⚿872

Where judgment creditor obtained order under ex parte application directing debtor to show cause why execution on original judgment against him in full amount should not be issued, and defendant at hearing urged that order purporting to vacate credit on original judgment and to revive judgment in its full amount was void because made without notice, debtor could thereafter raise question of validity of order reinstating original judgment although he did not appeal from that order nor move to set it aside within statutory time. Code Civ.Proc. §§ 343, 708.

4. Judgment ⚿866(2)

Proceeding to revive judgment on ground that sheriff's deed was ineffective because it was inferior to deed of trust previously executed on same property was authorized under the statute prescribing procedure when execution sale is to be set aside for irregularity, and was not subject to the limitation specified in statute requiring that action for relief not otherwise subject to specified limitation must be commenced within four years after accrual. Code Civ.Proc. §§ 343, 708.

5. Judgment ⚿890

In proceeding by judgment creditor on ex parte application for order directing debtor to show cause why execution upon original judgment against him should not be issued in full amount, wherein debtor at hearing attached order purporting to vacate credit on judgment and to revive judgment on ground that sheriff's deed was ineffective, and asserted that order of vacation was void because made without notice, creditor had burden of showing that there was no partial satisfaction of his judgment.

◆

Oliver O. Clark and Jack R. Mills, Los Angeles, for appellant.

Walter Gould Lincoln, Los Angeles, in pro. per.

GRIFFIN, Justice.

On May 5, 1932, plaintiff and respondent recovered a money judgment in the sum of $6,101.00 plus costs, against defendant and appellant Dreher and the Fairview Farms Company, of which Dreher was president, and against certain other named defendants.

Within a few days thereafter, Dreher waived his right to move for a new trial and to appeal from the judgment. On June 7, 1932, Dreher signed two affidavits, which were prepared by Lincoln, to obtain the immediate appointment of a receiver for Dreher's co-judgment debtors. Apparently, plaintiff forthwith obtained an execution on that judgment and levied upon certain lands claimed to be owned by the named defendants. Plaintiff obtained a sheriff's deed of sale dated October 3, 1932. At the sale, he bid in the property for approximately $3500, which amount was credited on this judgment, satisfying the judgment to that extent, leaving a balance of approximately $2800, which partially satisfied judgment remained on the records of the court until July 24, 1950.

On that date, eighteen years after the execution sale, Lincoln, upon his *ex parte application and without notice* to any judgment debtor, applied for and obtained, in another department, an order of the court which recites that,—it appearing from the affidavit of Lincoln that no defendant had any right or title to the property sold by the sheriff, and that Lincoln received nothing as consideration for his credit, it is ordered that the sale by the sheriff and the credit given is "annuled" and the judgment dated May 5, 1932, and duly recorded in book 39 of judgments "shall forthwith and hereafter be in full force and effect as if no credit had been given thereon".

By the terms of the order it does, in effect, restore and revive the judgment to its original condition, as of the date of the credit. This order was based upon a showing by plaintiff that in an action by him seeking to quiet his title to the land involved in the sheriff's deed, the court held his sheriff's deed to be ineffective and inferior to a deed of trust previously executed on the same property.

On September 21, 1950, upon the ex parte application of plaintiff, he obtained an order directing Dreher to show cause why an execution upon the original judgment against him, in the full amount plus interest and costs, all totaling in excess of $14,000, should not be issued, and directing that he personally appear and be examined under oath in supplementary proceedings concerning his property. It purportedly restrained Dreher from thereafter dealing in any manner with his real and personal property. After a protracted hearing in which defendant submitted 20 affidavits and certain exhibits of record, and in which plaintiff submitted 10 affidavits, including certain other records, the court made findings and entered its order directing the writ of execution to issue in the full amount of the judgment, as indicated in the order to show cause, and ordered defendant's appearance for examination as the judgment debtor.

The questions stated and objections urged by defendant at the hearing and on this appeal are these: (1) Is the order of July 24, 1950, which purports to vacate the credit of October 1, 1932, and to revive the judgment in its full amount, void because made without notice? (2) Does the evidence support the findings of the trial court that Lincoln did not agree, in 1932, to forbear the enforcement of this judgment against Dreher? (3) Did Lincoln's conduct during the first five-year period following the judgment constitute the diligence required of him, and if not, does his negligence during that period nullify the order here appealed from? (4) Did Lincoln's conduct during the last 13 of the 18 years that elapsed since the entry of the judgment constitute the diligence required of him? and (5) Would it now be inequitable to enforce the judgment against Dreher?

We will first discuss the question of the validity of the order allowing the credit on the judgment and the order reviving or reinstating the former judgment in its full amount, plus interest thereon. The record shows that Lincoln obtained the judgment involved in May, 1932. He immediately levied upon certain property in which all defendants had an interest and purchased such interest as may have passed by the sheriff's sale for approximately $3500, and the judgment was, accordingly, reduced and partially satisfied. The judgment, as thus reduced, remained of record until July, 1950, at which time plaintiff endeavored to have the judgment in the original amount revived by reason of an ex parte application. The application was made and the order was admittedly obtained *without notice to the parties concerned,* which parties included not only the defendant Dreher but the Fairview Farms Company and others.

Section 708 of the Code of Civil Procedure provides in part: "* * * If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, *or because the property sold was not subject to execution and sale,* the court having jurisdiction thereof must, *after notice and on motion of such party in interest,* or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more." (Italics ours.)

[1] Since notice of the application for a revival of the judgment in its full amount was admittedly not given, the order was unauthorized because of the lack of jurisdiction of the court to enter it, which lack of jurisdiction appears in the record before us and which fact plaintiff fully admits in these proceedings.

Plaintiff argues that defendant is precluded from raising that question in this proceeding because he did not appeal from the order nor did he move to set it aside under section 473 of the Code of Civil Procedure within the time specified in that section.

[2] In Thompson v. Cook, 20 Cal.2d 564, at page 569, 127 P.2d 909, at page 912, where a similar question arose, the court said:

"As the motion to revive the judgment was made without notice to the defendants, the court was without jurisdiction to act thereon and the order granting said motion was void. * * *

"It is well settled in this state that a court has no power to set aside on motion a judgment or order not void on its face unless the motion is made within a reasonable time, and it has been definitely determined that such time will not extend beyond the limited time fixed by section 473 of the Code of Civil Procedure as at present in force. * * * However, to the rule just stated there is a well established exception which provides that although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court to declare the judgment or order void." (See, also, City of Los Angeles v. Morgan, 105 Cal.App.2d 726, 234 P.2d 319.)

[3, 4] These proceedings fully attack the validity of the order reinstating the judgment in the full amount. A proceeding to revive or to reinstate a judgment under the circumstances here related, is authorized under section 708 of the Code of Civil Procedure, and apparently is not barred by the limitation specified in section 343 of the Code of Civil Procedure. Cross v. Zane, 47 Cal. 602; Sullivan v. Wellborn, 32 Cal.2d 214, 217, 195 P.2d 787; Doehla v. Phillips, 151 Cal. 488, 91 P. 330; 15 Cal.Jur. p. 257, sec. 257. But see dicta in Merguire v. O'Donnell, 139 Cal. 6, 72 P. 337.

The record discloses that plaintiff brought a quiet title action on his sheriff's deed not only against defendants Dreher, and Fairview Farms Company, but also against several of the companies with which Dreher was connected and also against the Vitruvian Corporation, holder of a trust deed, and also against other named defendants numbering in excess of one hundred. Many of these named defendants were personally served and plaintiff took default judgment against them, wherein the court found that insofar as they were concerned, plaintiff, since 1932, was the owner and entitled to the possession of the property described. As to the Vitruvian Corporation, which appeared by answer and cross-complaint, it found that certain portions of the property described in plaintiff's complaint were subject to said Vitruvian Corporation's trust deed and that its title was paramount to and prior to any asserted claim of the plaintiff.

[5] Plaintiff Lincoln had the burden of showing that there was not a partial satisfaction of the judgment. Defendant Dreher should have had the right and opportunity to prove, as a matter of fact, that the judgment was partially satisfied by virtue of the sale. We conclude that the order which, in effect, revived and reinstated the former judgment in its full amount, was void for the reasons stated and that the order directing an execution in that amount, plus accumulated interest, was unauthorized.

Since the showing made by plaintiff as to his claimed exercise of due diligence during the past 18 years, and defendant's showing of a claimed agreement of forbearance and of his claimed ability to respond to an execution issued against his property during that period had one been issued, were apparently predicated upon a claimed judgment for $6101.50, plus interest thereon in the amount stated, and since the showings made as to due diligence were unsatisfactory in so many respects, all of the issues presented should be retried in the light of any order that may be subsequently made by the trial court in this connection.

Order directing that execution issue in the amount claimed is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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108 Cal.App.2d 466

In re WELCH.

HAKES et al. v. PERKINS.

Civ. 18432.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Hearing Denied Feb. 25, 1952.

Proceeding in the matter of Jone Welch, a person under the age of twenty-one years, wherein Clifford Hakes and others filed a petition, opposed by Sydney Perkins, for an order declaring Jone Welch free from parental control. The Juvenile Court of Los Angeles County, William R. McKay, J., entered a decree adjudging that named minor was an abandoned child and an order declaring the child free from parental control, and Sydney Perkins appealed. The District Court of Appeal, Wood, J., held that the statutory presumption of intent to abandon arising from mother's failure to provide for support of minor child for more than one year and other evidence were legally sufficient to support the finding of abandonment.

Decree and order affirmed.

1. Parent and Child 🔑2(4)

Proof that minor child was left voluntarily by parent with another, without any provision for his support or without communication from parent for a period of one year, and with intent to abandon the child is necessary to establish "abandonment" sufficient under statute to warrant declaring the child free from parental custody and control. Welfare and Institutions Code, § 701(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

2. Bastards 🔑15

In proceeding for an order declaring minor child free from parental control, evidence supported finding that for more than one year mother had made no provision for support of minor child born out of wedlock and voluntarily left in the care of another. Welfare and Institutions Code, § 701(a).

3. Parent and Child 🔑2(4)

The statutory presumption of intent to abandon minor child left in the care of another arising from parent's failure to provide for support of child for the period of one year may be overcome by opposing evidence. Welfare and Institutions Code, § 701(a).

4. Parent and Child 🔑2(4)

Whether intent to abandon minor child left by parent in the care of another has existed for a period of one year is a question of fact for trial court in proceeding for an order declaring such child free from parental control. Welfare and Institutions Code, § 701(a).

5. Parent and Child 🔑2(4)

In proceeding for an order declaring minor child free from parental control, it is the province of trial court to weigh the evidence and determine the credibility of the witnesses. Welfare and Institutions Code, § 701.

6. Bastards 🔑15

In proceeding for an order declaring minor child born out of wedlock and left by mother in the care of another free from parental control, evidence supported finding that mother was able to provide for child's support during period of alleged abandonment. Welfare and Institutions Code, § 701(a).

7. Bastards ⚷15

In proceeding for an order declaring minor child born out of wedlock and left by mother in the care of another free from parental control, statutory presumption of intent to abandon arising from mother's failure to provide for support of child for more than one year and other evidence, including the inferences which might reasonably be drawn therefrom, were sufficient to support finding of abandonment. Welfare and Institutions Code, § 701(a).

8. Parent and Child ⚷2(4)

In proceeding for an order declaring minor child free from parental control, child's wishes with respect to where she preferred to live were immaterial upon the issue of abandonment. Welfare and Institutions Code, § 701(a).

9. Parent and Child ⚷2(4)

On appeal from order declaring minor child free from parental control, Appellate Court was bound by trial court's finding as to abandonment of child by mother, where the evidence was legally sufficient to support such finding without regard to child's wishes with respect to where she preferred to live. Welfare and Institutions Code, § 701(a).

◆

James M. Fizzolio, North Hollywood, and C. Thomas Fizzolio, Los Angeles, for appellant.

Church, Church & Howard, Los Angeles, for respondents.

PARKER WOOD, Justice.

Appeal from a decree adjudging that a minor is an abandoned child within the meaning of section 701 of the Welfare and Institutions Code, and from an order declaring that she is free from parental control.

Section 701 of said code provides: "The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions: (a) Who has been left by either or both of his parents in the care and custody of another without any provision for his support, or without communication from either or both of his parents, for the period of one year with the intent on the part of such parent or parents to abandon such person. Such failure to provide, or such failure to communicate for the period of one year, shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him."

It was alleged in the petition herein (for an order declaring the minor free from parental control) that the minor, Jone Welch, had been left in the care of Mona Tate Kramer by her parents without any provision for her support, and without communication from said parents, with the intent on the part of said parents to abandon said person for the period of one year and more, "to-wit, continuously since the 9th day of January, 1948, to the time of filing this petition [February 25, 1949]." In a supplement to said petition, filed November 14, 1950, it was alleged that since January 13, 1949, upon which date Mona Tate Kramer placed said child in the home of Clifford and Peggy Hakes, the mother has not communicated with said child at the home of the Hakes and that the address and telephone number of the Hakes were well known to said mother; that since January 13, 1949, she has made no provision whatever for the support of the minor; that she has been capable of earning money for the support of said minor. The court found that the allegations of the petition and the supplement to the petition were true.

Appellant, who is the mother of the child, contends that the evidence is insufficient to establish any intention on her part to abandon the child.

Jone Welch, a girl, was born out of wedlock on September 12, 1944. In February, 1945, appellant placed her in the home of Mrs. Kramer. Appellant and Mrs. Kramer entered into a written agreement which provided that Mrs. Kramer would take full care of Jone; that appellant would pay Mrs. Kramer $21 a week in advance, appellant would assume the financial responsibility of medical care and clothes, and she would keep Mrs. Kramer notified at all times as to her address. She made the payments for the years 1945 and 1946, but the payments for the latter part of 1946 were made at irregular intervals. On May 9, 1947, appellant was in arrears in the payments for Jone's care in the sum of $277. Thereafter, in May of that year, she paid Mrs. Kramer $35, and on December 24th of that year she paid her $60. On January 3, 1948, she paid $80, and on January 9, 1948, she paid $50. No payment has been made by appellant since that date. On January 13, 1949, Mrs. Kramer placed Jone in the home of the respondents, Mr. and Mrs. Hakes, and Jone has lived there since that time.

During the first few weeks Jone lived with Mrs. Kramer, the appellant visited her on week-ends. About June, 1945, appellant and Mrs. Kramer took Jone to the Children's Hospital, and as a result of examinations it was determined that Jone had a defective hip which was a congenital condition. Jone was placed in a plaster cast which extended from her armpits to one of her ankles. She remained in the hospital about 10 days and was then removed to Mrs. Kramer's home. Appellant paid the hospital bill when Jone left the hospital. Jone remained in a cast about eight months. During that time she required nursing services 24 hours a day, which services were rendered by Mr. and Mrs. Kramer. Approximately once a month it was necessary to take Jone to the hospital for medical treatment. On two occasions appellant and Mrs. Kramer took her to the hospital and the other times Mr. and Mrs. Kramer took her. During the time she was in a cast, appellant saw her four or five times.

In January, 1946, appellant married Mr. Dagmar. In May, 1946, she went to Las Vegas, Nevada, and in October, 1946, she filed a divorce complaint in Las Vegas. Later that year, when she was ill, she went to Mrs. Kramer's home and remained there two or three days as a guest. She lived in Las Vegas about eight months, and then she returned to California. In May, 1947, appellant took Jone to a birthday party and then returned her to Mrs. Kramer's home. Thereafter, Mrs. Kramer tried to communicate with appellant. Mrs. Kramer testified that she sent a registered letter to each of the addresses which appellant had given to her, and that the letters were returned. With reference to accepting registered mail, appellant testified that she "refused registered mail all along, and would still refuse any registered mail." In one of the letters, which was sent on July 8, 1947, Mrs. Kramer stated that she had tried repeatedly for about two months to locate appellant, that appellant had ignored all her requests to get in touch with her, and that Jone's board bill had reached the sum of $410. In another of those letters, which was sent on August 23, 1947, she stated, among other things, that appellant's "complete indifference to Jone and her care, health or progress, and your failure to contribute anything towards her support for months, leads me to believe the task of caring for a child is really too much for you. * * * However your bill now has reached the fabulous size of almost $600.00 and something must be done. The following is a suggestion. That I adopt Jone."

On August 28, 1947, the Children's Hospital Society wrote a letter to Mrs. Kramer stating that it was enclosing a form which should be taken to the probation department "in order that we may have court consents for Jone's treatment." Thereafter Mrs. Kramer filed a petition to be appointed Jone's guardian and in October, 1947, she was appointed such guardian. She testified that it was necessary to have a guardian in order to obtain medical treatment for Jone. In November, 1947, when appellant went to Mrs. Kramer's home she was told about the guardianship proceeding. On Christmas, 1947, appellant went to the Kramer home and gave clothing and other presents to Jone. At that time she and Mrs. Kramer discussed the guardianship proceeding, and appellant stated, in effect, that she objected to efforts to take her baby from her.

On January 9, 1948, appellant visited Jone at the home of Mrs. Kramer. Thereafter appellant went to San Francisco, and while there, on January 14, 1948, she wrote a letter to Mrs. Kramer in which she stated that she had sent Jone a music box, and that she was going to send money orders every Friday. She stated further in that letter that she had "been thinking over what you did about Jone [the guardianship] and I realize it was the best thing because I know me and it always takes a large jolt to put me straight. Have faith now in me and I'll keep my end up and you won't be sorry * * * kiss my baby for me and tell her I love her very much."

About Easter, 1948, appellant went to Mexico and stayed there 10 days. About June, 1948, Mrs. Kramer went to appellant's apartment, on Havenhurst Street in Los Angeles, and told her that she (appellant) would have to do something with the baby—that if she was not able or willing to take care of her she ought to let someone adopt her. Appellant stated that she did not want her child adopted. Thereafter appellant moved from that apartment to a larger apartment. She testified that she moved there in order to have Jone with her. On July 28, 1948, Mrs. Kramer requested that the probation department make an investigation regarding the place where the child should live. About August 1, 1948, a probation officer interviewed the appellant and made a written report of the interview. In her report the officer stated, "The mother has rented a three-room apartment which includes an adjoining outdoor play space for the child, on the assumption that she would soon have Jone in the home with her."

In August, 1948, Mr. and Mrs. Kramer went to Oregon on a vacation and took Jone with them. During their absence appellant went to their home and talked with a friend of the Kramers. The friend wrote a letter to Mrs. Kramer in which she stated that appellant apparently wanted Jone and that appellant did not believe that Jone was on a vacation with the Kramers. Upon receiving that letter, Mrs. Kramer sent a letter to the appellant in which she stated, "when some months ago I finally located you on Havenhurst St., I called on you really to discuss this [Jone's care] & how you intended paying me (your bill now nearing 1400 dollars) but when I saw where and how you were living it flashed thru my mind that it was a hopeless case and Jone deserved something better & more solid—hence the question of adoption. * * * However—show me your ability to give her a fair chance and I certainly will listen to reason. To suddenly wrench her away from the only home she has ever known would be cruel beyond words, but if you can prove you can care properly for her, a gradual weaning can be established. * * Your definite obligation however now is to pay your bill for her care. When I return I'll call you and we can discuss this from every angle." That letter was received by appellant. After Mrs. Kramer returned from Oregon, she and appellant had a telephone conversation. On September 12, 1948, Jone's birthday, appellant visited Jone at Mrs. Kramer's home and gave her a small ceramic horse.

On November 10, 1948, Mrs. Kramer wrote a letter to appellant in which she stated: "We have been terribly distraught and worried realizing this change must come about. One cannot live almost four years, actually sacrifice and suffer with a little girl as we have with Jone without loving her as we would our very own * * but apparently it is not to be—and we ask the privilege here—should circumstances so arise as to alter your decision, please give us the privilege of adopting Jone. As you now have this new apartment and feel able to care for her it is now necessary to face the change. * * * She [Jone] knows no one but ourselves and no home but ours. * * * It would be a terrible blow were she to be torn from this suddenly. * * * To soften this * * * we suggest you be our guest for three or four days to get acquainted with her, so we may introduce you as her mother under any title you prefer. * * * Won't you call and set a date for a friendly visit, perhaps the latter part of this week." Mrs. Kramer testified that she received no reply to that letter. Appellant testified that shortly after she received that letter she telephoned to Mrs. Kramer and "told her that I wanted my daughter now and I had a place for her." A few days before Christmas, 1948, appellant telephoned to Mrs. Kramer and made arrangements to visit Jone at 10 o'clock Christmas morning. She arrived about 1 p. m. and brought gifts to Jone, and she stayed there about 20 minutes. She did not mention the letter in the telephone conversation or during her visit on Christmas at the Kramer home. As above stated, on January 13, 1949, Jone went to live with Mr. and Mrs. Hakes. On July 22, 1949, appellant visited Jone, who was at Mrs. Kramer's home that day, and stayed about 20 minutes. On Christmas Day, 1949, appellant went to Mrs. Kramer's home and asked where Jone was. Mrs. Kramer replied that appellant knew that Jone was with Mr. and Mrs. Hakes. Appellant then stated that she would go to their home to see Jone, and Mrs. Kramer told her that Mr. and Mrs. Hakes and Jone were out of town. At the time of the hearing herein (November 13, 1950) appellant had not seen Jone since her visit on July 22, 1949.

On February 25, 1949, Mr. and Mrs. Hakes and Mrs. Kramer filed the petition herein for an order declaring Jone free from parental control. On July 15, 1949, the appellant herein filed a petition for a writ of habeas corpus, which was denied. Also on July 15, 1949, the appellant filed a petition for removal of the guardian, which was denied without prejudice on January 18, 1950. In May, 1950, appellant filed a second petition for removal of the guardian, and it appears that no hearing was had thereon for the reason a citation had not been issued. Prior to the hearing on the petition herein (re abandonment), Mr. and Mrs. Hakes filed a petition for adoption of Jone. Those petitions came on for hearing on the same date, November 13, 1950, and the petition re abandonment was heard and determined first. (The petition re adoption was granted at a later date.)

Appellant testified that in 1945 and 1946 she worked as a motion picture actress; she earned not less than $3,000 in 1945 and approximately $7,000 in 1946; in 1947 she worked only four days in motion pictures and earned $22 a day; in that year she collected the maximum unemployment benefits which were in excess of $300, and she lived with friends in Sherman Oaks from the middle of the summer until December; then she went to San Francisco for a few weeks and occupied an apartment of a man who was out of the city, but during that time she traveled back and forth between San Francisco and Los Angeles. She testified that in 1948 she earned barely enough to live on and she received financial assistance from her mother and also from a man friend; during that year she started to work as an apprentice dog trainer; she did not get a "set salary," she received $200 or $300 from her employer and she also received tips from the customers; while working as such apprentice, she purchased an automobile—"an old jalopy" for which she made a down payment of $50; two weeks later she discovered that it needed a new motor, and she let the seller reclaim it. Counsel for petitioner asked appellant if she had attempted to secure any gainful employment instead of working as an apprentice and making no money. Appellant replied that it was an odd question—that she was desperately trying to get along and make money in her own way in a business world; that she did not approve of women working; and that she and her mother "were building a future, a kennel and a pet shop." She testified further that during 1948 she lived for four or five months in an apartment house which belonged to the man who was giving her financial assistance; she then moved into a house where she lived about eight months, and the rental of $85 a month was paid by the same man friend. She testified further that she first learned that Jone was living with Mr. and Mrs. Hakes about May, 1949, when she was served with the petition herein.

[1–6] Appellant asserts that the evidence is insufficient, as a matter of law, to support the decree that Jone is an abandoned child within the meaning of section 701(a) of the Welfare and Institutions Code. Said section contemplates that, in order to establish an abandonment, there must be proof that the child was left voluntarily by his parent with another, without any provision for his support *or* without communication from the parent for a period of one year, and with the intent on the part of the parent to abandon him. In re Cattalini, 72 Cal.App.2d 662, 665, 165 P.2d 250. As above shown, appellant voluntarily left Jone in the care of Mrs. Kramer. The court found that she made no provision for Jone's support for a period of more than a year beginning January 9, 1948. The evidence supports that finding. Appellant agreed to pay $21 a week for Jone's support, to pay for her medical care and clothing, and to keep Mrs. Kramer informed as to appellant's address. After January 9, 1948, appellant made no payment for Jone's support, for medical care or clothing, and she failed to keep Mrs. Kramer informed as to her whereabouts. The failure to provide for a minor for the period of one year is presumptive evidence of the intent to abandon the minor. Welf. & Inst. Code, sec. 701(a), supra. "While this presumption may be overcome by opposing evidence the question whether an intent to abandon has existed for a period of a year is a question of fact for the trial court." In re Sanders, 88 Cal.App.2d 251, 254, 198 P.2d 523, 525. Appellant asserts that her failure to make payments for support was due to her financial distress. The court found that appellant was able to provide for Jone's support during the period of the alleged abandonment. As above shown, during the year following January 9, 1948, appellant went to San Francisco and she went to Mexico for 10 days; she made a down payment of $50 on the purchase of an automobile; at the time a probation officer visited her in August she was living in a three-room apartment; and she testified that later she moved into a house which was rented for $85 a month. It is the province of the trial court to weigh the evidence and determine the credibility of the witnesses. In re Creely, 70 Cal.App.2d 186, 189, 160 P.2d 870. It cannot be said, as a matter of law, that finding was not supported by the evidence.

[7] The said statutory presumption of intent to abandon, and the other evidence including the inferences which might reasonably be drawn therefrom, are legally sufficient to support the finding of abandonment. See In re Sanders, 88 Cal.App.2d 251, 256, 198 P.2d 523.

[8, 9] Appellant also contends that the court erred in considering the child's desire to remain with Mr. and Mrs. Hakes. The trial judge asked the child how she liked to live with Mr. and Mrs. Hakes, and whether she preferred to live with them or with the appellant. The issue herein was whether there was an abandonment of the child. The child's wishes, with respect to where she preferred to live, were immaterial upon that issue. Irrespective of the interview of the child by the judge, if the evidence otherwise was legally sufficient to support the finding of fact as to abandonment, this court is not empowered to disturb the decree of the trial court. The evidence being legally sufficient, as above stated, this court is bound by the trial court's finding.

The decree and order are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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108 Cal.App.2d 431

In re GIUBBANI'S ESTATE.

Civ. 8033.

District Court of Appeal,
Third District, California.
Dec. 27, 1951.
Rehearing Denied Jan. 21, 1952.
Hearing Denied Feb. 21, 1952.

Proceedings in the matter of the estate of Marguerita Giubbani, deceased, wherein Silvio Bui, executor, filed objections to the valuation placed upon certain property of deceased, which objections were opposed by Thomas Kuchel, State Controller. The Superior Court, Shasta County, Albert F. Ross, J., overruled the objections and denied objector's motion for new trial, and objector appealed. The District Court of Appeal, Van Dyke, J., held that the evidence sustained the finding as to valuation.

Affirmed.

1. Taxation 🔑900(5)

On executor's appeal from order approving inheritance tax appraiser's valuation of business property, record did not support claim that trial court, either in ruling upon objections to appraised value or in answering arguments for new trial, had based rulings upon evidence outside the case.

2. Appeal and Error ⚿854(2)

Ordinarily a judgment that is correct upon the record will not be reversed because of trial court's memorandum opinion even though such opinion expresses an erroneous viewpoint.

3. Appeal and Error ⚿1010(1)

Where there is substantial evidence to support trial court's findings, such findings will not be disturbed on appeal.

4. Taxation ⚿895(1)

In proceedings to determine valuation of business property for inheritance tax purposes, evidence was sufficient to support finding that such valuation was $116,880

R. P. Stimmel, Redding, Alvin P. Jackson, Hollywood, for appellant.

James W. Hickey, Chief Inheritance Tax Atty., John F. Rivolta, Associate, Sacramento, for respondent.

VAN DYKE, Justice.

Marguerita Giubbani died testate July 15, 1949, in Redding, Shasta County. Her will was admitted to probate and in due course S. C. Baker, an inheritance tax appraiser, was appointed as such, and as probate appraiser. He appraised the property in the estate, including certain business property in Redding, which business property he valued at $116,880. As inheritance tax appraiser he later filed his report, determining the tax to be paid to the State, in which report he placed the same value upon the same property. Silvio Bui, as executor of the will of decedent, filed objections to this report and among other objections took issue with the value placed upon the business property, alleging that the value should have been set at $56,626.67. After a hearing the trial court overruled his objections as to this particular parcel, affirming and adopting the value as reported. The executor moved for a new trial, which motion was denied, and he now appeals from the judgment.

Mr. Baker testified that he had for many years been a resident of Redding and an inheritance tax appraiser; that he knew the property in issue; that he had arranged for the sale of the parcel to the husband of decedent; that the land was worth $200 per front foot along Market Street in Redding and that it extended 192 feet thereon; that the north wall, east wall and south wall were of brick 12 inches thick, the west wall was also of brick, part solid brick and part brick veneer; that the building consisted of two stories, the two floors containing approximately 21,200 square feet; that the lower floor contained five partitions, three of solid brick 8 inches thick, the other two of solid brick 12 inches thick; that the gross annual rentals were $15,420 as received by the decedent and her estate, although this sum did not include additional rentals that might have been received by a tenant, the executor, who rented the second floor and sublet offices therein; that he knew the condition and type of foundation; that the foundation was of brick extending three feet into the earth and from three to four feet wide at the bottom; that the building was well constructed; and that its remaining life was between 30 and 35 years. For appellant Mr. Luckenbach testified that the land was worth $200 per front foot, but that the building was worth $15,333, making a total valuation of $53,733, as opposed to Mr. Baker's total figure as stated. For appellant there also testified Mr. Christensen who gave a total valuation of $63,744, and who placed the same value on the land as did Mr. Luckenbach and Mr. Baker. The qualifications of all three witnesses as experts on value are not questioned. Mr. Luckenbach also said that "the best corner" in the business district of Redding was at Yuba and Market Streets, about 600 feet from the subject property. It further appeared that the lower story of the building contained ten commercial stores facing Market Street and that the second story consisted of 15 offices.

[1, 2] Appellant first contends that the trial court erred in that it considered evidence not presented to the court in violation of the "fundamental rule that all evidence shall be taken in open court, and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him." Higgins v. Los Angeles Gas & Electric Co., 159 Cal. 651, 115 P. 313, 315, 34 L.R.A.,N.S., 717, and Rouse v. Pacific Electric Ry. Co., 27 Cal.App. 772, 151 P. 164. This assignment of error is based upon a statement made in the opinion of the trial court rendered on motion for new trial wherein the court stated that while he had a high respect for all three of the expert witnesses who had testified he thought the testimony of appellant's two witnesses not "consistent with the ordinary facts of life and common sense." The court continued, saying he could not accept the proposition that the building involved was 4/5ths depleted already "knowing the high values that have been allowed on buildings much older in many cases in this court in the last few years", that the court had "had one case where a jury placed a value of $15,000 on a frame house built in 1888, which is almost as much as Luckenbach and Christensen placed on this large two-story brick business building which was partially constructed about 1900 and remodeled twice thereafter, since World War One." This statement appearing in the opinion of the trial court affords no foundation for the assignment of error. The court was not considering evidence dehors the record, but, arguendo, was using his local knowledge to meet and refute the arguments presented to him on the motion for new trial. The record does not uphold the claim that the trial court, either in ruling upon the objections to the appraised value or in answering the arguments for new trial, was basing his rulings upon evidence outside the record. In view of the substantial character of the evidence in support of the appraisal as filed and challenged we think it cannot be said that the trial court improperly considered evidence not introduced before it at the hearing. In saying this we are aware, as is counsel for the appellant, that ordinarily the memorandum opinion of the trial court, even though it expresses an erroneous viewpoint, will not work a reversal of a judgment that upon the record is correct. But we have chosen to examine the argument made and we think that it has no foundation in fact.

[3] Appellant next contends that the evidence is insufficient to support the findings and judgment as to the value of the subject property. What we have already said in our statement of the evidence, coupled with the rule that upon appeal the appellate court's function begins and ends with a determination as to whether or not there is any substantial evidence, contradicted or not, which will support the trial court's conclusions is sufficient answer to this last contention of appellant.

[4] We think it unnecessary to follow the argument presented by appellant in support of this contention. As has been said, a qualified witness testified as to the values adopted by the trial court. This witness detailed the facts upon which his opinion as to value was based, stating that he had considered such matters as type and condition of the building on the property, floor area of the same, number of stores and offices contained in the building, the rentals being obtained by decedent therefrom at the time of her death and other like details. When this witness had so expressed his opinion as to value the trial court was warranted in accepting that value as the value of the property. It is true, as is argued, that other witnesses, whose qualifications had also been stipulated to, gave other testimony, but this did no more than to raise a conflict with that upon which the trial court based its judgment. Appellant argues that in giving their opinion of value these witnesses adopted standards of appraisal which no one denied were proper, and in the use of these standards these witnesses testified to details which also were not expressly contradicted by respondent's evidence, but the end result was that the values so arrived at by these witnesses were different from the value arrived at by respondent's

witness, with the result that a factual issue was presented to the trial court which it resolved by accepting as correct the testimony of respondent's witness.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

Hearing denied; CARTER, J., not participating.

* * *

108 Cal.App.2d 540

SMITH v. MENDONSA et al.

Civ. 8027.

District Court of Appeal, Third District, California.

Jan. 4, 1952.

Hearing Denied March 3, 1952.

Suit by Ellis M. Smith against Louis P. Mendonsa and others to enforce agreement as to use of certain real property which had been conveyed by plaintiff to defendants, wherein it was agreed that in use of property defendants would permit no trees to remain thereon which exceeded the height of fifteen feet and that should any trees attain a greater height they could be removed. The Superior Court, Tehama County, H. S. Gans, J., rendered judgment awarding damages for past violations of the agreement and perpetually enjoining defendants from maintaining upon their property any tree in excess of the stipulated height and from permitting branches of any tree to overhang the plaintiff's land, and defendants appealed. The District Court of Appeal, Van Dyke, J., held that the record sustained the award of damages.

Judgment affirmed.

1. Damages 🔑140

In suit by orchard owner against adjoining property owner to enforce agreement as to use of adjoining property, limiting height of trees to prevent shading and overhanging, wherein damages included lessened crops and retardation of growth of trees, record sustained award of damages of approximately $140 per year.

2. Damages 🔑1

Party who has committed wrong is not in favored position to urge technical rules governing award of damages.

3. Damages 🔑6, 127

When it clearly appears that party has suffered damage, a liberal rule should be applied in allowing court or jury to determine amount, and given proof of damage, uncertainty as to exact amount is no reason for denying all recovery.

4. Injunction 🔑62(1)

In cases involving promises as to use of property, injunctive relief, depending upon inadequacy of damages, may be granted.

5. Injunction 🔑1

Whether injunctive relief will be granted in given case is matter largely within discretion of trial court.

6. Injunction 🔑190

Where property owner had agreed that in use of his property he would limit height of trees to prevent improper shading of contiguous orchard and overhanging, and promisor violated agreement and damages would recur each year and increase, award of perpetual injunction from maintaining any tree in excess of stipulated height and from permitting branches to overhang was not abuse of trial court's discretion.

7. Contracts 🔑324(1)

It is duty of courts to encourage keeping of agreements properly made and to give adequate remedy for breach thereof when it occurs, particularly where breach is deliberate and wrong is wilful.

8. Specific Performance 🔑124

In suit by orchard owner against adjoining property owner to enforce agreement as to use of adjoining property whereby promisor agreed that in use of land no trees would be permitted to exceed height of 15 feet to prevent improper shading of promisee's land and to prevent overhanging, in view of fact that parties had contracted definitely as to heights of trees and purpose of agreement, refusal of court to appoint commissioner to determine to what heights trees might grow or overhang without damages to contiguous lands, was not error.

Peters & Peters, Chico, for appellant.

Rawlins Coffman, Red Bluff, for respondent.

VAN DYKE, Justice.

On May 1, 1947, plaintiff and respondent, as promisee, entered into an agreement with defendants and appellants, as promisors, concerning the use of certain real property which had been conveyed by respondent to appellants. Therein they agreed that in the use of their property they would permit no trees to remain thereon which exceeded a height of 15 feet; that should any tree attain a greater height respondent would have the right to remove the same. It was stated that the purpose of the agreement was to prevent the improper shading of respondent's contiguous land and to prevent trees on the appellants' property from overhanging it. It appeared that respondent was, when the agreement was made, and ever since had been devoting his property to orchard purposes. Appellants on their land have been conducting a gas station, a restaurant and a bar. The trial court rendered judgment awarding respondent damages for past violations of the agreement in the sum of $425 and perpetually enjoining the appellants from maintaining upon their property any tree in excess of the stipulated height and from permitting branches of any tree to overhang the land of respondent. From this judgment this appeal is taken.

Appellants contend that the proof of damage was insufficient to support the award and that the injunction issued was too severe and should be either set aside or modified.

We are not here concerned with whether or not the promise sued upon constitutes under our code a covenant running with the land of either the promisor or the promisee, since we are here dealing with the original parties to the agreement; and it is not contended that the written agreement in question is in any wise invalid.

[1-3] Turning first to the contention that the damages are not based upon supporting evidence, but on the contrary are the result of conjecture, the record discloses testimony that the shading of the orchard trees near the appellants' property line was detrimental to the growth of the trees themselves and further would, during some seasons at least, lower the production of fruit upon the affected trees; that there were some 48 orchard trees so affected, amounting to better than half an acre of planting; that these trees had been retarded as to growth and their production lessened. Referring to such cases as Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 P. 942, 12 L.R.A.,N.S., 267, and Morris v. George, 57 Cal.App.2d 665, 135 P.2d 195, appellants contend that the proof of damage, while it need not be exact yet must give some fairly definite basis for computation, and that with respect to growing crops the measure of damages is the market value of the probable yield without detriment less the cost of producing and marketing and the return actually received. The period of time covered by the award for damages was three years and therefore the damages awarded amounted to approximately $140 per year. We think that the record furnishes adequate support for the award made. The wrong was that of the appellants and they are not in a favored position to urge the technical rules governing awards of damages. The elements of damage here included more than the loss of a crop. In addition to lessened crops during the three years covered by the award, there was the element of retardation of growth of the trees. It is obvious that accurate proof of such damage would be most difficult to produce. The case comes within the rule stated in 25 C.J.S., Damages, § 162, p. 815, that when it clearly appears that a party has suffered damage a liberal rule should be applied in allowing a court or jury to determine the amount, and that, given proof of damage, uncertainty as to the exact amount is no reason for denying all recovery. In view of the elements of damage involved and the meager award made, we think the judgment, in so far as it awards damages, must be sustained.

[4, 5] Appellants complain of the severity of the injunction, contending that the court should have balanced the hardships in so far as injunctive relief was concerned

and because the damage to respondent was determined to be moderate, whereas the damage to appellants through the infliction of the injunction will be great, the court erred in its ruling. Appellants point to the ornamental value of the trees involved, some of which now stand at a height of better than 60 feet, to the value of shade trees in the area where appellants conduct their business and assert that the enforcement of the injunction will seriously damage their business and all but destroy their means of livelihood. That in cases involving promises as to the use of property, injunctive relief, depending upon the inadequacy of damages, may be granted is well settled. (Restatement of the Law of Property, Sec. 528.) It is equally well settled that whether injunctive relief will be granted in a given case is a matter largely within the discretion of the trial court. (Restatement, id.) The text referred to under the heading of "Discretionary Character of Injunctive Relief" declares at page 3188: "The mere fact that a judgment for damages is not as adequate relief from the point of view of the plaintiff as an injunction would be is not wholly determinative of the question as to whether an injunction will be given. A judgment for damages merely shifts to the defendant a harm equal to that which the plaintiff has suffered. This is not true in the case of the issuance of an injunction. The harm to the defendant which may follow the granting of an injunction against him may be entirely disproportionate to the benefit resulting to the plaintiff. The action prohibited by an injunction may have distinct social advantages even though it violates a promise. Hence factors other than the question of inadequacy, from the point of view of the plaintiff, of the remedy of damages must be considered in determining whether an injunction will issue."

[6, 7] We think that the trial court acted within its discretion in granting injunctive relief. These factors impel to that conclusion: The contract itself is very clear; the promise made is definite; the purpose is declared to be the prevention of the very damage which ensued when that promise was broken; the damage would not only recur each year but would increase as the trees increased in height and cast longer shadows for a longer time each day. The appellants may have been improvident when they gave their promise, but they gave it and they must have understood its far-reaching consequences, including of course the climatic conditions which they urge upon this court in proof of the hardship inflicted upon them by the injunction. It is not the business of courts, either of law or of equity, to remake contracts fairly entered into by persons who are capable of contracting. On the contrary, it is the duty of courts to encourage the keeping of agreements so made and to give adequate remedy for the breach thereof when it occurs. This is particularly true where the breach is deliberate and the wrong is wilful.

Appellants argue that the court did not consider the balance of hardships, but on the contrary granted injunctive relief simply because the agreement was specific and the court could not see why it should not be complied with. The court stated this in substance in its memorandum opinion which has been made a part of the record here, but we do not think that the reasoning of the court was so confined. On the contrary we think that the trial court considered the relative hardships, but, notwithstanding the hardship to appellants, considered that, in view of the definiteness of the promise, it still ought to be enforced by injunctive process.

[8] The contract as written contained a statement that it was the purpose of the agreement to prevent the improper shading of respondent's land and the overhanging of the appellants' trees. From this the appellants argue that the real issue was not whether or not the trees had been permitted to grow to a height in excess of the stipulated height of 15 feet or had been permitted to overhang, but whether or not the result was an injurious shading of respondent's land. At the trial appellants requested that the court appoint a commissioner to determine to what height appellants' trees might grow or overhang without damage to respondent. This request was refused, the court taking the view that the

parties had contracted definitely as to the height and must abide by their agreement. We think in this that the court was correct. The contract very clearly sets the permissible height and provides that no overhanging shall be permitted. In view of the clarity of the contractual promise, we cannot construe the language concerning the purpose as a limitation thereon or as putting at large what was definitely agreed upon.

The judgment appealed from is affirmed.

ADAMS, P. J., and SCHOTTKY, J., pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

108 Cal.App.2d 355

MORSE v. INDUSTRIAL ACC. COMMISSION OF STATE et al.

No. 14990.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1951.

Rowena Morse, petitioner, brought proceedings against the Industrial Accident Commission of the State of California, and others to recover compensation under the Labor Code for the death of petitioner's deceased husband as result of injury. The Commission returned an award unsatisfactory to the petitioner, and the petitioner appealed. The District Court of Appeal, Wood, J., held that section of the Labor Code dealing with death benefits to be awarded dependents of a deceased employee, accords to total dependent of a deceased employee a death benefit of $2000 even though disability indemnity which had accrued to employee exceeded that amount and even though death occurred more than twelve months after injury.

Award annulled with directions.

1. Workmen's Compensation 🔑912

Section of the Labor Code dealing with death benefits payable to dependents of a deceased employee, accord to the total dependent of a deceased employee a death benefit of $2,000, even though the disability indemnity, which may have accrued to the employee, exceeded that amount, and even though death occurred more than 12 months after injury. Labor Code, § 4702.

2. Statutes 🔑181(1)

The main principle of statutory interpretation requires a court to ascertain legislative intent and give it effect if possible. Code Civ.Proc. § 1859.

3. Statutes 🔑219

When statute is ambiguous, administrative interpretation is given serious consideration.

4. Statutes 🔑219

Section of Labor Code providing that death benefit shall be sum sufficient to equal, in case of total dependency, 3½ times average earnings of deceased employee, and in case of partial dependency only, three and one half times amount annually devoted to support of dependents by employee, and that for total dependency minimum death benefit shall be $2,000 and that if death occurs within twelve months after injury, disability indemnity shall not be deducted from death benefit and shall be paid in addition to death benefit, was not so ambiguous as to justify court in following administrative interpretation thereof. Labor Code, §§ 4452, 4702.

5. Workmen's Compensation 🔑912

Where employee sustained compensable injury February 26, 1946, and he died July 25, 1950, as proximate result of injury, and his accrued temporary disability indemnity amounted to $6,870, and his widow was a total dependent, widow was entitled to minimum death benefits of $2,000. Labor Code, § 4702.

Hoffman, Davis & Martin, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger and Alvin L. Dove, San Francisco, for Industrial Acc. Commission.

Leonard, Hanna & Brophy, San Francisco, for respondent Mutual Cas. Co.

FRED B. WOOD, Justice.

[1] The sole question upon this appeal is whether or not section 4702 of the Labor Code, as amended in 1939, accorded to the total dependent of a deceased employee a death benefit of $2,000 even though the disability indemnity which had accrued to the employee exceeded that amount, and death occurred more than 12 months after the injury. We conclude that it did.

Section 4702, as amended by chapter 308 of the Statutes of 1939, pages 1580–1581, read as follows:

"4702. The death benefit shall be a sum sufficient to equal:

"(a) In a case of total dependency, three *and one-half* times the average annual earnings of the deceased employee.

"(b) In a case of partial dependency only, three *and one-half* times the amount annually devoted to support of the dependents by the employee.

"The death benefit shall be paid in installments in the same manner and amounts as disability indemnity, payments to be made at least twice each calendar month, unless the commission otherwise orders. ~~In no case shall~~ *Except as provided in the next paragraph* the death benefit, when added to all accrued disability indemnity, *shall not* exceed three *and one-half* times the average annual earnings of the employee as limited in section 4452, nor exceed the sum of ~~$5000~~ *$6,000,* except as otherwise provided in sections 4553 and 4554. *For a total dependency the minimum death benefit shall be $2,000.*

"If death occurs within twelve months after injury, disability indemnity shall not be deducted from the death benefit and shall be paid in addition to the death benefit." (Strike-out and italics supplied, to indicate deletions and additions made by the 1939 amendment.)

This section, obviously, was designed to fix the amount of death benefit payable, starting as it did with the words, "The death benefit shall be a sum sufficient to equal:". It provided, in clauses (a) and (b), different formulae for computing total and partial dependency benefits. Next, it dealt with the times of payment, in installments, and then imposed a maximum limitation; neither the total nor the partial dependency benefit (when added to the disability indemnity, if death occurred more than 12 months after injury) could exceed three and one-half times average annual earnings, nor $6,000. Then followed the statement, "For a total dependency the minimum death benefit shall be $2,000." That statement speaks for itself. Its meaning is so directly and immediately clear and manifest, one encounters difficulty in finding other words in which to express the identical concept. Perhaps these words will serve: "For a total dependency the least amount of death benefit payable shall be $2,000." See Dauphiny v. Buhne, 153 Cal. 757, 765, 96 P. 880, 883: "Minimum as applied to damages means the least possible amount that may be awarded * * *" The conclusion seems inescapable that by this statement the Legislature intended to prevent the maximum limitation formula from reducing the death benefit, for a total dependent, to an amount below $2,000.

Respondents say that the statement under consideration cannot have the effect we accord it because it occurs in the same paragraph as the sentence which expresses the maximum limitation, and the latter by its introductory words ("Except as provided in the next paragraph") inexorably recognizes as the sole exception to its provisions that which appears in the next paragraph ("If death occurs within twelve months after injury, disability indemnity shall not be deducted * * *") Such a construction puts undue emphasis upon punctation and sentence structure, and renders purposeless and ineffectual the $2,000 minimum provision. The mere fact that the latter is separated from the former by a period, instead of a comma or semicolon and a qualifying word or two as in the concluding clause of the former ("except as otherwise provided in sections 4553 and 4554"), is of no real significance and should not prevent us from ascertaining the legislative intent and giving it effect.

One of the respondents argues that their view of section 4702 does not render the $2,000 minimum meaningless or useless, upon the theory that it has the same meaning as in section 4452. But there it is used in connection with a multiplication factor (three and one-half times average annual earnings shall be taken, in death cases, at not less than $2,000),—quite different from its use in section 4702, which fixes the amount of death benefit payable. Why repeat it in section 4702, and why repeat it only as to total dependents, if it is to have no effect different from or greater than that already given it in section 4452, especially when section 4702 already by specific reference incorporated the limitations expressed in 4452?

[2] The main principle of statutory interpretation requires a court to ascertain the legislative intent and give it effect if possible. See Code Civ. Proc. § 1859, and County of Alameda v. Kuchel, 32 Cal. 2d 193, 199, 195 P.2d 17. In applying that principle, the court is aided, in the instant case, by the legislative declaration in section 3202 of the Labor Code, that "The provisions of Division IV [sections 3201–6002] * * * of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." See Colonial Ins. Co. v. Industrial Accident Comm., 27 Cal.2d 437, 439–440, 164 P.2d 490, and cases cited.

[3, 4] We recognize the principle that when a statute is ambiguous the administrative interpretation, in this case that of the respondent commission, is given serious consideration. We have given it that consideration but do not find such a degree of ambiguity in the statute as would justify us in following the administrative interpretation.

[5] In the instant case, the employee sustained a compensable injury February 26, 1946. He died July 25, 1950, as a proximate result of the injury. His accrued temporary disability indemnity amounted to $6,870. His widow, petitioner herein, was a total dependent. The respondent commission correctly awarded her the sum of $300 as reasonable burial expense, subject to a lien of $35 payable to her attorneys, but erroneously denied her the minimum death benefit of $2,000.

The findings and award under review are annulled, with directions to respondent commission to make new findings and award in accordance with this decision, awarding petitioner the $2,000 minimum death benefit as well as the burial expense and the attorney's fee.

PETERS, P. J., and BRAY, J., concur.

108 Cal.App.2d 388

ELBERT, Limited v. DE GAFFEY et al.

Civ. 18475.

District Court of Appeal, Second District,
Division 1, California.

Dec. 27, 1951.

Rehearing Denied Jan. 14, 1952.

Action by Elbert, Ltd., a corporation against Arcadia B. de Gaffey, and others. The Superior Court of Los Angeles County, Thurmond Clarke, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Hanson, J., pro tem., held that provision of Streets and Highways Code which required service of notice upon owner for his agent as prerequisite to issuance of tax deed in every instance, whether owner was or was not named in certificate and regardless of whether property was occupied or unoccupied, would be construed as requiring service upon owner or his agent only when owner or agent as such was named in certificate in accordance with requirement of statute as it existed prior to compilation and codification, since Code Commission was not vested with authority in compilation to amend by any language it used, intent and meaning of any section upon which compilation was based.

Judgment reversed.

1. Statutes 🔑147

Code Commission was not vested with authority and did not intend, when it presented Streets and Highways Code compiled for enactment by Legislature, to amend intent and meaning of any section upon which compilation was based.

2. Statutes ⚷147

Where applicable provision of Improvement Act at time of codification of statutes required service upon owner or his agent as prerequisite to issuance of tax deed, only when owner or agent as such was named in certificate, and provision as subsequently compiled by Code Commission for re-enactment into Streets and Highways Code required service of notice on owner in every instance, whether property was occupied or unoccupied, and whether owner was named in certificate, codified provision would nevertheless be construed as requiring service upon owner or agent only when owner or agent as such was named in certificate, since Code Commission was not vested with authority to amend by language used, intent and meaning of section upon which compilation was based. Streets and Highway Code, §§ 5000–6794, 6550.

John F. Bender and Gizella M. Allen, Los Angeles, for appellant.

Daniel M. Potter, A. Feldman, Los Angeles, for respondents.

HANSON, Justice Pro Tem.

The question presented is whether under the "Improvement Act of 1911", Streets and Highways Code, secs. 5000–6794, the assignee of a purchaser at a tax sale of unoccupied property is required under the act not only to post the notice required by Section 6550 upon the property but in addition to serve the notice upon the owner of the property, or his agent if he is named in the certificate of sale, as a prerequisite to a conveyance by the county treasurer whose duty it is to act.

The solution of the problem before us turns primarily on the interpretation of the language used in Section 6550 and that used in the original statute of which Section 6550 is a codification.

[1] Section 6550 of the act set forth in the margin[1] discloses that the assignee "shall * * * serve upon the owner of the property purchased, or his agent if he is named in the certificate of sale and upon the party occupying the property, if the property is occupied, a written notice [detailing its contents]." Limiting ourselves to the language used it is evident that it comprehends "unoccupied" as well as "occupied" property and requires that in either event the notice must be served on the owner of the property or "his agent if he is named in the certificate of sale". In addition the notice must be served on the occupant of the property if there be such occupant. But if there is no such occupant then in such a case "a similar notice" must be posted upon the property. Such posted notice is required not in lieu of but in addition to the notice required to be served upon the owner or his agent named in the certificate if such an agent is therein named.

In the case before us the certificate did not recite the name of any person as agent and the notice was not served upon the owner, but it was, however, posted on the premises. Accordingly, it is self-evident that the service of notice was insufficient under the express wording of Section 6550.

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[1] "Section 6550. Notice as prerequisite to conveyance. [*Service by purchaser on owner: Time: Contents.*] In order to obtain a deed the purchaser of the property or his assignees shall, 30 days prior to the expiration of the time of redemption, or 30 days before the date of his application for a deed, serve upon the owner of the property purchased, or his agent if he is named in the certificate of sale and upon the party occupying the property, if the property is occupied, a written notice, stating:

"(a) That the property or a portion of it has been sold to satisfy the bond lien;

"(b) The date of sale;

"(c) The date, number and series of the bond;

"(d) The amount then due, and

"(e) The time when the right of redemption will expire, or when the purchaser will apply for a deed.

"[*Posting.*] If the property is unoccupied, a similar notice must be posted in a conspicuous place upon the property at least 30 days before the expiration of the time for redemption, or 30 days before the purchaser applies for a deed."

We are told however that we should construe this section as not requiring service upon the owner (or his agent) where, as here, the owner's name is not set forth in the certificate of purchase, but in lieu thereof the recitation is "Owner unknown." We fail to see any merit in this contention in view of the explicit language of the statute.

It is next contended that the language of Section 6550 must be restricted to the language used in Section 74 of the "Improvement Act of 1911," as amended in 1921, St.1921, p. 296, and interpreted as that language would be interpreted. This contention is based on the claim that the Code Commission was not vested with authority and did not intend when it presented the Streets and Highways Code, which it had compiled for enactment by the legislature, to amend by any language it used the intent and meaning of any section upon which the compilation was based. This contention is meritorious. We have heretofore so ruled in Estate of Jamison, Cal. App., 237 P.2d 546, and so need not detail what we there said on the subject. Moreover, the contention is fully supported by Section 2 of the Streets and Highways Code reading as follows: "The provisions of this code, in so far as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments."

[2] Turning to Section 74, which we quote in the margin,[2] it will be observed that the section requires service upon the owner or his agent only when the owner or agent as such is named in the certificate. The present statute, Section 6550, requires in every instance service of notice on the owner whether he is or is not named in the certificate of purchase unless the service is made upon the owner's agent "named in the certificate of sale".

In view of the conclusion we have reached it is unnecessary to consider additional errors assigned by appellant.

Respondents' contention made on oral argument before us that the written notice posted on the premises was misleading and insufficient was not raised in the court below and is not presented in the briefs. Accordingly, we do not consider it.

The judgment is reversed with instructions to enter judgment for the plaintiff as prayed in the complaint.

WHITE, P. J., and DRAPEAU, J., concur.

108 Cal.App.2d 502

NEW AMSTERDAM CAS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

No. 14991.

District Court of Appeal, First District,
Division 1, California.
Dec. 31, 1951.

Proceedings in the matter of workmen's compensation application made by Emily R. Anson, employee, and opposed by New Amsterdam Casualty Company, insurance carrier. The Industrial Accident Commission made a permanent disability award in favor of the employee, and the insurer appealed. The District Court of Appeal, Wood, J., held that the evidence sustained the finding of an 84% permanent disability, but that the Commission had erred in not reducing the employee's life pension by 25% in view of the payment for temporary disability.

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[2] Section 74: "* * * *provided, however,* that the purchaser of the property, or his assignees must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate, and upon the party occupying the property, if the property is occupied, a written notice * * * In case of unoccupied property, a similar notice must be posted in a conspicuous place upon the property at least thirty days before the expiration of the time for redemption, or thirty days before the purchaser applies for a deed; * * *"

Award annulled and case remanded with direction.

1. Workmen's Compensation ⚷1724, 1939

Percentage of total permanent disability sustained by employee presents question of fact, and commission's decision thereon in compensation proceedings is not subject to review by courts unless palpably contrary to undisputed evidence, and court has no power to disturb such action provided there was any evidence before commission to justify such finding.

2. Workmen's Compensation ⚷1644

In waitress' compensation proceedings, finding of 84 per cent permanent disability by arthritis was supported by evidence.

3. Workmen's Compensation ⚷ 1410

In compensation proceedings, testimony of employee as to her loss of grasping power is evidence on that subject.

4. Workmen's Compensation ⚷863, 865

A person cannot be temporarily and permanently disabled at same time, and when there is change from temporary to permanent disability, as distinguished from permanent disability ab initio, permanent disability is regarded as new and further disability. Labor Code, §§ 4650, 4651.

5. Workmen's Compensation ⚷60, 867, 868, 903

The September 1947 Labor Code amendment providing that disability payments should commence on eighth day after injury became permanent, did not apply retroactively to injury which occurred prior thereto, and therefore where Commission found on March 9, 1949, that injuries sustained on January 27, 1947, had caused temporary total disability, and subsequently on March 2, 1951, Commission determined that injury had caused permanent disability of 84 per cent, but no determination was made as to when disability became permanent, Commission did not err in ascertaining compensation payable for permanent disability, deducting credit for temporary disability already paid, and ordering payment of permanent disability beginning as of February 3, 1947, eight days after date of injury. Labor Code, §§ 4650, 4651.

6. Workmen's Compensation ⚷867

The term "permanent disability payment", as used in Labor Code section authorizing 75% payment for permanent disability in addition to temporary disability payment where temporary disability payment exceeds 25% of permanent disability payment, is defined by that section of Labor Code prescribing formula for computing disability payments, and therefore, in making computations required by section in which quoted term is used, life pension as well as weekly payments for fixed period would have to be taken into account. Labor Code, §§ 3202, 4658, 4659, 4661, 4700.

7. Workmen's Compensation ⚷867

There was no such ambiguity in Labor Code section, authorizing payment of 75 percent of disability payment in addition to temporary disability payment where temporary disability payments exceed 25 percent of permanent disability payments, as would render applicable the liberal interpretation policy prescribed by statute. Labor Code, §§ 3202, 4658, 4661, 4700.

8. Workmen's Compensation ⚷867

Where, as in Labor Code section providing for payment of 75 percent of permanent disability payment in addition to temporary disability payment in certain instances, statutory formula requires computation of employee's life expectancy, express legislative sanction or mandate for making such computation is not necessary. Labor Code, §§ 3202, 4658, 4661, 4700.

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Mullen & Filippi, San Francisco, for petitioner.

Edmund J. Thomas, Jr., T. Groezinger and Alvin L. Dove, all of San Francisco, for respondent, Industrial Accident Commission.

FRED B. WOOD, Justice.

This is a proceeding upon application of the workmen's compensation insurance carrier to review a decision of the Industrial Accident Commission which determined that an employee had a permanent disability of 84 per cent.

The commission found that the temporary disability payments previously awarded

($2,275.60) exceeded 25 per cent of the permanent disability award ($3,400.83, the aggregate of the 240 weekly payments), thereby reducing the 240 weekly payments by 25 per cent but not reducing the life pension weekly payments. The commission ordered the disability payments to commence as of the same date that the temporary disability payments had commenced (February 3, 1947, eight days after the injury), not upon termination of the period of payment of the temporary disability.

Petitioner claims (1) the finding of 84 per cent permanent disability is not supported by the evidence; (2) it was error to award permanent disability payments for a period during which temporary disability payments were made; and (3) the law requires a 25 per cent reduction of the life pension as well as the weekly payments.

[1, 2] *(1) The percentage of total permanent disability* sustained by an employee presents a question of fact. The commission's decision thereon "is not subject to review by the courts unless palpably contrary to the undisputed evidence." Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 59, 159 P. 150, 152. A court has "no power to disturb such action provided there was any evidence before the commission to justify such a finding." Ford Motor Co. v. Industrial Acc. Commission, 202 Cal. 459, 464, 261 P. 466, 468. In this case, the determination of 84 per cent disability was based upon these findings: "Said applicant was a waitress, 46 years of age, and said injury caused permanent disability consisting of limited motion of spine, *tips of fingers failing to touch floor on forward bending by 20″*; 80% limitation of backward bending with pain; two-thirds limitation of lateral bending with discomfort; discomfort in lumbar region on rotation; slight spasm of muscles; tenderness of lumbar muscles; slight discomfort on rocking and jarring; aching pain in lumbosacral region radiating to gluteal region, both thighs and legs to ankle, worse on right, with some increased discomfort when cold and on lifting; necessity of wearing belt; inability to do other than light work; *approximately 10% reduction of grasping power of both hands*." (Emphasis added, to indicate the findings which petitioner questions.)

The evidence and the reasonable inferences which may be drawn therefrom support the questioned findings.

Dr. Keene O. Haldeman, in his report of October 25, 1949, said: "On forward flexion, standing with knees straight, the fingertips come 20 inches from the floor with pain in the lower back and right buttock * * *." Dr. Forest E. Fleming reported, September 20, 1950, that "Upon forward bending the fingers fail the floor by 20″. This maneuver is accomplished with some difficulty and with the complaint of pain in the lumbar region."

[3] June 14, 1949, Dr. Nels W. Ahnlund reported, inter alia: "pain in the right arm, which hurts only on use. When it is painful she has no power of grip," and commented: "We have reviewed Mrs. Anson's history with the reports submitted of Dr. Staub, Dr. Moore, Dr. Cox, Dr. Parker, Dr. Ryan, and Dr. Towne. The essential findings that I can gather from these reports and with which I am in agreement, are that this woman does not appear to be exaggerating her complaints." The employee testified that there is a weakness and pain through her arms when she uses them; that she first noticed these pains when she tried to work after her injury (a period of some few months only); that the pain comes from her back through her arm and shoulder; that it is mostly in her right arm, a weakness there, she cannot grasp anything. The testimony of the employee as to her loss of grasping power is evidence on that subject. Liberty Mut. Ins. Co. v. Industrial Acc. Commission, 33 Cal.2d 89, 93, 199 P.2d 302. In this case, there is also Dr. Ahnlund's medical report.

As to causation, there is evidence that none of the factors of permanent disability were disabling prior to the injury. In addition, Dr. Ahnlund, in his report of July 15, 1949, after indicating difficulty in evaluating the exact amount of disability due to the injury and that due to a pre-existing arthritic condition, said: "As stated in our previous report, she had done heavy labor-ing work and housework prior to her injury, but this was apparently the straw that broke the camel's back." In his report of November 14, 1949, he said: "I feel that it is a medical possibility that a fall such as Mrs. Anson sustained on January 27, 1949 [1947] would be enough to initiate the onset of disabling symptoms of a mixed arthritis." Dr. Haldeman, in his report of October 25, 1949, said in part as follows: "It is probable that the patient has some residual symptoms as a result of her injury of January 27th, 1947, although I do not believe that they are of sufficient severity to prevent her working." After describing various symptoms as shown by X-ray films, he said: "I am therefore not able to attribute the patient's present symptoms to arthritis of the spine or sacroiliac joint."

[4, 5] *(2) Concerning the date for commencement of the permanent disability payments*, section 4650 of the Labor Code provided that "If the injury causes permanent disability, a disability payment shall be made for one week in advance as wages on the eighth day after the injury", and section 4651 of the code provided that permanent disability payments "shall thereafter be made on the employer's regular pay day, but not less frequently than twice in each calendar month, unless otherwise ordered by the commission." These provisions would seem to require the commission to order commencement of the permanent disability payments in this case precisely as it did order them.

Petitioner contends that these provisions were not applicable when the employee sustained a temporary disability which later developed into a permanent disability. In this case, the commission, on March 9, 1949, found that the injury caused "temporary total disability from the date thereof [January 27, 1947] to and including February 12, 1949 and indefinitely thereafter," and retained jurisdiction "to entertain a petition for permanent disability indemnity when and if said injury proximately causes permanent disability." December 2, 1949, petitioner gave notice of cessation of payments and requested an order terminating liability. After a hearing thereon, amended findings and award were filed March 2, 1951, in which the commission determined that the "injury caused permanent disability" of 84 per cent; ascertained the compensation payable therefor, less a credit for temporary disability already paid, and ordered payment thereof at the rate of $14.17 a week, "beginning February 3, 1947," and continuing until that amount shall have been paid, with interest, and thereafter a life pension payable at the rate of $5.23 a week.

Cessation of temporary disability payments occurred in December 1949. The earliest indication which we have found in the record concerning a possible permanent disability appears in a report of June 14, 1949, by Dr. Ahnlund. He therein said, "If I were to care for her, I would greatly prefer that she be allowed a permanent disability rating * * *." We have not found in the record a determination of the date when the disability became permanent.

Petitioner correctly states that a person cannot be temporarily and permanently disabled at the same time. Industrial Indemnity Exch. v. Industrial Acc. Commission, 90 Cal.App.2d 99, 202 P.2d 850. When there is a change from a temporary to a permanent disability (as distinguished from permanent disability *ab initio*), permanent disability is regarded as a new and further disability. Armstrong v. Industrial Acc. Commission, 219 Cal. 673, 28 P.2d 672; Cowell Lime & Cement Co. v. Industrial Acc. Commission, 211 Cal. 154, 294 P. 703, 72 A.L.R. 1118. However, we are considering "payments." There is no provision of the state Constitution which would prevent the Legislature from requiring that payments for a permanent disability (whether it occurs *ab initio* or as a new and further disability) commence as of the eighth day after the injury. That requirement, it appears, the Legislature did impose until section 4650 was amended to commence the disability payment on the eighth day after the injury becomes permanent. Stats.1947, ch. 1033, p. 2304, at 2305. That amendment, effective in September 1947, did not apply retroactively to an injury which occurred prior thereto.

[6] *(3) Concerning the reduction of the permanent disability payments when the temporary disability payments exceed 25 per cent of the former,* section 4661 of the Labor Code, as amended in 1945, is the governing statute. It then provided that where an injury causes both temporary and permanent disability the employee is not entitled to both, but only to the greater of the two, "except that where the temporary disability payment exceeds 25 per cent of the permanent disability payment the injured employee shall be paid 75 per cent of such permanent disability payment in addition to the temporary disability payment." Stats.1945, ch. 1335, p. 2506.

What was the meaning of "permanent disability payment", as used in the quoted portion of section 4661? The code did not in express terms furnish a definition.

Petitioner claims that section 4658 of the Labor Code supplied it. That section prescribed a formula for computing "the disability payment". For percentages of 1 to 60 per cent of permanent disability, it prescribed from 4 to 240 weeks of payments in the amount of 65 per cent of average weekly earnings, without further payments of any kind. For percentages of 70 to 100 per cent of permanent disability, it prescribed 240 weekly payments of 65 per cent of average weekly earnings, and thereafter payments for remainder of life varying upward from 10 to 40 per cent of average weekly earnings. Section 4659 of the code supplied a formula for determining payment for permanent disability percentages intermediate to those specified in section 4658.

If section 4658 did supply the definition of "permanent disability payment", the conclusion seems inescapable that in determining the 25 per cent and the 75 per cent under section 4661, the payments for the remainder of life as well as the payments for the specified number of weeks must be taken into account when, as in this case, the permanent disability exceeds 70 per cent. Section 4658 makes no differentiation between the two types of payment save as to the amount of each. It lists them in parallel columns, prefaced with the statement: "If the injury causes permanent disability, the percentage of disability to total disability shall be determined and the *disability payment computed and allowed* according to the following schedule: * * *." (Emphasis added.) Furthermore, section 4700 of the code terminated the disability payment upon the death of the employee. It declared that "Any accrued and unpaid compensation shall be paid to the dependents, or, if there are no dependents, to the personal representative of the deceased employee or heirs or other persons entitled thereto, without administration, but such *death terminates the disability.*" (Emphasis added.) We conclude that section 4658 did supply the definition of "permanent disability payment" and that the remainder of life payments as well as the specified number of weeks' payments must be taken into account in making the computation under section 4661.

In support of its use of the 240 weekly payments (to the exclusion of the life pension payments) in making the computation, respondent commission invokes the liberal interpretation policy declared in section 3202 of the Labor Code, and the absence of express legislative authority for determination of the employee's life expectancy.

[7, 8] As to interpretation in accordance with the policy expressed in section 3202, we are not convinced that the commission's interpretation is more liberal to the employee than that which we have indicated, nor do we find an ambiguity in the statute which renders section 3202 applicable.

Concerning ascertainment of the employee's life expectancy, the difficulty is no greater than that which confronts courts and juries in making similar computations in other situations. (See cases collected in 8 Cal.Jur. 1005–1006, § 52; 1030 & 1031, §§ 68 & 69.) An *express* legislative sanction or mandate for making such a computation is not necessary when, as in this case, the statutory formula requires it.

The award is annulled and the case is remanded for further proceedings not inconsistent with this opinion.

PETERS, P. J., and BRAY, J., concur.

PFINGSTEN v. WESTENHAVER. *

Civ. 18638.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1951.

Rehearing Denied Jan. 8, 1952.

Hearing Granted Feb. 14, 1952.

Lyman D. Pfingsten sued Robert E. Westenhaver, administrator of the estate of Maidie Blanche Adams, deceased, for property damage in collision between plaintiff's truck-trailer unit and decedent's automobile. The Superior Court of Los Angeles County, Harold B. Jeffery, J., rendered a judgment on a verdict for plaintiff, and defendant appealed. The Court of Appeal, Moore, P. J., held that the testimony of a witness who saw nothing of the collision but a cloud of dust did not justify a finding of negligence.

Judgment reversed with instructions.

Automobiles ⚿244(12, 35)

Testimony that just before collision near bridge between automobile of defendant's decedent and plaintiff's truck-trailer, automobile passed witness at 40–45 or 50 miles an hour, that witness saw lights of truck and automobile on respective right sides of their highway, then saw red brake lights and beams of bridge lighted by headlights and in a second saw "just a dark cloud," without seeing anything of collision but a cloud of dust, did not warrant a finding of negligence.

◆

Early, Maslach, Foran & Tyler, by George Maslach, Los Angeles (Donald J. Pierr and John B. Connolly, Los Angeles, of counsel), for appellant.

Daniel E. Farr, W. T. Stockman and Richard P. Roe, all of Los Angeles, for respondent.

MOORE, Presiding Judge.

This suit is for property damage resulting from a collision between a truck-trailer unit owned and driven by plaintiff and an automobile driven by either Maidie Blanche Adams or her son, Robert Cook, both of whom were killed in the accident. The action was brought against the administrator of the estate of Maidie Blanche Adams. The jury having rendered a verdict in favor of plaintiff, defendant appeals from the judgment thereon.

Appellant contends that there is no substantial evidence of negligence on the part of the driver of the automobile.

The accident occurred at about 6:00 or 6:30 in the evening of December 31, 1948, on U. S. Highway 75 in Sioux County, Iowa, approximately a mile and a half south of the town of Maurice, at or near the north end of a bridge which forms a part of the highway.

The only evidence as to the circumstances and manner in which the collision occurred is contained in the testimony of plaintiff's witness, John De Groote, who testified that just prior to the accident he was driving south on Highway 75 when the automobile of Mrs. Adams bearing California license plates passed him going "around 40, 45, maybe 50 miles an hour." At that time he was about three fourths of a mile north of the point of collision, driving at 38 miles an hour. After the Adams car passed him he "slowed down just a little because our road was icy." At the time of collision he was about 400 or 500 feet north of the accident, he did not apply his brakes for fear the icy ridge in the road would cause him to hit the bridge. Both highway and bridge were twenty feet wide. Although the truck was travelling north, after the collision it was on the west side of the pavement, while the automobile had come to a stop on the east side. The car had been struck on the right side just behind the motor.

Mr. De Groote testified that he saw the lights of the truck and the automobile respectively on the "right sides of their highway." Then he saw the red brake lights of the California vehicle and the beams of the bridge lighted by headlights, and in a second "just a dark cloud." Whether those lights were "on either the truck or the car at the time of the impact," he could not see. He was "not able to see the actual collision at all * * *. Just the dust cloud." In so far as he observed the Adams car it was on the west half of the pavement "until they used their brake lights."

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* Subsequent opinion 244 P.2d 395.

"Q. All you saw of the collision was a cloud of dust? A. That is correct."

While such testimony gives rise to interesting probabilities and strained speculations, it supplies no legal evidence of negligence on the part of Mrs. Adams or her son. There is no proof to justify the finding of negligence.

Inasmuch as the judgment must be reversed because of the insufficiency of the evidence, it is not necessary to discuss the other points raised by defendant.

Judgment reversed with instructions to enter judgment for defendant.

McCOMB, J., concurs.

108 Cal.App.2d 496

PEOPLE v. FIELD et al.

Cr. 4705.

District Court of Appeal, Second District, Division 3, California.

Dec. 28, 1951.

Hearing Denied Jan. 24, 1952.

Harry Field and Robert B. Long were convicted in the Superior Court of Los Angeles County, William B. Neelay, J., of forgery, and Harry Field appealed. The District Court of Appeal, Vallée, J., held that an appeal will not lie from sentence upon conviction of criminal offense, and that Superior Court is not without jurisdiction to try, adjudge to punishment, or punish escapee from state hospital for insane, when accused is found to have been sane at time criminal offense was committed and at time of trial and adjudgment to punishment, despite absence of certificate from superintendent of state hospital that defendant has become sane, since certificate merely gives rise to rebuttable presumption of insanity at time of offense and at time of trial.

Appeal from sentence dismissed, judgment affirmed.

1. Criminal Law 🔑1023(10)

An appeal does not lie from sentence imposed upon conviction for criminal offense.

2. Criminal Law 🔑48

Under provision of Penal Code that defendant may plead that he is not guilty of offense charged because he was insane at time he was alleged to have committed unlawful act, person is "insane" if at time overt act was committed he was suffering from such defect in reason, from disease of mind, as not to know nature and quality of act he was doing, or if he did know it, that he did not know he was doing what was wrong. Pen.Code, §§ 1016, 1017, 1367, 1372; Welfare and Institutions Code, § 6500.

See publication Words and Phrases, for other judicial constructions and definitions of "Insane".

3. Criminal Law 🔑625

A person is "insane" within meaning of section of Penal Code providing that if at any time during pendency of criminal action and prior to judgment a doubt arises in mind of trial judge as to sanity of defendant, court must order question as to his sanity to be determined; if person is incapable of understanding nature and object of proceeding against him and of conducting his defense in rational manner. Pen. Code, §§ 1026, 1027, 1201, 1368.

4. Criminal Law 🔑48

Word "insane" as used in section providing that person cannot be tried, adjudged to punishment, or punished for public offense, while he is insane; contemplates person incapable of understanding nature and object of proceeding against him and of conducting his defense in rational manner. Pen.Code, §§ 1367 et seq.

5. Criminal Law 🔑625

Provisions of chapter entitled "inquiry into insanity of defendant before trial or after conviction" are entirely distinct from proceedings on plea of not guilty by reason of insanity, and provide procedure to be followed in case doubt arises as to sanity of defendant during pendency of criminal action against him. Pen.Code, §§ 1367 et seq.

6. Insane Persons 🔑86

Requirement of provision of Penal Code that superintendent of state hospital to which defendant has been committed until he becomes sane, certify to sheriff and district attorney that defendant has become sane, is for purpose of bringing defendant to trial or judgment in proceeding which was suspended when defendant was found insane. Pen.Code, §§ 1367 et seq.

7. Insane Persons ⚿86

Neither provision of Penal Code that person cannot be tried, adjudged to punishment, or punished for public offense while he is insane, nor provision that superintendent of state hospital must certify to sheriff and district attorney that defendant who had been detained in state hospital until he becomes sane, has become sane; deprive superior court of jurisdiction to try and punish escapee from state hospital who commits a public offense, when record does not disclose statute or proceeding under which defendant was committed to state hospital, but absence of certificate merely gives rise to rebuttable presumption that defendant was insane at time offenses were committed and that he is insane at time of trial. Pen.Code, §§ 1367, 1372.

8. Insane Persons ⚿49

An order of commitment to state hospital for insane does not conclusively establish that person committed is insane, but person is presumed to be insane, and such presumption continues until contrary is shown.

9. Criminal Law ⚿625

The insanity which demands that a person shall be confined in state hospital is not necessarily same insanity which bars prosecution of that person for commission of felony.

* * *

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

[1] Defendant was charged with forging three checks. He pleaded not guilty of the offenses charged and not guilty of the offenses charged "because he was insane at the time he is alleged to have committed said unlawful acts." The court, a jury having been waived, found defendant guilty of the offenses charged, and on abundant evidence found that he was sane at the time they were committed and that he is sane "at the present time." He was sentenced to state prison. He appeals from the judgment and the sentence. As an appeal does not lie from the sentence, that appeal must be dismissed.

At the time the offenses were committed defendant was under commitment to Mendocino State Hospital for the insane, Welfare and Institutions Code, § 6500, and was an escapee therefrom. The record does not reveal the statute under which he had been committed to the state hospital. The order of commitment was in effect at the time of the trial. Defendant contends that by reason of that fact the court was without jurisdiction to try him "or to adjudge him to punishment, or to punish him." He relies on sections 1367 and 1372 of the Penal Code.

[2–7] The Penal Code uses the words "insane" and "insanity" in different senses. A defendant may plead that "he is not guilty of the offense charged because he was insane at the time that he is alleged to have committed the unlawful act." Pen. Code §§ 1016, 1017. A person is insane in the sense the word is used in these sections if at the time the overt act was committed he was suffering such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. People v. Wells, 33 Cal.2d 330, 349, 350, 202 P.2d 53; People v. Coleman, 20 Cal.2d 399, 409, 126 P.2d 349. Penal Code sections 1026 and 1027 prescribe the procedure to be followed on a plea of not guilty by reason of insanity. If at any time during the pendency of a criminal action and prior to judgment a doubt arises in the mind of the trial judge as to the sanity of the defendant, the court must order the question as to his sanity to be determined. Pen.Code, § 1368; People v. Darling, 107 Cal.App.2d 635, 237 P.2d

691. A similar proceeding is provided if the defendant, as cause against judgment, asserts that he is insane and if "in the opinion of the court, there is reasonable ground for believing him insane". Pen.Code, § 1201. A person is insane in the sense used in section 1368 if he is incapable of understanding the nature and object of the proceeding against him and of conducting his defense in a rational manner. People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123. We think it is in this sense that the word "insane" is used in section 1367 when it says that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." Section 1367 is the first section of chapter VI, title 10, part 2 of the Penal Code. Chapter VI is correctly entitled "Inquiry into the Insanity of the Defendant Before Trial or After Conviction". Section 1368 provides that if prior to judgment a doubt arises as to the sanity of the defendant, the same shall be determined; provides for the trial thereof, and what shall occur with respect to the prosecution. Section 1369 prescribes the procedure at the trial. Section 1370 prescribes what shall be done if the defendant is found sane, and provides that "If the jury finds the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed by the sheriff to a state hospital for the care and treatment of the insane, and that upon his becoming sane he be redelivered to the sheriff." Section 1371 provides that the commitment to a state hospital exonerates his bail. Section 1372, relied on by defendant, reads: "If the defendant is received into the state hospital he must be detained there until he becomes sane. When he becomes sane, the superintendent must certify that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the state hospital, and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged." The provisions of chapter VI are entirely distinct from the proceedings on a plea of not guilty by reason of insanity. They provide the procedure in case a doubt arises as to the sanity of a defendant during the pendency of a criminal action against him. People v. Superior Court, 4 Cal.2d 136, 142, 47 P.2d 724. "The provisions of the Code (Pen.Code, § 1016 et seq.), under which this petitioner tendered the issue whether or not he was insane at the time he is alleged to have committed the unlawful act with which he was charged, relate to an entirely different situation than that created by doubt arising during the pendency of an action relating to the *then* state of mind of the defendant." In re Singer, 3 Cal.2d 154, 156, 43 P.2d 1103, 1104. People v. West, 25 Cal. App. 369, 371–372, 143 P. 793. The requirement of section 1372 that the superintendent of the state hospital certify to the sheriff and the district attorney that the defendant has become sane, is for the purpose of bringing him to trial or judgment in the proceeding which was suspended when he was found insane. It does not follow from either section 1367 or 1372 that, in a case such as this in which the record does not disclose the statute or proceeding under which the defendant was committed to the state hospital, the superior court is without jurisdiction to try, adjudge to punishment, or punish an escapee from a state hospital who commits a public offense and is found to have been sane at the time the offense was committed, at the time of trial, and at the time he is adjudged to punishment. The absence of a certificate from the superintendent of the state hospital that the defendant has become sane merely gives rise to the rebuttable presumption that he was insane at the time the offenses were committed and that he is insane at the time of trial.

[8, 9] An order of commitment to a state hospital for the insane does not conclusively establish that the person committed is an insane person. Such a person is presumed to be insane. The insanity is presumed to continue unless the contrary is shown. In re Zanetti, 34 Cal.2d 136, 138, 208 P.2d 657; People v. Puter, 85 Cal.App. 2d 348, 351, 193 P.2d 23. The presumption is rebuttable. Fetterly v. Randall, 92 Cal.

App. 411, 413–415, 268 P. 434. The insanity which demands that a person shall be confined in a state hospital is not necessarily the same insanity which bars the prosecution of that person for the commission of a felony. In re Buchanan, 129 Cal. 330, 332–334, 61 P. 1120, 50 L.R.A. 378. In Re Gibson, 78 Cal.App. 794, 248 P. 732, the defendant had been adjudged insane and committed to a state hospital. He escaped and was charged with having committed murder after his escape. The court held that the defendant's alleged insanity was merely a matter of defense to be urged at the trial of the murder charge.

In People v. McConnell, 80 Cal.App. 789, 252 P. 1068, the offense was committed on March 27, 1925. The defendant was found guilty. The court said, 80 Cal.App. at pages 791–792, 252 P. at page 1069: "Upon the trial the defenses relied upon were a denial of any burglary or attempt to commit the same, and insanity. In support of his defense of insanity, there was admitted in evidence a judment and order of commitment of defendant as an insane person to Stockton State Hospital. There was also admitted in evidence under the objection of defendant a certificate of the medical superintendent of said hospital that defendant was not insane, and was discharged on November 3, 1925. Certain medical evidence was also introduced to show that defendant was not insane. * * Conceding the commitment to have been properly received as evidence of defendant's insanity, it was not, therefore, conclusive upon the subject. In criminal cases a partial insanity, or an insanity with respect to certain subjects, is not incompatible with the possession of mental capacity sufficient to make the party liable to punishment for his acts. It does not follow, therefore, because one was so committed in the manner indicated, that the commitment is proof that such person was insane to the extent that the law would exempt him from responsibility for his criminal acts. As was said in People v. Willard, supra, [150 Cal. 543, 89 P. 124] there are many kinds and degrees of insanity, and it is not every kind or degree which will relieve a person from criminal responsibility, and the degree of mental impairment which would authorize his confinement in an asylum for the insane may be entirely different from the degree of mental derangement which will relieve him from responsibility for his criminal acts. One may be insane upon one or several subjects, and for that reason a proper person for confinement in a state asylum to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects, and entirely responsible under the law for a criminal act committed by him." See also, People v. West, 25 Cal.App. 369, 143 P. 793.

Defendant relies on People v. Phyle, 28 Cal.2d 671, 171 P.2d 428, In re Phyle, 30 Cal.2d 838, 186 P.2d 134, and Phyle v. Duffy, 34 Cal.2d 144, 208 P.2d 668. People v. Phyle is not even remotely in point. The only question in that case was whether the trial court had abused its discretion in imposing the death penalty. In re Phyle was a proceeding in habeas corpus. Phyle had been sentenced to death. The warden of San Quentin had initiated proceedings to determine his sanity. He had been found insane and committed to a state hospital. Thereafter the superintendent of the state hospital certified to the Governor that Phyle was sane and the Governor issued a warrant to the warden for his execution. The court stated, 30 Cal.2d at pages 840–841, 186 P.2d at page 136: "The only question presented is whether a person who has been adjudged insane after conviction, sentence, and delivery to a warden of a state prison for execution, has the right to a judicial determination of the question of his restoration to sanity." The question of Phyle's sanity at the time of the commission of the offense or at the time of his conviction and sentence (the question here) was not involved. If we understand the opinion in Phyle v. Duffy correctly, that case merely holds that mandamus against the warden is the proper remedy to secure a jury trial in a case in which it is shown that the warden has abused his discretion in not concluding "there is good reason to believe that a defendant, under judgment of death, has become insane," as provided by Penal Code, section 3701. In any event, there is nothing said in that case pertinent to the question in the present case.

The appeal from the sentence is dismissed. The judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

108 Cal.App.2d 536

HYMES v. POLLOCK et al.

Civ. 18579.

District Court of Appeal, Second District, Division 3, California.

Jan. 4, 1952.

Action by Daniel B. Hymes against Corna Pollock and others for injuries sustained by motorist when, after passing named defendant's automobile parked at night at right angles to four-lane highway so as to block portions of two lanes, motorist returned on foot and was struck by parked automobile when another automobile collided with it. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., rendered judgment for plaintiff against named defendant and another, and they appealed. The District Court of Appeal, Parker Wood, J., held that whether plaintiff was contributorily negligent in returning to parked automobile was a question of fact for trial judge.

Judgment affirmed.

1. Negligence ⚷74

A person who takes such steps as are reasonably necessary to rescue or protect those whose lives have been imperiled by defendant's negligence is not contributorily negligent in voluntarily leaving a place of safety and incurring danger, if he does not act with a recklessness which would not be warranted under the circumstances in the judgment of a prudent man.

2. Automobiles ⚷245(72)

In action against owner and driver of automobile, parked at night at right angles to four-lane highway so as to block portions of two traffic lanes, for injuries sustained by motorist who, after passing parked automobile, returned on foot to investigate and was struck by parked automobile when another automobile collided with it, whether injured motorist was contributorily negligent in placing himself in a position of peril by returning to parked automobile was a question of fact for trial judge.

◆

C. Oscar Kalenius, Burbank, for appellants.

Arthur C. Fisher, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff recovered judgment against defendants Pollock and Story, in a nonjury trial, for damages for personal injuries Defendants appeal.

It seems that appellants' contention is that plaintiff was guilty of contributory negligence.

San Fernando Road, at the scene of the accident, is paved, is 60 feet wide, and has four marked traffic lanes—two for southbound traffic and two for northbound traffic. Plaintiff was driving his automobile south on that highway near the town of Roscoe about 11 o'clock at night, and he saw an automobile, without any light on it, which was parked in an east-west direction on the west half of the traveled portion of the highway, thereby blocking portions of the two southbound traffic lanes. The front of the automobile was about 10 feet from the west curb and the back of it was about 4 feet from the double line in the center of the highway. Plaintiff passed the parked automobile by driving on the left or east side of the highway. Then he stopped his automobile about 80 feet beyond the said parked automobile. He testified that it appeared to him that something was wrong since the automobile was parked in such a manner at that hour; and that he started to walk toward the automobile to see what was wrong. He walked north along the west side of the highway until he was about 20 feet from the parked automobile, and then he started to walk on the highway. As he approached the automobile he saw three persons sitting in the front seat. Two of those persons were defendants Story and Pollock. When plaintiff was about 5 feet from the automobile, another automobile which was traveling south on San Fernando Road struck the parked automobile and knocked it against him, rendered him unconscious, broke his leg, and inflicted other injuries. After the collision, the parked automobile was about 20 feet south of the place where it was when it was struck. Defendant Story, who had parked the automobile on the highway, was intoxicated. The automobile was owned by defendant Pollock.

[1, 2] Appellants argue to the effect that plaintiff observed the danger, drove around the parked automobile, and then negligently placed himself in a position of peril by returning to the parked automobile when he was under no duty to go there. "[W]here the negligence of a defendant has imperiled human life, a person who takes such steps as are reasonably necessary to rescue or protect those imperiled is not contributorily negligent in voluntarily leaving a place of safety and incurring danger if he does not act with a recklessness which would not be warranted, under the circumstances in the judgment of a prudent man." Petersen v. Lang Transp. Co., 32 Cal.App.2d 462, 467, 90 P.2d 94, 97. In Henshaw v. Belyea, 220 Cal. 458, at page 462, 31 P.2d 348, at page 349, the court said: "'The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.'" Appellant herein was not negligent as a matter of law. It was a question of fact for the trial judge as to whether plaintiff was contributively negligent. The evidence amply supports the express and implied findings of the court. The appeal has no merit.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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108 Cal.App.2d 148

In re DURHAM'S ESTATE.

DURHAM v. MOORE.

Civ. 18578.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1951.

Rehearing Denied Dec. 26, 1951.

Hearing Denied Feb. 7, 1952.

Proceedings in the matter of the estate of Virginia Fair Durham by William C. Durham, as executor, and individually, opposed by Aubrey Ivan Moore. The Superior Court of Los Angeles County, John Gee Clark, J., entered orders determining heirship, setting apart recorded homestead, fixing attorneys' fees for extraordinary services, and appointing appraisers to appraise property upon which decedent had declared a homestead, and William C. Durham appealed. The District Court of Appeal, McComb, J., held that order appointing appraisers is not appealable, but that evidence sustained findings that real property in decedent's name at time of her death was her separate property and not community property.

Purported appeal from order appointing appraisers dismissed, other orders affirmed.

See also Cal.App., 238 P.2d 1061.

1. Appeal and Error ⚿931(1), 1010(1)

Appellate court will not weigh evidence, but will view evidence in light most favorable to successful party in lower court, and will indulge all intendments which will sustain findings of trier of facts, and will not disturb such findings if there is substantial evidence in support thereof.

2. Husband and Wife ⚿262(1)

Property deeded to wife by instrument in writing is presumed to be her separate property, regardless of source or character of consideration for conveyance. Civ.Code, § 174.

3. Husband and Wife ⚿264

In proceeding in probate court for settlement of an estate, wherein it appeared that certain real property had been deeded by written instrument to decedent as her separate property, and husband of decedent contended that property had been taken in decedent's name as her sole and separate property for purpose of avoiding and defrauding her husband's creditors and that property was in fact community property, evidence sustained finding of probate court that real property in name of wife at time of her death was her separate property and not community property. Civ.Code, § 174.

4. Fraudulent Conveyances 🔑176(3)

Where property standing in name of wife at time of her death had been conveyed to her as her separate property, husband could not, upon death of wife, contend that he was beneficial owner of property and that property had been conveyed to wife for purpose of defrauding husband's creditors, since, if deeds were tainted with his fraud, husband might not avoid them. Civ.Code, § 174.

5. Husband and Wife 🔑262(1)

Where evidence disclosed that bank accounts standing in wife's name at time of her death were acquired by her after her marriage, such property was presumed to be community property.

6. Husband and Wife 🔑264

In proceeding in probate court to settle estate of wife, in which dispute arose as to whether certain bank accounts standing in wife's name at time of her death were community property, evidence established that money in such accounts had been acquired by wife after her marriage. Civ. Code, § 164.

7. Evidence 🔑588
Trial 🔑140(1)

In probate proceeding the credibility of witnesses and weight to be accorded testimony are questions directed to trial judge, who, under proper circumstances, may accept all or such part of testimony of any witness as he believes to be true, or may reject all or any part which he believes to be untrue.

8. Executors and Administrators 🔑178

Where wife had, during her lifetime, declared homestead on property which was her separate property, and property was appraised in inventory of estate at amount in excess of homestead exemptions, and property was sold during administration for sum in excess of homestead exemption, husband was properly awarded, on account of declaration of homestead, amount of homestead exemption. Probate Code, § 664.

9. Homestead 🔑66

The existence of a mortgage on a homestead is not to be considered in ascertaining value of homestead.

10. Executors and Administrators 🔑216(2), 256(6)

The amount of attorney's fees to be allowed for extraordinary services in connection with settlement of an estate is matter to be left to sole discretion of probate court, whose judgment, in absence of showing of an abuse of discretion, will not be disturbed on appeal.

11. Executors and Administrators 🔑256(6)

Where there was total absence of showing that probate court abused its discretion in allowing attorney $250 fees for extraordinary services in connection with settlement of an estate, finding that such sum was reasonable attorney's fee for services performed was binding on appellate court.

12. Executors and Administrators 🔑67

Order appointing appraisers for estate of decedent is not appealable. Probate Code, § 1240.

◆

Lee Combs, Los Angeles, for appellant.

Eugene J. Landau and Newell & Chester, all of Los Angeles, for respondent.

McCOMB, Justice.

These are appeals by William C. Durham as executor of the estate of Virginia Fair Durham, decedent, and William C. Durham, individually, from an order of the probate court:

1. Determining heirship;
2. Setting apart a recorded homestead;
3. Fixing an allowance of attorneys' fees for extraordinary services; and
4. A purported appeal from the order appointing appraisers to appraise certain property upon which decedent had declared a homestead.

1. *The appeal from the decision of the probate court on the petition to determine heirship.*

Question: Was there substantial evidence to sustain the probate court's findings that (a) three separate parcels of real property standing in the name of decedent at the time of her death were her separate property, and (b) two bank accounts standing in decedent's name at the time of her death were community property?

[1] *Yes.* An appellate court will view the evidence in the light most favorable to respondent, will not weigh the evidence, will indulge all intendments which will sustain the finding of the trier of fact, and will not disturb such finding if there is substantial evidence in support thereof. (In re Estate of Isenberg, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424.)

Applying the foregoing rule to the evidence as disclosed by the record in the instant case we find:

(a) The title to the real property in question was deeded to decedent by a written instrument as her separate property. Appellant concedes this in his brief by saying, "The only evidence of any kind or character on this subject was the presumption established by the deed in each of the three parcels and a declaration in a will drawn in 1933 at a time when decedent and appellant owned only one of the three parcels involved." This property was taken in decedent's name as her sole and separate property for the purpose of avoiding and defrauding her husband's creditors.

[2] Regardless of the source or character of the consideration, property deeded to a wife by an instrument in writing is presumed to be her separate property. (Sec. 174, Civ.Code; In re Estate of Nelson, 104 Cal.App. 613, 620 [8], 286 P. 439; Donze v. Donze, 88 Cal.App. 769, 772 [1], 264 P. 294.)

[3] Under the foregoing rule the evidence recited constituted substantial evidence to sustain the probate court's finding that the real property standing in decedent's name at the time of her death was her separate property and not community property.

[4] No useful purpose would be subserved by setting forth evidence of appellant which would lead to a contrary conclusion. Neither is there any merit in appellant's contention that decedent held the property in trust for him since the evidence disclosed that he conveyed the property to his wife for the purpose of defrauding his creditors. He may not now successfully contend that he was the beneficial owner of the property. Since the deeds were tainted with his fraud he may not avoid them. (Saint v. Saint, 120 Cal.App. 15, 22 [2], 7 P.2d 374.)

[5, 6] (b) The evidence disclosed that a commercial account in the sum of $7,419.41, and a savings account in the sum of $7,134.71, both standing in decedent's name at the time of her death were acquired by her after her marriage and were therefore presumed to be community property. (Sec. 164, Civ.Code; Veterans' Welfare Board v. Liebhart, 50 Cal.App.2d 179, 180 [1], 122 P.2d 693.)

[7] Hence the probate court's finding was sustained by this evidence. Again it it to be noted that evidence of appellant to the contrary must be disregarded by this court. Mr. Presiding Justice Nourse in Wright v. Delta Properties, Inc., 79 Cal. App.2d 470, 476 [2], 180 P.2d 57, 61, thus succinctly states the rule: "* * * the credibility of a witness and the weight to be accorded his testimony are questions directed to the trial judge, which under proper circumstances may accept all or such part of the testimony of any witness as he believes to be true, or may reject all or any part which he believes to be untrue."

2. *The appeal from the order setting apart a recorded homestead.*

[8] Decedent had as owner during her lifetime declared a homestead on a lot known as the Comstock property which was her separate property. It was appraised at $27,500 in the inventory of the estate but was sold during administration for $29,750. As it was appraised at a figure in excess of the homestead exemptions, the property was appraised as of February 24, 1941, pursuant to the provisions of section 664 of the

Probate Code.[1] Therefore the probate court properly awarded appellant on account of the declaration of homestead the amount of the homestead exemption. (Bell v. Wilson, 172 Cal. 123, 126, 155 P. 625.)

[9] Likewise the probate court did not err in failing to take into account the amount of a mortgage on the homesteaded property since the existence of a mortgage on a homestead is not to be considered in ascertaining its value. (Tiernan v. His Creditors, 62 Cal. 286, 289.)

3. *The appeal from the order allowing attorneys' fees for extraordinary services.*

[10, 11] Appellant's attorney sought extraordinary fees in the sum of $450. The probate court allowed only $250. The amount of attorney's fees to be allowed for extraordinary services in connection with the settlement of an estate is a matter to be left to the sole discretion of the probate court whose judgment, in the absence of a showing of an abuse of discretion, will not be disturbed on appeal. (In re Estate of McDonald, 37 Cal.App.2d 521, 527 [6], 99 P.2d 1115.)

In the instant case there is a total absence of any showing that the probate court abused its discretion. Therefore this court is bound by the finding that $250 was a reasonable attorney's fee for the extraordinary services performed on behalf of the estate.

4. *The purported appeal from an order appointing appraisers to appraise certain property upon which decedent had declared a homestead.*

[12] Only the orders listed in section 1240 of the Probate Code are appealable.[2] (In re Estate of Olmstead, 216 Cal. 585, 587 [1], 15 P.2d 495.)

An order appointing appraisers is not listed in this section. Therefore the order is not appealable and the purported appeal will be dismissed.

The orders 1, 2 and 3 are affirmed and the purported appeal from the order appointing appraisers is dismissed.

MOORE, P. J., concurs.

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[1] Section 664 of the Probate Code reads: "If the homestead selected and recorded prior to the death of the decedent is returned in the inventory appraised at not over the amount of the homestead exemption, or was previously appraised as provided in the Civil Code and such appraised value did not exceed that sum, the court shall order it set apart to the persons in whom title is vested by the preceding section. If it is returned in the inventory appraised at more than the amount of the homestead exemption, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeds the amount of the homestead exemption, or if the homestead was appraised as provided in the Civil Code and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling-house, as will amount in value to the sum of the amount of the homestead exemption, and make report thereof, giving an exact description of the portion set apart as a homestead."

[2] Section 1240 of the Probate Code reads: "An appeal may be taken to the Supreme Court from an order granting or revoking letters testamentary or of administration; admitting a will to probate or revoking the probate thereof; setting aside an estate claimed not to exceed two thousand five hundred dollars in value; setting apart property as a homestead or claimed to be exempt from execution; confirming a report of an appraiser or appraisers in setting apart a homestead; granting or modifying a family allowance; directing or authorizing the sale or conveyance or confirming the sale of property; settling an account of an executor or administrator or trustee, or instructing or appointing a trustee; instructing or directing an executor or administrator; directing or allowing the payment of a debt, claim, legacy or attorney's fee; determining heirship or the persons to whom distribution should be made or trust property should pass; distributing property; refusing to make any order heretofore mentioned in this section; or fixing an inheritance tax or determining that none is due."

108 Cal.App.2d 154

In re DURHAM'S ESTATE.

MOORE v. DURHAM.

Civ. 18578.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1951.

Rehearing Denied Jan. 2, 1952.

Proceedings in the matter of the estate of Virginia Fair Durham, between Aubrey Ivan Moore and William C. Durham. The Superior Court of Los Angeles County, John Gee Clark, J., entered decree that two bank accounts of decedent were community property of decedent and William C. Durham and that William C. Durham was entitled to $7,500 for his homestead rights in parcel of separate property belonging to decedent, and Aubrey Ivan Moore appealed. The District Court of Appeal, McComb, J., held that evidence sustained probate court's finding that accounts were community property.

Affirmed.

See also Cal.App., 238 P.2d 1057.

1. Husband and Wife ⚷264

In probate proceeding in which it was contended that commercial account and savings account standing in name of deceased wife at time of her death was not community property of the decedent and her husband, wherein evidence disclosed that the two bank accounts represented property acquired during marriage and that funds comprising bank accounts had been earned by husband, evidence sustained court's finding that accounts were community property.

2. Husband and Wife ⚷262(1)

Where bank accounts standing in wife's name at her death represents funds acquired during marriage, there is presumption that such property is community property. Civ.Code, § 164.

3. Appeal and Error ⚷989
Trial ⚷139(1), 140(1)

The credibility of a witness and weight to be accorded his testimony are questions directed to trier of facts, who may accept all or part of testimony of any witness, or may reject all or any part which trier of facts believes to be untrue, and appellate court will disregard testimony which would support conclusion contrary to that reached by trier of fact.

4. Homestead ⚷140

A homestead declared by wife vests absolutely in her husband upon death of wife.

5. Homestead ⚷145

Husband who, as executor of wife's estate, sold property, during course of administration of estate of wife, which had been declared by wife as homestead, did not thereby waive his homestead rights, since homestead declared by wife vests absolutely in husband upon death of wife.

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Eugene J. Landau and Newell & Chester, all of Los Angeles, for appellant.

Lee Combs, Los Angeles, for respondent.

McCOMB, Justice.

Appellant Moore appeals from that portion of a decree determining heirship holding that (1) two bank accounts of decedent Virginia Fair Durham were community property, and (2) respondent Durham was entitled to $7,500 for his homestead rights in a parcel of separate property belonging to decedent upon which she had declared a homestead.

Questions: First: *Was there substantial evidence to sustain the probate court's finding that a commercial account and savings account standing in the name of decedent at the time of her death were the community property of decedent and her husband, respondent William C. Durham?*

[1, 2] *Yes.* It is conceded that the money which comprised the two bank accounts was property acquired during the marriage of respondent and decedent. Therefore there was a presumption that it was community property. (Sec. 164, Civ. Code.) Likewise there was testimony that the funds comprising the bank accounts had been earned by respondent. The foregoing presumption and evidence clearly sustains the probate court's finding that the accounts were community property.

[3] The rule is settled that the credibility of a witness and the weight to be accorded his testimony are questions directed

to the trier of fact who may accept *all* or *part* of the testimony of any witness it believes to be true or may reject *all* or *any part* which it believes to be untrue. (Wright v. Delta Properties, Inc., 79 Cal. App.2d 470, 476 [2], 180 P.2d 57.) Hence testimony which would support a conclusion contrary to that reached by the trier of fact must be disregarded by this court.

Second: *Did respondent waive his homestead rights in a parcel of real property which was the separate property of decedent upon which she had declared a homestead?*

[4] *No.* A homestead declared by a wife vests *absolutely* in her husband upon the death of the wife. (In re Estate of Beer, 178 Cal. 54, 57, 171 P. 1062; Williams v. Williams, 170 Cal. 625, 627, 151 P. 10; Selinger v. Milly, 51 Cal.App.2d 286, 294, 124 P.2d 631.

[5] In view of this rule there is no merit in appellant's contention that since the property upon which the homestead had been declared was sold by the executor (respondent) during the course of administration of the estate respondent waived his homestead rights.

Affirmed.

MOORE, P. J., concurs.

DRAKE et al v. CITY OF LOS ANGELES et al.*

Civ. 18591.

District Court of Appeal, Second District, Division 3, California.

Dec. 18, 1951.

Hearing Granted Feb. 14, 1952.

C. R. Drake and Bertha Withers brought suit against the City of Los Angeles, a municipal corporation, and others to restrain the construction of housing projects. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered a judgment adverse to the plaintiffs, and they appealed. The District Court of Appeal, Vallée, J., held that section of the Housing Authorities Law providing that all housing projects of a housing authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated did not require that projects be submitted to City Planning Commission pursuant to city charter and State Conservation and Planning Act for report and recommendation before council could act thereon.

Motion to dismiss denied, and judgment affirmed.

1. Municipal Corporations ⊂⇒304(1)

Housing Authority was not precluded from developing, constructing, or owning a slum-clearance or low-rent housing project until city council of Los Angeles approved that precise project. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws, Acts 3483, 3484; Gen.Laws, Act 5211c, § 73; St.1941, p. 3497, § 97.

2. Municipal Corporations ⊂⇒295

Provision of the Housing Authorities Law that all housing projects of a Housing Authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to locality in which housing project is situated, did not require that projects be submitted to City Planning Commission of Los Angeles pursuant to city charter and the State Conservation and Planning Act for report and recommendation before council could act thereon. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws Acts 3483, 3484; Gen.Laws, Act 5211c § 73; St.1941, p. 3497, § 97.

3. Municipal Corporations ⊂⇒304(1)

Where on date when Los Angeles City Council again approved housing projects, there were before the council 11 definite projects, specifically located and described, there was sufficient approval within meaning of provision of the Housing Authorities Law that no low-rent housing or slum-clearance project shall be developed, constructed, or owned by an authority unless governing body of city in which it is proposed to develop, construct, or own the project, approve the project by resolution duly adopted. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws, Acts 3483, 3484; Gen.Laws Act 5211c, § 73; St.1941, p. 3497, § 97.

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* Subsequent opinion 243 P.2d 525.

4. Municipal Corporations ⚷295

Failure to submit proposed housing projects to Planning Commission before approval by Los Angeles City Council, did not render approval by council void. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws, Acts 3483, 3484; Gen.Laws, Act 5211c, § 73; St.1941, p. 3497, § 97.

5. Municipal Corporations ⚷85

In approving housing projects, Los Angeles City Council was acting in an administrative capacity as an agent of the state, and it was therefore compelled to act in manner prescribed by the Housing Authorities Law, and not in the manner prescribed by city charter, unless the Housing Authorities Law specifically so stated. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws, Acts 3483, 3484; Gen.Laws, Act 5211c, § 73; St.1941, p. 3497, § 97.

6. Municipal Corporations ⚷303(1)

Unless general municipal statutes, charter provisions, and municipal ordinances were expressly made applicable by the Housing Authorities Law to the City of Los Angeles, acting in its administrative capacity in approving housing projects, such general municipal statutes, charter provisions, and municipal ordinances were not applicable. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws, Acts 3483, 3484; Gen.Laws, Act 5211c, § 73; St.1941, p. 3497, § 97.

7. Municipal Corporations ⚷282(1)

Provisions of section of the Housing Authorities Law that all housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated, and that in the planning and location of any housing project, a housing authority shall take into consideration the relationship of the project to any larger plan or long range program for development of the area in which the Housing Authority functions, apply only after a site for a project has been acquired by an Authority. Gen.Laws, Act 3483, § 13.

8. Municipal Corporations ⚷295

Section of the State Conservation and Planning Act providing that when a city has adopted a master plan, no street shall be closed, and no public building or structure shall be constructed or authorized, until the matters shall have been submitted to and reported on by the Planning Commission, did not apply to approval of proposed housing project by City of Los Angeles. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws, Acts 3483, 3484; Gen. Laws, Act 5211c, § 73; St.1941, p. 3497, § 97.

9. Municipal Corporations ⚷295

Acquisition of a housing site by Housing Authority was not within meaning of requirement of section of the Los Angeles charter that no resolution of the council involving acquisition of any public building site shall be adopted unless and until such resolution shall have first been submitted to the City Planning Commission for report and recommendation. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen. Laws, Acts 3483, 3484; Gen.Laws, Act 5211c, § 73; St.1941, p. 3497, § 97.

10. Municipal Corporations ⚷1000(5)

Allegations of complaint that City of Los Angeles proposed to buy tax-deeded land to be sold to Housing Authority, did not state facts sufficient to constitute a cause of action by taxpayers to restrain city and Housing Authority from constructing housing projects. United States Housing Act of 1937, §§ 1 et seq., 9–11, 15(7), as amended, 42 U.S.C.A. §§ 1401 et seq., 1409–1411, 1415(7); Gen.Laws, Acts 3483, 3484; Gen.Laws, Act 5211c, § 73; St.1941, p. 3497, § 97.

◆

G. G. Baumen, S. V. O. Prichard, Dockweiler & Dockweiler and Frederick C. Dockweiler, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., John L. Flynn, Asst. City Atty. and Weldon L. Weber, Deputy City Atty., all of Los Angeles, for respondent City of Los Angeles.

Harold W. Kennedy, County Counsel, Andrew O. Porter, Deputy County Counsel, Los Angeles, for respondent Los Angeles County and H. L. Byram, County Tax Collector.

Faries & McDowell, McIntyre Faries, Stanley A. Furman, Loeb & Loeb and Herman F. Selvin, all of Los Angeles, for respondent Housing Authority.

VALLÉE, Justice.

Plaintiffs, as taxpayers, brought this action to restrain the city of Los Angeles and the Housing Authority of the city of Los Angeles from developing, constructing, or acquiring certain housing projects. The county of Los Angeles and its tax collector were joined as defendants because some of the property proposed to be used as sites for the projects was tax-deeded land. The demurrers of the respective defendants were sustained without leave to amend. Plaintiffs appeal from the judgment of dismissal which followed.

The United States Housing Act of 1937, as amended, authorized the Public Housing Administration of the United States to give financial assistance to local governments for the development, acquisition, or administration of slum-clearance and low-rent housing projects. The assistance may be in either or both of two forms: a grant or loan for the making of preliminary investigations, surveys, and planning, and grants or loans for the acquisition, construction, and operation of the projects. Precedent to the granting of a preliminary loan, the governing body of the locality involved must have approved the public housing agency's application therefor by resolution. Precedent to receiving other financial aid, the local governing body must have entered into an agreement with the public housing authority providing a) for the demolition or compulsory repair of unsafe and unsanitary dwelling units in a number equal to those to be constructed; and, b) for the local co-operation required by the Public Housing Administration.[1]

In 1938 the California Legislature enacted the Housing Authorities Law[2] and the Housing Cooperation Law.[3] The Housing Authorities Law created a Housing Authority in each city, county, and city and county in the state, and declared the public necessity for slum-clearance and low-rent housing projects. Each Housing Authority is a body corporate and politic, complete in itself, separate and distinct from the public corporation in which it operates. Section 8(b) of the Law, in part, reads: "provided, that * * * no low-rent housing or slum-clearance project shall hereafter be developed, constructed, or owned by an authority * * * until the governing body of the city * * * in which it is proposed to develop, construct, or own the same, approves said project by resolution duly adopted."[4] The Law specifically provides that "No provisions of law with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the Legislature shall specifically so state."[5]

Section 13 of the Law provides: "All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated. In the planning and location of any housing project, an authority shall take into consideration the relationship of the project to any larger plan or long-range program for the development of the area in which the housing authority functions."[6]

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[1] 42 U.S.C.A. §§ 1409–1411, 1415(7) and 1951 Supp.Pamphlet.

[2] Stat.1938, Ex.Sess., p. 9, 2 Deering's Gen.Laws, Act 3483.

[3] Stat.1938, Ex.Sess., p. 2, 2 Deering's Gen.Laws, Act 3484.

[4] Stat.1945, p. 1450, § 8(b), 2 Deering's Gen.Laws (1949 Supp.), Act 3483, § 8 (b).

[5] Stat.1938, Ex.Sess., pp. 14–16, § 8, 2 Deering's Gen.Laws, Act 3483, § 8.

Section 73 of the State Conservation and Planning Act provides, in effect, that when a city has adopted a master plan no street shall be closed, and no public building or structure shall be constructed or authorized, until the matter shall have been submitted to and reported on by the Planning Commission.[7]

The Housing Co-operation Law authorizes a city in which an authority is located to aid and co-operate in "the planning, undertaking, construction or operation of housing projects", and to plan or replan, zone or rezone, any part of the city, and to enter into agreements with an authority "respecting action to be taken by [the city] pursuant to any of the powers granted by this act; * * *."[8] The Housing Cooperation Law specifically provides that the exercise of these powers may be authorized by resolution of the city council and such "resolution may be adopted at the meeting at which such resolution is introduced. Such a resolution * * * shall take effect immediately and need not be laid over or published or posted."[9]

Section 97 of the Charter of Los Angeles provides that no ordinance or resolution authorizing, ordering, or involving any public building site, the location of any public building, or the changing of zones, shall be adopted by the Council until it shall have first been submitted to the City Planning Commission for report and recommendation.[10]

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[6] Stat.1938, Ex.Sess., p. 18, § 13, 2 Deering's Gen.Laws, Act 3483, § 13.

[7] Stat.1947, ch. 807, amended by Stat. 1947, chs. 249, 868, 869, 2 Deering's Gen. Laws, Act 5211 (1949 Supp.). Section 73 reads: "Whenever the legislative body of the city or county shall have adopted a master plan for the city or county, or for any major section or district thereof, no road, street, highway, square, park or other public way, ground or open space shall be acquired by dedication or otherwise, and no road, street, highway or public way shall be closed or abandoned, and no public building or structure shall be constructed or authorized in the area for which such master plan shall have been adopted by the legislative body, until the location, character and extent thereof shall have been submitted to and shall have been reported upon by the planning commission. If the authorization, acquisition, financing or acceptance of such road, street, highway, square, park or other public way, ground or open space, or the construction or authorization of such public building or structure, be vested by law or charter provisions in some governmental body, commission or board other than the legislative body of such city or county, then such other governmental body, commission or board having such jurisdiction shall first submit to the planning commission the location, character and extent of such proposed public improvement for report thereon. In the event that the planning commission shall disapprove the same, its disapproval may be overruled by such other governmental body, board or commission only by a vote of not less than two-thirds of its entire membership. Failure of the planning commission to act within 40 days, or such longer period as may be designated by the legislative body or such other governmental body, board or commission, after the date of the official submission of any matter to it by the legislative body or by such other governmental body, board or commission, shall be deemed to be approval of such matter by the planning commission."

[8] Stat.1938, Ex.Sess., p. 2, § 4(d, e), 2 Deering's Gen.Laws, Act 3484, § 4(d, e).

[9] Stat.1938, Ex.Sess., p. 5, § 7, 2 Deering's Gen.Laws, Act 3484, § 7.

[10] Section 97. "No ordinance, order or resolution shall be adopted by the Council authorizing, ordering or involving any of the following enumerated matters, unless and until such ordinance, order or resolution shall have first been submitted to the City Planning Commission for report and recommendation concerning the relation of the matter involved to and its effect upon any portion of the master plan of the City or any plans being prepared by said Department:

"(a) The acquisition, establishing, opening, widening, narrowing, straightening, abandoning or vacating of any public street, road, highway, alley, square, park, playground, airport, public build-

The complaint alleges:

1. On March 7, 1946, the city, by ordinance, set forth a master plan for the zoning of the city and adopted a comprehensive zoning plan.

2. Sometime prior to August 8, 1949, the Housing Authority determined it would propose the development of low-rent housing projects of 10,000 units.

3. On August 8, 1949, the Council adopted Ordinance 95222, an urgency ordinance effective immediately, which recited that the Housing Authority "proposes to develop and administer a low-rent housing project or low-rent housing projects" consisting of about 10,000 dwelling units. The ordinance approved "the development, construction, and operation" of the projects "in accordance with Section 8(b) of the Housing Authorities Law." It also approved the application of the Housing Authority to the Public Housing Administration "for a preliminary loan for surveys and planning in respect to such projects." The ordinance authorized the execution of a co-operation agreement between the city and the Housing Authority. The agreement, executed August 9, 1949, in part, read: "7. The City further agrees to cooperate with the Authority by vacating without cost to the Authority such streets, roads, roadways, alleys and sidewalks within the area of the Projects, or adjacent thereto as may be necessary in the development of such Projects, by accepting the dedication of land for new streets and alleys, by zoning or re-zoning to an appropriate residential classification any area in the City within which the Projects shall be located, and by such other lawful action or ways as the Authority may find necessary in connection with the development and construction of the Projects," and "This Agreement shall evidence the following actions by the City Council: (a) Approval by the City Council of the Projects as required by Section 8(b) of the Housing Authorities Law of California," and said the sites of the projects were to be selected by the Housing Authority.

At that time no sites had been selected, no determination had been made as to the number of low-rent family dwelling units which would be contained in each project, no application had been made to the Public Housing Administration for a loan, and no contract had been made with the federal government for annual contributions. Ordinance 95222 was not first submitted to the City Planning Commission for report and recommendation as to its effect on any portion of the master plan of the city.

4. Between August 9, 1949, and August 16, 1950, the Housing Authority procured a preliminary loan of $1,729,000 from the Public Housing Administration for the purpose of making a study as to the location, size, character, and all other details, of one or more low-rent housing projects to accommodate 10,000 family dwelling units; made an annual contribution contract with the Public Housing

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ing site, or other public way, ground or open space;

"(b) The location and appearance of any bridge, viaduct, subway, tunnel or elevated roadway for the use of pedestrian or vehicular traffic or any public building;

"(c) The creation of districts or zones for the purpose of regulating the use of lands, density of population, the height, bulk, location or use of buildings therein, or the size of yards, open spaces or setbacks adjacent to buildings, or the changing, amending or altering of any such zones, districts or regulations.

"It shall be the duty of the City Planning Commission, within thirty (30) days from the receipt of any such proposed ordinance, order or resolution, to make and file its report and recommendation thereon with the Council, and should said Planning Commission recommend against the approval of the matter involved, the Council may adopt such ordinance only upon a two-thirds vote of the whole of said Council. Should the City Planning Commission recommend approval or fail to make any recommendation within the time mentioned herein, said Council may adopt such ordinance, order or resolution by a majority vote of the whole Council.

"The Director of Planning shall make such investigation relative to such proposed ordinance, order or resolution as the City Planning Commission may require, and shall file his report thereon with the Commission." Stat.1941, ch. 97, pp. 3487, 3497.

Administration to assist in the development and administration of the projects estimated to cost about $200,000,000; made studies and determined on twelve projects.

5. On August 17, 1950, the Housing Authority sent a letter to the Council stating it had selected twelve sites and was "well advanced in the preparation of plans and specifications and land acquisition for the development of housing projects on said sites. The sites have been approved by the City's Planning Department and the Public Housing Administration." The letter listed the sites and a map of each was attached. It requested that no further building permits be issued, and stated: "After the sites have been acquired, the Housing Authority will make application for any zoning or rezoning as may be necessary pursuant to Section 7 of the Cooperation Agreement." The Council referred the letter to a committee. It was alleged it was not true, as stated in the letter, "that the twelve projects had been submitted to the City Planning Commission."

6. On November 16, 1950, the Housing Authority sent a letter to the Council committee in which it advised that one site had been abandoned and the boundaries of several others revised. The letter requested that the proposal of the Housing Authority to acquire the land comprising the eleven sites described on attached maps be approved "in accordance with the last paragraph of Section 12.24 B. 1. of the Comprehensive Zoning Plan [grant of a conditional use permit]" of the city.

7. On November 22, 1950, the committee reported to the Council recommending that the proposal to acquire eleven sites and the request of the Housing Authority be approved. The report stated the committee was advised the sites had been approved "by the Planning Department." In fact the projects had not been submitted to the "City Planning Commission" for report and recommendation. At no time has the selection of said sites or "the proposal to construct public buildings at said locations" been submitted to the City Planning Commission for report and recommendation as required by section 97 of the Charter. The report of the committee was adopted by the Council by resolution on November 22, 1950.

8. The complaint also alleged that: on October 31, 1950, the Council of the city of Los Angeles and the Board of Supervisors of the county of Los Angeles entered into an agreement whereby the Council agreed to purchase the state's title in 414 parcels of land, which had been deeded to the state for delinquent taxes, to be used in connection with one of the housing projects; the agreement was approved by the State Controller; the tax collector of the county had been authorized to give notice of the agreement as provided by law; he had given such notice; the city "as such" does not contemplate the construction of any public housing; the time for redemption of tax-deeded property has expired and the tax collector is preparing a deed of the property to the city. The resolution by which the Council authorized execution of the agreement recited that it is proposed the property "be acquired by the City and subsequently be purchased by the Housing Authority after Federal authorization is received."

Plaintiffs contend that under section 8 (b) of the Housing Authorities Law, a Housing Authority has no power to develop, construct, or own a slum-clearance or low-rent housing project until the Council of the city has approved that precise project; that the Council did not approve precise projects, and, consequently, the Housing Authority has no power to proceed. They say the thing to be approved is "a specific low-rent housing project having situs and size and character." Plaintiffs also contend that because, under section 13 of the Law, all housing projects "of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated", it was essential the projects be submitted to the City Planning Commission pursuant to section 97 of the Charter and section 73 of the State Conservation and Planning Act for report and recommendation before the Council could act thereon; that as the projects were not submitted to the Planning Commission before the Council approved them, the action of the Council was void, and the Housing Authority is without authority to proceed.

[1, 2] We have concluded that plaintiffs' contentions are unsound and the complaint does not state facts sufficient to constitute a cause of action.

In view of various statements in plaintiffs' briefs, we should say at the outset that we are not concerned with the wisdom of the Housing legislation or of the procedure therein described. The Housing Authorities Law has been held constitutional.[11] If, as plaintiffs say, Housing Authorities have become "political Frankensteins," the remedy is not with the courts. Our sole province is to declare the law as we find it.

We read Kleiber v. City, etc., of San Francisco, 18 Cal.2d 718, 117 P.2d 657, and Housing Authority v. Superior Court, 35 Cal.2d 550, 219 P.2d 457, as settling the following proposition of law: 1) the declared purpose and policy of the Housing legislation is slum-clearance and substitution of low-rent, safe, and sanitary dwellings; 2) the public purpose and policy of the law is effective throughout the state; 3) the subject matter of the law is of state-wide, and not merely of local, concern; 4) the law applies to and affects the entire citizenry of the state as a body, whether the details incident thereto be executed in one or another, in several or all, of the political subdivisions authorized to act thereunder; 5) every necessary legislative act was completed by the Legislature, and there was nothing left to do except administer the law; 6) the steps to be taken by the city are not legislative but administrative in character, designed merely as detail to carry out a previously declared legislative purpose and policy; 7) except as otherwise specifically provided in the Housing Authorities Law, that law supersedes all laws, charter provisions, and ordinances; 8) the city, to gain the advantages of the Law, must proceed in the manner specified by the Housing Authorities Law, and the statute is the only authority under which the city may act in the premises.

[3] Ordinance 95222, pursuant to section 8(b) of the Housing Authorities Law, specifically approved the proposed development, construction, and operation of low-rent housing projects of about 10,000 units. Plaintiffs argue that this approval was void. They say the Council can only approve specific projects, complete as to location, type, size, and similar details. Section 8(b) says that no project shall be developed "until the governing body of the city * * * in which it is *proposed to develop*, construct, or own the same, approves said project by resolution * * *." (Italics added.) We think it manifest that it is a "proposed" project which must be approved before it may be developed. Approval must be given before development. The Federal Housing Act[12] defines "development" as "any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-rent housing project." We have no doubt the California Legislature used the word "develop" in the same sense. To develop and present to the Council a specific project as described by plaintiffs would entail the expenditure of large sums of money[13] which, in large part, would have to come from the federal government in the form of a preliminary loan.[14] It is not reasonable to assume the Legislature intended that an Authority should obligate itself for a loan (here in excess of $1,700,000) without first obtaining the approval of the Council. The thing to be approved was a "proposed" project. The requirement that a "pro-

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[11] Housing Authority v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794.

[12] 42 U.S.C.A. § 1402(5), 1951 Supp. Pamphlet.

[13] See Housing Authority v. Forbes, 51 Cal.App.2d 1, 124 P.2d 194.

[14] Stat.1938, Ex.Sess., p. 11, § 3(i), 2 Deering's Gen.Laws, Act 3483, § 3(i), 1949 Supp.

posed" project be approved connotes that approval shall be given of a general proposal as distinguished from approval of a specific detailed project. There is no language in the Housing Authorities Law indicative of an intent that at the time the Council approves a project there shall be before it a determination of the sites of the buildings, specific plans and specifications for the dwelling units (e. g., their size, number of rooms in each unit, their arrangement), for front yards, for service yards, for streets, for parking areas, for walks, for play or garden areas, for disposal facilities, or for any of the other details going to make up a so-called modern housing project. The amendment of section 8(b) in 1945 was designed to make city approval a condition precedent to the doing of any work in the development of a project. Its purpose was to give the city the power to determine whether a particular project was or was not needed, and to give approval only if a project was needed. The concept of the federal legislation is the same: it is that the local governing body of the area in which the Authority functions shall determine whether a project is needed and shall be developed.[15] When, on November 22, 1950, the Council again approved the projects, there were before it eleven definite projects, specifically located and described. This, in itself, was sufficient to constitute the approval required by section 8(b) of the Law.

[4–8] Failure to submit the proposed projects to the Planning Commission before approval by the Council did not render the approval void. In approving the projects the Council was acting in an administrative capacity as an agent of the state. It was compelled to act in the manner prescribed by the Housing Authorities Law; not in the manner prescribed by the Charter of the city, unless the Housing Authorities Law specifically so states.[16] Section 8(b) of the Law expressly provides the manner in which the Council shall act. It is by resolution.[17] There is no requirement that the question of approval or disapproval shall first be submitted to the Planning Commission. Section 97 of the Charter is not applicable to the action of the Council in acting under section 8(b). Unless general municipal statutes, charter provisions, and municipal ordinances are expressly made applicable by the Housing Authorities Law to the city acting in its administrative capacity, such general municipal statutes, charter provisions, and municipal ordinances are not applicable.[18] When section 13 of the Law says that all housing projects of an Authority shall be subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the project is situated, it simply means that as a project is developed or constructed it shall conform to such laws, ordinances, and regulations; and if, as developed, it does not so conform, it cannot be constructed unless there is a change in such laws, ordinances, and regulations. It is evident from the wording of section 13 of the Law that its provisions apply only after a site for a project has been acquired by an Authority, and under section 8(b) a site cannot be acquired by an Authority until the proposed project has been approved by the Council. Section 13 says: "All housing projects *of an authority* shall be subject to the planning, zoning * * * laws * * *." (Italics added.) A project cannot be "of an authority" if it is merely a proposed project, as were those approved by the Council. For the same reasons section 73 of the State Conservation Act does not apply to the approval of a proposed housing project.

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[15] 42 U.S.C.A. § 1415(7), 1951 Supp.Pamphlet.

[16] Stat.1938, Ex.Sess., p. 16, § 8, 2 Deering's Gen.Laws, Act 3483, § 8. Section 24 reads: "In so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling."

[17] In the present case approval was by ordinance. An ordinance is the equivalent of a resolution. Govt.Code, § 50020; Hellman v. Shoulters, 114 Cal. 136, 157, 44 P. 915, 45 P. 1057; City of Los Angeles v. Waldron, 65 Cal. 283, 285, 3 P. 890.

[18] Housing Authority v. Superior Court, 35 Cal.2d 550, 559, 219 P.2d 457; State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915, 920–922. See, also, Southern California Roads Co. v. McGuire, 2 Cal.2d 115, 121-126, 39 P.2d 412; In re Means, 14 Cal.2d 254, 257–259, 93 P.2d 105, 123 A.L.R. 1378; Department of Water and Power v. Inyo Chemical Co., 16 Cal.2d 744, 753–754, 108 P.2d 410; Eastlick v. City of Los Angeles, 29 Cal.2d 661, 664–668, 177 P.2d 558, 170 A.L.R. 225.

[9] Assuming, without deciding, that the approval of a housing project involves a "public building site," as argued by plaintiffs, we are of the view that the acquisition of a housing site is not within the meaning of the requirement of section 97 of the Charter that no resolution of the Council involving "acquisition * * * of any * * * public building site" shall be adopted "unless and until such * * * resolution shall have first been submitted to the City Planning Commission for report and recommendation * * *." It appears patent from the language of section 97 that the acquisition of a public building site refers to the acquisition of a public building site by the city itself and not to the acquisition of a public building site by a separate and independent public corporation.

To hold it was necessary to follow the procedure prescribed by section 97 of the Charter or section 73 of the State Conservation and Planning Act *prior to the approval of a housing project* would, in effect, nullify the specific procedure prescribed by the Housing Authorities Law.[19]

In concluding that the acts of the Council in enacting Ordinance 95222 and in adopting the resolution of November 22, 1950, were valid, we are not to be understood as holding that the Housing Authority or the Council is not required to comply with section 97 of the Charter. As we have seen, section 13 of the Authorities Law provides that all housing projects shall be subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations of the city.[20] Conformity with the planning, zoning, sanitary, and building laws, ordinances, and regulations of the city is a mandatory requirement and not a matter of discretion. Section 4 of the Housing Cooperation Law authorizes the city, "upon such terms, with or without consideration, as it may determine", to plan or replan, zone or rezone, any part of the city for the purpose of aiding and cooperating in the planning, undertaking, construction, or operation of housing projects.[21] We do not construe section 7 of the Cooperation Agreement by which the city agreed to cooperate with the Authority "by zoning or re-zoning to an appropriate residential classification any area in the City" as a commitment by the city to make such rezoning as the Authority may think necessary. This is in accord with the construction placed on the agreement in the letter of August 15, 1950, from the Authority to the Council in which it said: "After the sites have been acquired, the Housing Authority will make application for any zoning or rezoning as may be necessary pursuant to Section 7 of the Cooperation Agreement." The city did not by the agreement commit itself to do any specific thing in a specific location not then existing. The agreement did not supplant or supersede the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the project is situated; nor did it render unnecessary resort thereto at such time as the activities of the Authority are such as to require compliance therewith. The agreement is but a commitment that the city will co-operate by using its powers in aid of the accomplishment of the purposes of the Housing Authorities Law.[22] We must presume official duty will be regularly performed. We must assume, as nothing to the contrary is alleged, that as the Authority proceeds in the planning, development, and construction of the projects, it and the Council will comply with all zoning, and other pertinent laws, ordinances, and regulations. The resolution of the Council of November 22, 1950, constituted a determination that the location of the projects conformed to the master plan. It did not constitute a determination that the planning, development, or construction of the projects conformed to the zoning, and other pertinent laws, ordinances, and regulations. The Council may, of course, acting in conformity with the Charter, and relevant laws, ordinances, and regulations replan or rezone any part of the city for the purpose of aiding in the construction of a project.

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[19] Simpson v. Hite, 36 Cal.2d 125, 129–134, 222 P.2d 225.

[20] Stat.1938, Ex.Sess., p. 18, § 13, 2 Deering's Gen.Laws, Act 3483, § 13.

[21] Stat.1938, Ex.Sess., p. 3, § 4(d), 2 Deering's Gen.Laws, Act 3484, § 4(d).

[22] McNulty v. Owens, 188 S.C. 377, 199 S.E. 425, 430; McLaughlin v. Housing Authority of City of Las Vegas, Nev., 227 P.2d 206, 211.

The Housing Authority urges that because of specific provisions of Ordinance 90500 of the city (the ordinance which adopted the Comprehensive Zoning Plan), the action of the Council of November 22, 1950, constituted the grant of a conditional use permit for which no application to the Planning Commission was necessary.[23] The city and the plaintiffs contend the contrary. The provisions of the ordinance referred to in the briefs are not pleaded in the complaint and are not before us. It appears from the record (affidavit of Howard L. Holtzendorff in support of motion to dismiss or affirm) that since the complaint was filed, conditional use permits have been formally applied for and granted. It is unnecessary, therefore, to determine this question.

[10] The allegations of the complaint that the city proposed to buy tax-deeded land to be sold to the Housing Authority, do not state facts sufficient to constitute a cause of action. The city has the legal right to purchase tax-deeded land for a public use.[24] The Housing Cooperation Law specifically empowers the city to "[d]edicate, sell, convey or lease any of its property to a housing authority".[25]

Respondent Housing Authority filed a notice of motion to dismiss the appeal or affirm the judgment. As the judgment is to be affirmed, we have no occasion to consider the motion to dismiss the appeal.

The motion to dismiss the appeal is denied. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, JJ., concur.

DUPREY v. SHANE et al.

Civ. 14761.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1951.

Rehearing Granted Jan. 26, 1952.

See 241 P.2d 78.

Malpractice action by Iva Mae Duprey against Doctor Raymond Shane, Helen M. Shane, the Shane Diagnostic Foundation and Doctor John James Harrison. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., rendered judgment on $19,572.40 verdict for plaintiff, and the defendants appealed. The District Court of Appeal, Peters, P. J., held that where practical nurse employed by chiropractor was injured in course and scope of employment and chiropractor negligently treated injury and the injury was thereby aggravated and the industrial accident commission awarded compensation, nurse could maintain malpractice action against chiropractor but the nurse could not recover as item of damage a medical bill which had been paid by chiropractor or his insurance carrier.

Judgment affirmed as reduced.

1. Appeal and Error 🔑930(1)

On defendants' appeal from judgment on verdict for plaintiff, the facts were stated most favorable to plaintiff.

2. Appeal and Error 🔑1002

Conflicts in the testimony are for the jury.

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23. Los Angeles Ord. 90500, § 12.24, B. 8. See Essick v. City of Los Angeles, 34 Cal. 2d 614, 213 P.2d 492.

24. Rev. & Tax.Code, § 3791 et seq.; Charter City of Los Angeles, § 2, St.1925, p. 1028.

25. Stat.1938, Ex.Sess., p. 3, § 4(a), 2 Deering's Gen.Laws, Act 3484, § 4(a).

3. Workmen's Compensation ⚷2253

Where physician's employee is injured in course and scope of employment and employing physician elects to treat the industrial injury, the duties and obligations growing out of employer-employee relationship terminate, and the physician assumes the same responsibilities that any physician called in on the case would have assumed, and if physician's negligent treatment aggravates the original injury, the employee may sue physician-employer for malpractice, notwithstanding that industrial accident commission has awarded compensation for the injury arising in course and scope of employment. Labor Code, § 3852.

4. Workmen's Compensation ⚷2084

Where employer is insured and employee suffers injury in course and scope of employment, the employee's remedy before Industrial Accident Commission is the exclusive remedy against the employer for the injury. Labor Code, §§ 3600, 3601.

5. Workmen's Compensation ⚷1791

The finding of Industrial Accident Commission that employee has suffered an injury compensable under the Workmen's Compensation Act is res judicata on that issue as against the employer. Labor Code, § 3201 et seq.

6. Workmen's Compensation ⚷957

The rule that when a person is injured by a tortious act and such injury is aggravated by negligence of attending physician, such aggravation of the injury is within scope of risk created by original tortious act applies to workmen's compensation cases. Labor Code, § 3201 et seq.

7. Workmen's Compensation ⚷1178

Where an employee is injured in industrial accident and original injury is aggravated by negligence of attending physician and employee seeks recovery for original injury and for aggravation from his employer or from insurance carrier, Industrial Accident Commission has exclusive jurisdiction to determine this claim against employer or insurance carrier. Labor Code, § 3201 et seq.

8. Workmen's Compensation ⚷957, 1177, 2253

When an employee is injured in industrial accident and attending physician retained by insurance carrier is negligent and causes a new injury, employee may not only sue employer before Industrial Accident Commission but may also sue physician for malpractice and the commission has no jurisdiction of the malpractice action against the physician, and this is true even though employee has secured award from commission against employer for the injury. Labor Code, § 3201 et seq.

9. Workmen's Compensation ⚷1177, 2253

If employee of physician goes to such physician for treatment of non-industrial injury and the physician is guilty of negligence, the employee may sue the physician for malpractice and the Industrial Accident Commission has no jurisdiction of such an action. Labor Code, § 3201 et seq.

10. Workmen's Compensation ⚷2253

Where practical nurse employed by chiropractor was injured in course and scope of employment and chiropractor negligently treated injury and the injury was thereby aggravated and Industrial Accident Commission awarded compensation, nurse could maintain malpractice action against chiropractor. Labor Code, § 3852.

11. Physicians and Surgeons ⚷18(8)

In malpractice action against chiropractor and another chiropractor employed by first chiropractor, evidence was sufficient to show that both chiropractors negligently treated plaintiff to her injury.

12. Physicians and Surgeons ⚷16, 18(6)

If two chiropractors negligently treating plaintiff were joint tort-feasors, both would be liable for full damage to plaintiff, at least in absence of evidence to show facts upon which an apportionment could have been made, and the burden of producing such evidence was on the chiropractors.

13. Workmen's Compensation ⚷2243

The rule that where an employee is injured by third party and sues the third party the employee may recover all expenses incurred by him, his employer or insurance carrier, is predicated on the fact that the employer or his carrier has a lien on the judgment for such expenses. Labor Code, §§ 3850(b), 3855, 3856.

14 Workmen's Compensation ⟹2253

A practical nurse suing chiropractor-employer for negligent treatment by chiropractor of industrial injuries sustained by nurse could not recover as an item of damage a medical bill which had been paid by chiropractor or his workmen's compensation insurance carrier. Labor Code, §§ 3850(b), 3855, 3856.

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Newell J. Hooey, Robert L. Lamb, San Francisco, for appellants.

Paul I. Myers, San Francisco, for respondent.

PETERS, Presiding Justice.

The cast of characters involved in this legal drama are:

Iva Mae Duprey, the plaintiff and respondent, employed as a practical nurse by The Shane Diagnostic Foundation;

The Shane Diagnostic Foundation, a partnership engaged in the practice of chiropractic, a defendant and appellant;

Dr. Raymond Shane and his wife Helen, defendants and appellants, who are partners doing business under the name of The Shane Diagnostic Foundation;

Dr. John J. Harrison, a defendant and appellant, who is a chiropractor employed by the Shane Diagnostic Foundation during the period here involved.

This is a malpractice action brought by Duprey against The Shane Diagnostic Foundation, the two Shanes, and Dr. Harrison. The basic theory of the suit is that on December 8, 1947, the respondent received injuries to her neck and body while working at her employment; that thereafter she was treated by her fellow employee, Dr. Harrison, and by her employer, Dr. Shane; that such treatments were negligently administered, resulting in a new and further disability, for which damages are sought. The basic defense on this appeal is that the Superior Court had no jurisdiction of the appellants, or of the subject matter of the action, because, so it is claimed, the injury arose in the course and scope of the employment, and the Industrial Accident Commission has exclusive jurisdiction. Admittedly, the Commission has made an award to respondent, and it is claimed that this award is *res judicata* of all of the issues in this action. The trial court overruled demurrers, objections to the introduction of evidence, motions for nonsuit and for a directed verdict and other motions, all raising this basic question of jurisdiction. The jury brought in a verdict for $19,572.40 against the appellants above named, judgment was entered on this verdict, and a motion for a new trial denied.

On this appeal appellants make three basic contentions:

(1) That the Industrial Accident Commission has exclusive jurisdiction over all of the injuries sustained by respondent, and its decision is *res judicata* of all of the issues involved herein;

(2) That, as a matter of law, the evidence is insufficient to sustain the judgment against Dr. Harrison. The other defendants do not urge the insufficiency of the evidence to show negligence;

(3) That the judgment is demonstrably excessive in the amount of $2,351.81.

[1] *The Facts Most Favorable to Respondent.*

It was stipulated that Helen and Dr. Shane were partners doing business as The Shane Diagnostic Foundation; that Dr. Harrison was employed as a chiropractor by this partnership and was such during the week of December 8 to 15, 1947; that respondent was an employee of the partnership on December 8, 1947, and that she was paid her wages for the week of December 8th to the 15th, and tried to work during that period.

On December 8, 1947, it is admitted that respondent was injured in an accident arising out of her employment. On that day, as a practical nurse and in the course and scope of her duties, she was giving therapy to a patient. The patient, in moving around in the course of the treatment, started to roll off the treatment table. Respondent, who was standing on the opposite side of the table from which the patient was falling, grabbed the patient in order to break the fall. The patient grabbed respondent by her hands and the lower part of her arms, and thus the patient was eased to the floor. The respondent was pulled across the table with a "terrific yank" to her shoulder. No injury to her neck was then received, according to respondent.

A short time after this incident respondent began to suffer pain in her right arm and shoulder, and her head began to ache. She spoke to Dr. Harrison about her pains, and, according to her testimony, he told her that headaches were his specialty and to come into his office and he would fix it up. This all occurred on the afternoon of December 8th. Dr. Harrison gave her what is referred to as a "Palmer adjustment," that is, the application of pressure to the neck while the patient is reclining. Respondent testified that this treatment was suggested by Dr. Harrison and consented to by her, and that Dr. Harrison gave her this same treatment several times that afternoon, after asking respondent if she were better, and receiving a negative reply.

Dr. Harrison's testimony is not very satisfactory. He stated that he gave respondent a treatment during the morning of December 8th, but he also testified that he "palpated" her back, spine and neck after the accident, on "some" afternoon, and made an examination. On this examination, he stated, he discovered an area of tenderness, normal spastic tissue found in cases of pain, and a soreness and stiffness of the cervical area. He testified that he did not then manipulate or adjust respondent's spine or neck, although he also testified that he "manipulated her or adjusted her." At any rate, it is admitted that Dr. Harrison did not then or thereafter have any X rays made, nor did he make a fluoroscopic examination.

Respondent testified that on December 9th, 10th, 11th and 12th Dr. Harrison gave her several chiropractic adjustments and manipulations each day, similar to the treatments of December 8th, that considerable pressure was applied each time, and that such treatments were very painful. Dr. Harrison could not remember giving respondent any treatments on these days. Respondent also testified that the pain increased with each adjustment, that a completely new pain developed in her neck, that she suffered terrible headaches, and that her head began to fall to one side. Other doctors in the office looked at her through a fluoroscope on December 12th, but no X rays were taken.

Respondent testified that she was treated during part of this period by Dr. Shane. She testified that on December 10th, Dr. Shane gave her a "quick cervical"—a twisting and jerking of the head in the effort to try and snap in anything out of place. Similar treatment was given to her by Dr. Shane on December 11th. No X rays were taken by Dr. Shane.

Dr. Shane denied that he gave respondent any chiropractic treatments on the days here involved, but testified that he examined her cervical spine on December 12th, but did not then examine the back of her head or her right shoulder. It was his testimony that respondent's head was rigid but erect, and that he could not then make a good examination because of the pain. Dr. Harrison, too, claimed that the reason he had not treated respondent was because of the pain spasm then present. This, he contended, prevented him from ascertaining the nature of the difficulty, although at another place he testified that his examination revealed a "subluxation of the fourth cervical vertebra," which means that that vertebra was out of place. Dr. Harrison testified that such a condition requires an adjustment, but that such cannot be done when there is spastic tissue present. Heat and other forms of therapy will relieve the spastic condition. X rays were not taken by him because he did not believe that the condition he found required them, and he had no cause to suspect a fracture.

Dr. Shane, who was not particularly active in treating patients, testified that a vertebral fracture could be identified by palpation—finger pressure—but that to ascertain the type and degree, X rays would be necessary. He thought that it would be bad practice for a chiropractor to treat a fracture.

By December 12th, according to respondent, she could not hold up her head, the entire right side of her body was very painful, and she could hardly use her right arm or walk. On December 13th—a Saturday—she told several of the doctors at her place of employment that she could not stand the pain any longer and believed that X rays should be taken, and she had X rays taken that day. Her condition became worse over the week end, and on Monday, December 15th, she consulted a regular physician and surgeon, Dr. Karfiol. This doctor took more X rays which showed a partial dislocation of the fourth cervical vertebra. He hospitalized respondent on December 18th and kept her in traction for about two weeks, which made the dislocation no longer visible.

This physician testified that he applied traction rather than manipulation because he does not manipulate spines if there is an anatomical injury, that is, a disorder discoverable by X rays or touch, because manipulation in such cases could be dangerous and cause nerve injuries. Dr. Karfiol's diagnosis of a subluxation was confirmed by Dr. Williams, and X ray specialist, called in by Dr. Karfiol. A Dr. Brown, physician, examined the X rays taken up to this point and could find no evidence of a dislocation.

In February of 1948 respondent consulted Dr. Anderson. He hospitalized respondent for about six or seven weeks, applied a Thomas collar to her neck, later a steel brace and gave her therapy treatments until early 1949. Dr. Anderson testified as to the subluxation of the vertebra. When asked if he had formed an opinion as to the probable cause of her condition, he replied that he had reported to an insurance company that it was his opinion that "as a result of the above described injury, or, as is more likely, the vigorous manipulation subsequent to injury, the patient has a subluxation of her neck at the level of cervical four on five." As late as March of 1950 this doctor ascertained that respondent's posture was still poor, her right shoulder was carried considerably lower than the left, she leaned towards the left and her head was tilted in that direction, turning to the right was restricted sixty per cent, and the other side about fifty per cent. X rays taken at this time showed that the vertebrae were about normal. Dr. Anderson found no evidence of fracture. He was of the opinion that there was no causal relation between the original injury suffered on December 8, 1947, and the injury which she exhibited while he was caring for her, and he was further of the opinion that "it is highly possible and probable that the conditions that were found * * * could have been caused by the manipulations described." The doctor also gave it as his opinion that "it seems probable that the partial dislocation occurred as a result of the manipulations," and that the epidural bleeding and scarring of the spinal cord shown to exist could have been caused by the manipulations and adjustments of the spine. Counsel for respondent made a prolonged attempt to get an opinion from the doctor as to whether manipulation of the patient under the circumstances was or was not bad practice, and the doctor finally stated that manipulation without further diagnosis was bad practice.

A Dr. Garol, a physician and surgeon, examined respondent in March of 1950. After describing his method of examination and his findings, he concluded that there was extensive scarring of the spinal cord and that respondent had a fractured vertebra. He was definitely of the opinion that the accident of December 8, 1947, could not have caused the dislocation and fracture he later found.

[2] Some of this testimony was contradicted by testimony produced by appellants, but that conflict was for the jury.

Respondent applied for, and received, an award of compensation from the Industrial Accident Commission. The Commission found that on December 8, 1947, respondent sustained injury arising out of and occurring in the course of her employment "consisting of a cervical strain," and that such injury had caused temporary total disability from December 12, 1947, to January 11, 1949, and an appropriate award was made for that period and thereafter "until the termination of disability."

The Jurisdictional Question.

[3] The basic arguments of appellants are that the Commission had exclusive jurisdiction over all the injuries incurred by respondent, and that its decision is *res judicata* of the issues in this civil action. The question involved can be stated as follows: Where an employee of a doctor is injured in the course and scope of the employment, and the insured employer treats the industrial injury, and does so negligently, proximately causing a new and further injury and disability, may the employee sue the employer-doctor for malpractice, or has the Commission exclusive jurisdiction? It is our conclusion that, when the employing doctor elected to treat the industrial injury, the duties and obligations growing out of the employer-employee relationship terminated, and the doctor assumed the same responsibilities that any doctor would have assumed had he been called in on the case. As will be pointed out, such third party doctor can be sued for malpractice resulting in an aggravation of an industrial injury, or a new injury. It follows that the employer-doctor may be sued for malpractice when he elects to treat the industrial injury.

[4–7] There can be no doubt, of course, that, so far as the original injury of December 8, 1947, is concerned, the employer being insured, the remedy before the Commission is "the exclusive remedy against the employer for the injury". § 3601 of the Labor Code; see, also § 3600, Labor Code; Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043; Popejoy v. Hannon, Cal., 231 P.2d 484. It is also true that the finding of the Commission that respondent suffered an injury on December 8, 1947, compensable under the Workmen's Compensation Act is *res judicata* on that issue as against the employer. Goodman Bros. v. Superior Court, of City and County of S. F., 51 Cal.App.2d 297, 124 P.2d 644. It is equally true, and admitted by all here concerned, that, in tort cases generally, when a person is injured by a tortious act and this injury is aggravated by the negligence of the attending physician, such aggravation of the injury is within the scope of the risk created by the original tortious act. Dodds v. Stellar, 30 Cal.2d 496, 183 P.2d 658; Heaton v. Kerlan, 27 Cal.2d 716, 166 P.2d 857. This rule applies to workmen's compensation cases. Thus, it is clear that, where an employee is injured in an industrial accident, and this original injury is aggravated by the negligence of the attending physician, and the employee seeks recovery for the original injury and for the aggravation from his employer or from his insurance carrier, the Industrial Accident Commission has exclusive jurisdiction to determine this claim against the employer or his carrier. Smith v. Coleman, 46 Cal.App.2d 507, 116 P.2d 133. As to these principles, there is no serious disagreement between the parties.

[8] It seems equally clear that, when an employee is injured in an industrial accident, and the attending physician retained by the insurance carrier is negligent and causes a new injury, the employee may not only sue the employer before the Commission, but may also sue the doctor for malpractice. The Commission has no jurisdiction of that action against the doctor. This result is reached on the theory that a doctor in such cases is a "person other than the employer" within the meaning of section 3852 of the Labor Code which provides, in part, as follows: "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer." The same section gives the employer the right to sue such third person for reimbursement for expenses incurred by him.

The proper principle is stated as follows in Hanna "Industrial Accident Commission Practice and Procedure" at p. 103: "The Commission lacks jurisdiction over any action for damages by an employee against a physician on account of alleged malpractice in the treatment of an industrial injury. It may grant increased indemnity or additional treatment to the employee when necessitated by maltreatment on the part of the attending physician, such increased benefits being a part of the employer's liability. But when the employee chooses to seek damages from the doctor directly, jurisdiction is vested in the civil courts, as it is in all actions for negligence." See, also, Horovitz, "Workmen's Compensation," p. 141, and p. 351, fn. 83.

One of the first cases in this state so holding is Smith v. Golden State Hospital, 111 Cal.App. 667, 296 P. 127. That case not only directly held that an action lies in the civil courts against an attending physician by an employee injured by reason of the negligence of the insurance doctor in attending an industrial injury, but also suggested, by dicta, that the employee could not recover from the employer in a compensation case for such aggravation of the injury. As to the first point, which was the only point directly involved in the case, the appellate court, after a review of the authorities, stated, 111 Cal.App. at page 672, 296 P. at page 129: "That independent professions by the fact of business contact with the employer should be absolved of responsibility for mistake, avoidable or unjustified neglect resulting in secondary affliction, seems obnoxious to the purpose and spirit of such a statute. To so hold might induce industry to encourage quackery, and place a premium upon negligence, inefficiency, and wanton disregard of the professional obligations of medical departments of industry, toward the artisan." The rule of this case, in so far as it held that the injured employee may sue the attending doctor in a malpractice case, has been consistently approved and followed in this state. Cumming v. Auriemma, 7 Cal.App.2d 208, 210, 46 P.2d 209; Steiner v. Goodyear Tire & Rubber Co., 115 Cal.App. 162, 164, 300 P. 980; Fitzpatrick v. Fidelity & Casualty Co. of New York, 7 Cal.2d 230, 234, 60 P.2d 276; Smith v. Coleman, 46 Cal.App.2d 507, 513, 116 P.2d 133; Heaton v. Kerlan, 27 Cal.2d 716, 723, 166 P.2d 857. There are cases in other states that have adopted a contrary view, but California has consistently followed the rule as stated. For general annotations on the subject see 82 A.L.R. 932; 139 A.L.R. 1010.

It is true that in Heaton v. Kerlan, 27 Cal.2d 716, 166 P.2d 857, the dicta contained in the Golden State Hospital case to the effect that the employee could not recover against the insurance carrier in an action before the Commission for the aggravation of the original industrial injury caused by malpractice of the attending physician was disapproved. The precise language of the court is, 27 Cal.2d at page 721, 166 P.2d at page 860: "Language in that case that negligence in the treatment of an injury is not within the scope of the risk created by the injury * * * is disapproved." But the court expressly recognized, and its decision is predicated upon the theory, that the employee may sue the attending doctor for malpractice in a civil action—see discussion 27 Cal.2d at pages 722–723, 166 P.2d 857, 860. One of the cases several times expressly approved in the Heaton case is Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, at page 234, 60 P.2d 276 at page 278, where it is stated: "It is well settled, of course, that a doctor is liable for his own acts and an award to an employee or his dependents against the employer or his insurance carrier does not raise a bar to an action against the doctor for negligence or malpractice." See, also, Dodds v. Stellar, 30 Cal.2d 496, 183 P.2d 658.

Thus, it must be accepted as established in this state that an employee injured in an industrial accident may recover in a civil suit against an insurance doctor who aggravates the original injury by negligent treatment, even though the employee has secured an award from the Commission against the employer for the injury.

[9] It is equally clear, of course, that, if an employee of a doctor goes to that doctor for treatment of a nonindustrial injury, and the doctor is guilty of negligence, the employee may sue his employer for malpractice. That is obvious, because, of course, the Commission would have no jurisdiction of such an action.

[10] So far, the principles stated are reasonably clear. Appellants claim, however, that the rule that the employee injured in an industrial accident can sue the attending physician for malpractice only applies when the doctor is a third person, and has no application where the attending physician is also the employer. There seems to be no authority directly in point on this question, but on principle and logic it would seem

that it should make no difference to the liability of the doctor for malpractice whether the attending doctor is the employer or an insurance doctor. This fact should not affect the legal rights of the employee. Dr. Shane, it is true, was the employer of respondent. As an employer it was his duty to secure compensation for his employee. That he did. As an employer he was under no obligation to treat respondent personally. Had he sent respondent to the insurance doctor and had that doctor been negligent in treating the industrial injury, that doctor would have been liable for malpractice. There seems to be no logical reason why the employer-doctor, when he undertakes to treat the industrial injury, should not be responsible in a civil action for his negligent acts in treating that injury. Once it is established that an action before the Commission for the industrial injury is no bar to an action against the insurance doctor for malpractice, it would seem to follow that the employee does not lose his right to such an action simply because the employer who happens to be a doctor treats the injury. In such event, the employer-doctor is a "person other than the employer" within the meaning of section 3852 of the Labor Code above quoted. In treating the injury Dr. Shane did not do so because of the employer-employee relationship, but did so as an attending doctor, and his relationship to respondent was that of doctor and patient.

Appellants say that such a result can be reached only on the theory that Dr. Shane had a dual legal personality—that is, Dr. Shane the employer, and Dr. Shane the doctor, and contend that the law frowns upon the creation of such dual legal personalities, citing such cases as Walker v. City & County of S. F., 97 Cal.App.2d 901, 219 P.2d 487, and Park v. Union Mfg. Co., 45 Cal. App.2d 401, 114 P.2d 373. It is true that the law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved—Dr. Shane—bore towards his employee two relationships—that of employer and that of a doctor—there should be no hesitancy in recognizing this fact as a fact. Such a conclusion, in this case, is in precise accord with the facts and is realistic and not legalistic. We conclude, therefore, that an employee injured in an industrial accident may sue the attending physician for malpractice if the original injury is aggravated as a result of the doctor's negligence, and that such right exists whether the attending doctor is the insurance doctor or the employer.

Appellants next argue that the award before the Commission compensated respondent for the injuries she now asserts. This same argument was repudiated by the courts of this state in the many cases above cited holding that the injured employee has an action against the insurance doctor for malpractice. The issues in the Commission case and the malpractice case, and the items of damage recoverable in each case, are entirely different. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 58, 113 P.2d 495.

Liability of Dr. Harrison.

[11] Dr. Harrison was an employee of Dr. Shane. Most of his arguments are predicated on the theory that Dr. Shane, as employer, is not liable for malpractice and that he, as an employee of Shane should not be liable. Independently of the liability of Dr. Shane, it is hard to see how Dr. Harrison is in any different position than the insurance company doctor would have been had he been called in to treat respondent. Regardless of this point, however, the holding that Dr. Shane is responsible for his negligent treatment necessarily constitutes a holding that Dr. Harrison is likewise legally responsible for his negligence.

This appellant also argues that the evidence is insufficient, as a matter of law, to show negligence on the part of either Dr. Shane or himself. The evidence has already been reviewed. The evidence clearly supports the implied finding of the jury that respondent suffered a new and further injury by reason of treatments given to her by Drs. Shane and Harrison.

[12] Because the expert evidence is to the effect that these subsequent injuries were the result of the negligence of both Drs. Shane and Harrison, the latter contends that, because he, as an employee, is not responsible for the acts of Dr. Shane, respondents have failed to prove that his

negligence was a proximate cause of the injury. Obviously, the jury must have found that Drs. Shane and Harrison were joint tort-feasors. If they were joint tort-feasors, both are liable for the full damage to respondent, at least in the absence of evidence to show facts upon which an apportionment could have been made. The burden of producing such evidence was on the appellants. Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91; Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17. None was here produced.

Excessive Damages.

No point is made that the general verdict, as to amount, is not supported by the evidence. Appellants do, however, contend that the verdict is demonstrably excessive in the amount of $2,351.81.

The verdict and judgment were for $19,572.40 against Dr. Shane, his wife, the Shane Diagnostic Foundation and Dr. Harrison. In addition to proof of general damage, respondent introduced into evidence, over objection, and pursuant to an amendment to her complaint pleading the amount as special damages, medical bills in the amount of $3,572.40. One bill was for $1,220.59, admittedly paid by respondent, and concerning which there is no complaint, and another for $2,351.81 admittedly paid by Dr. Shane or his insurance carrier. The trial court, of its own motion, gave an instruction that told the jury that it could consider both bills in any award it might make. Presumably the disputed bill, together with other exhibits, was taken into the jury room pursuant to request. In view of the odd amount of the judgment, and under the other circumstances discussed, we must assume that the jury included the item of $2,351.81 in its verdict. Nitta v. Haslam, 138 Cal.App. 736, 747, 33 P.2d 678.

[13] It seems quite clear that this bill for $2,351.81 paid by Dr. Shane or his insurance carrier was not a proper item of damage against appellants. While it is true that, where an employee is injured by a third party and sues that third party, the employee may recover all expenses incurred by him, his employer or the insurance carrier, §§ 3855, 3850(b), Labor Code, that rule is predicated on the fact that the employer or his carrier has a lien on the judgment for such expenses. § 3856, Labor Code. But here no such lien has been filed, and it could not have been filed because there has been no finding of the Commission as to how much added expense was incurred because of the negligence of Drs. Shane and Harrison.

[14] While we have held that appellants are responsible to respondent in a civil action for the results of their negligence even though they are also employers, it would be most inequitable to require them to pay this item of $2,351.81 twice. That would be to allow respondent recovery for a damage she has not suffered. That sum has already been paid by Dr. Shane or by his insurance carrier. It would be highly inequitable and logically absurd to allow respondent to recover this sum as special damages as part of the judgment simply because as employer Dr. Shane had the legal right to file a lien against himself as attending physician. Respondent has suffered and can suffer no loss by reason of this item of damage.

The judgment is amended by reducing it in amount by the sum of $2,351.81. As so reduced, the judgment is affirmed. Both sides to bear their own costs on this appeal.

BRAY and FRED B. WOOD, JJ., concur.

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108 Cal.App.2d 522

LA FORGE v. GROENDYKE et ux.

Civ. 4417.

District Court of Appeal, Fourth District, California.

Jan. 3, 1952.

Rehearing Denied Jan. 21, 1952.

Hearing Denied Feb. 28, 1952.

A. W. LaForge brought action in ejectment against Robert M. Groendyke, and another, wherein the named defendant filed a counterclaim for reasonable value of services rendered. The Superior Court of San Bernardino County, Russell Goodwin, J., entered a judgment awarding the named defendant an additional $6000 for services performed and the plaintiff appealed from that part of the judgment. The District Court of Appeal, Barnard, P. J., held that evidence on issue of value of what the named defendant had received for his services was insufficient to support finding that services rendered were reasonably worth the sum of $6000 to the plaintiff in addition to the value of board, lodging and other compensation provided by plaintiff to the named defendant and family.

Portion of judgment appealed from reversed.

1. Interest ⚿39(3)

Where judgment was entered in favor of defendant for reasonable value of services rendered, interest should have been awarded only from date of judgment, and allowance of interest for period prior to date of judgment was error.

2. Pleading ⚿236(4)

Ordinarily, amendments to pleadings after judgment are allowed only on application for relief, and after judgment has been vacated.

3. Work and Labor ⚿4(2)

The law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.

4. Payment ⚿65(6)

Ordinarily where plaintiff has proved existence of a debt, burden of proving payment is on defendant.

5. Work and Labor ⚿26

In action in ejectment wherein defendant filed counterclaim for reasonable value of services rendered, defendant had burden of establishing existence of debt relied on.

6. Payment ⚿70(1, 6)

In action in ejectment wherein defendant filed counterclaim for reasonable value of services rendered while living on plaintiff's ranch and helping him operate same, bank statements and checks produced for purpose of showing how much money defendant had drawn out of plaintiff's account which defendant had right to draw on for use of himself and his family, should have been admitted into evidence.

7. Work and Labor ⚿30(4)

In action in ejectment wherein defendant filed counterclaim for reasonable value of services rendered, finding that services rendered were reasonably worth the sum of $6000 to plaintiff in addition to value of board, lodging, and other compensation provided by plaintiff to defendant and family, was insufficient in absence of finding as to value of what defendant had received.

8. Work and Labor ⚿29(3)

In action in ejectment wherein defendant filed counterclaim for reasonable value of services, evidence on issue of value of what defendant had received for his services was insufficient to support finding that services rendered were reasonably worth $6000 to plaintiff in addition to value of board, lodging, and other compensation provided by plaintiff to defendant and family.

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C. E. Crowley, Ontario, for appellant.

John Lewis King, San Bernardino, Frank Marino, Claremont, Stanley Mussell, Jr., San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment awarding the defendant husband, who will usually be referred to as the defendant, an additional $6000 for services performed.

The plaintiff lived with his wife and daughter Jessie in a house on a 34-acre walnut grove which he owned. He also had a son Gerald, who lived near by. In 1939, he had a hired man to whom he paid $30 per month, plus room and board. In September, 1939, the defendant asked for and was given the job, being paid $30 a month and receiving board and room. In November, 1939, the defendant married the daughter, and three children were later born to them. They lived with the plaintiff and his wife, all their living expenses and other items being paid from a joint checking account, later referred to. After the death of plaintiff's wife in June, 1946, the same arrangement continued. For some three years between 1940 and 1943, the defendant was also in partnership with his brother-in-law Gerald in raising hothouse cucumbers, devoting half his time to that project. They built hothouses costing $2500, which was furnished by the plaintiff. When the project ended the defendant and Gerald sold everything and kept the proceeds.

From November, 1939 to 1945 a joint checking account was carried in the names of the plaintiff, his wife, and his daughter Jessie. Mrs. Groendyke checked on this account and bought things as she desired for her own family and for the home in which they were living. In 1945, the defendant was given the right to draw checks on this joint account and he continued to draw such checks as he pleased until the account was exhausted sometime in 1948. The income from the ranch was deposited in this joint account and during the period in question $51,709.47 was deposited therein. During 1946 and 1947, the walnut grove seems to have been operated as a partnership. In the income tax returns for those years the defendant was reported as a partner in the operation of the grove and substantial profits were shown after allowing wages to both plaintiff and defendant, and the payment of considerable sums for outside help. In January, 1948, the defendant took full time employment in a neighboring town, which he continued until the trial of this action. In November, 1949, the plaintiff asked the defendant to vacate the house. The defendant refused to do so, saying he would make all the trouble that he could.

In January, 1950, the plaintiff brought this action in ejectment seeking restitution of possession of that part of the premises on which the house and its facilities were located. In their answer the defendants alleged "by way of counterclaim" that in 1939, the plaintiff orally promised them that if they were married and "would move upon the premises," and if the defendant would work thereon, they and the plaintiff and his wife would all live together "and the said defendants would eventually receive the said premises as their home"; that relying on these promises the defendants were married and moved upon the premises; that the defendant thereafter devoted his time to the ranch work; that he has performed the services to date and is willing to continue to perform them; and that the reasonable value of said services "to date" is the sum of $15,000. There was no allegation that such services had not been paid for or that any amount was due and unpaid. See, Lloyd v. Kleefisch, 48 Cal.App.2d 408, 120 P.2d 97.

The defendants vacated the house on March 15, 1950, and the case was tried on May 2 and 3, 1950. Findings were filed on September 25, 1950, it being found that the parties had orally agreed in November, 1939, that the defendant would provide all labor and operate the walnut grove during the remainder of the plaintiff's lifetime; that the plaintiff would make the residence on the property available at all times to the defendants as their own home, "and to give the said residence structure to the defendants herein"; that in reliance thereon the defendant from 1939 to 1948 devoted substantially all of his time to the operation of the grove and at all times did "all things necessary" for its proper care; that during 1948, the defendant obtained employment elsewhere and "contributed proceeds from his earnings to the support of the plaintiff and to the operation of said walnut ranch on a part-time basis"; that the plaintiff repudiated the agreement in November, 1949, and refused "during the year 1949" to make the dwelling available to the defendants and refused to transfer it to them in consideration for the labor performed by the defendant; and that the services rendered by the defendant from 1939 to the repudiation of the agreement "were reasonably worth the sum of $6000 to the plaintiff, in addition to the value of the board, lodging and other compensation provided by the plaintiff to the defendants and family."

A judgment was entered on September 25, 1950, awarding the plaintiff possession of the house, and awarding the defendant $6000 with interest from November 22, 1949. A motion for a new trial was argued and submitted on November 24, 1950. On December 4, 1950, the defendant filed an affidavit and notice of motion for permission to amend his "counterclaim" by striking out the allegation that the reasonable value of the services was $15,000, and by substituting an allegation "that the reasonable value of the aforesaid services to date in excess of and in addition to all benefits, credits or monies paid for said services heretofore, is the sum of $6000.00; that all of said sum of $6000.00 is now due and owing; that no part thereof has been paid." The affidavit stated that the counterclaim failed to allege that the amount was due and owing, and no part had been paid; that affiant intended to amend the counterclaim but neglected to do so; and that in order to conform to the proof and support the findings and judgment it was necessary that the amendment be made. The motion for permission to amend was heard and submitted on December 12, 1950. On December 15, that motion was granted, and the motion for a new trial was denied. The amendment thus permitted was filed on December 29, 1950. On January 3, 1951, the plaintiff filed notice of appeal from that part of the judgment which awarded $6000 to the defendant.

[1] The defendant concedes that the allowance of interest from November 22, 1949, was erroneous and that the judgment should be modified by striking out any provision for interest prior to the date of the judgment.

[2] It is first contended that defendant's original "counterclaim" was defective in that it failed to allege nonpayment, and that the court erred in allowing it to be amended several months after judgment was entered. This procedure is questionable, especially under the circumstances which here appear. Ordinarily amendments after judgment are allowed only on an application for relief, and after the judgment has been vacated. Keller v. Keller, 132 Cal. App. 343, 22 P.2d 798; Security First-Nat. Bank v. Rospaw, 107 Cal.App.2d 220, 237 P.2d 76.

[3] The main contention here is that the evidence is insufficient to support the findings and judgment to the effect that the defendant was entitled to $6000 in addition to what he had already received. The law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146. This is not the usual case of that nature, it being admitted that the services were not gratuitously rendered. The claimed indefinite promise to eventually give the house to the defendants may have been a sufficient basis for an implied promise to pay a reasonable value for the services, but it could go no further. The evidence that such a promise was made is far from satisfactory. It appears very improbable from the evidence as a whole, especially in view of certain physical facts making it next to impossible to separate the land around the house from the rest of the ranch, so long as the grove was to be operated. While the evidence is conflicting in this regard it is difficult, from the record, to understand why the court found that such a promise was made. Aside from that matter, and conceding the sufficiency of the evidence to show an implied obligation to pay the reasonable value of the services rendered, it was admitted, both by the pleadings and the testimony, that an extremely large part of that value had been paid and received. The real issues to be decided were as to what these services were reasonably worth, what part had been paid and what balance, if any, was due.

[4, 5] The defendant contends that he proved the obligation when he established the reasonable value of his services; that the burden was then on the plaintiff to prove what payments had been made; and that any failure of proof in this regard is chargeable to the plaintiff. It is ordinarily true that where a plaintiff has proved the existence of a debt the burden of proving payment is on the defendant. Melone v. Ruffino, 129 Cal. 514, 62 P. 93; Lloyd v. Kleefisch, 48 Cal.App.2d 408, 120 P.2d 97. It was necessary here for the defendant to first establish the existence of the debt relied on. The allegation and finding that these services were worth $6000 more that what had been received call for something more than evidence of their reasonable value, without regard to the other element, in

order to establish the debt. Although the defendant argues that his testimony would support a finding that his services were worth $33,000, it was not found that they were worth that amount or any other amount. It was alleged and found that they were worth $6000 plus something else, which is neither found nor established by the evidence.

The evidence as to the reasonable value of these services was also unsatisfactory. The defendant swore in his "counterclaim" that the reasonable value of his services over this period "is the sum of $15,000.00". He first testified that his services from 1935 to 1945 were worth $200 to $250 per month. He later testified that from 1942 to 1948 they were worth $300 to $350 a month. He testified that he worked evenings and Sundays on the grove in 1948 and 1949, that he did very little on the ranch in 1949, and that his services in 1948 and 1949 were worth $250 a month. He admitted that he received $30 a month besides a living for himself and family from 1939 to 1945; that during three years of that period he worked only half-time on the ranch; that during 1948, while employed elsewhere for six days a week, he worked on the ranch some evenings and Sundays; and that he worked there very little in 1949. It appears, without dispute, that the defendant's wife had access to the joint account from the date of the marriage until that account was exhausted in 1948, and that she wrote checks on that account as she pleased not only for living expenses, but for buying a refrigerator, an electric stove, a mangle and many other articles which she and her husband still claim and have. She estimated that she drew from this account $200 a month for the use of her own family during one year, but the testimony indicates that she used at least that much over most of the period in question. She made no estimate as to the amount she drew for medical or other expenses for her family. The defendant admitted that he was given access to this account in 1945; that this joint account was to be used for "whatever we wanted to use it for, however we wanted to use it"; that after 1945, he wrote checks on the account as he pleased; that whenever "we wanted" anything he went and bought it; and that he continued to do this until the account was exhausted in 1948. All of the income from the ranch was deposited in this joint account until 1948, and the only thing brought out in evidence was that the plaintiff had drawn checks on that account amounting to about $2500. No attempt was made to show the amounts thus taken and used by the defendants, or to show what had become of the rest of the $51,000 deposited. The defendant admitted that he had handled the business in connection with this joint account after 1945 and that he made the deposits and received the bank statements and returned checks, which he still had. He testified that he had not kept an account as to the amounts thus taken for the use of himself and his family, and that he did not know what it amounted to, although he testified that it was "possible" that his wife had drawn out $200 a month for the support of his family. No estimate was placed on the value of housing for his family, which he admittedly received for over eleven years.

[6–8] Plaintiff's counsel sought to have these bank statements and checks produced for the purpose, among other things, of showing how much money the defendant had drawn out of the joint account for the use of himself and his family, but the court sustained the defendant's objections and refused to allow this evidence to be introduced. That fact is especially significant in view of the amendment which was later allowed, long after judgment was entered, without any further hearing, and without any opportunity to the plaintiff to attack the facts thus alleged by either pleading or evidence. There was never any finding as to the amount of the reasonable value of any services rendered. While it was admitted that some service had been performed and that large amounts had been received by the defendant in return for those services, there was no finding as to the amount or value of what had been received, there was no satisfactory evidence upon which such a finding could have been based, and the plaintiff was prevented from producing evidence which would have shown some of the missing facts, at least, which were essential before any just judgment could be entered.

The portion of the judgment appealed from is reversed.

GRIFFIN, J., concurs.

MUSSELL, J., being disqualified, takes no part in the decision of this case.

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108 Cal.App.2d 288

JACKSON v. BELMONT et al.

Civ. 4425.

District Court of Appeal, Fourth District, California.

Dec. 19, 1951.

Action by John H. Jackson against Frank Belmont, doing business under the firm name and style of Granada Packing House, to recover on alleged executed agreement by which plaintiff agreed to sell and deliver to defendant all crops grown on his citrus trees and by which defendant agreed to pay one dollar per field box for amount picked. The Superior Court of Orange County, Franklin G. West, J., entered judgment for plaintiff on complaint and cross-complaint, and defendant appealed. The District Court of Appeal, Griffin, J., held that where agreement between fruit grower and shipper was on ordinary printed form for consignment to shipper, and handwritten statement was appended thereto which stated that shipper guaranteed one dollar per field box, to be paid when fruit was picked, all of which was to be retained by grower, ambiguity existed which authorized admission of evidence as to statements of parties for ascertaining their intention in respect to such addition and to explain ambiguity, but not to modify terms of written agreement, and that evidence established that agreement was not merely one for consignment.

Judgment affirmed.

1. Evidence 🔑461(1)

Where agreement between fruit grower and shipper was on ordinary printed form for consignment by grower to shipper, and handwritten statement was appended thereto which stated that shipper guaranteed one dollar per field box, to be paid when fruit was picked, all of which was to be retained by grower and that picking was to be commenced on certain date, ambiguity was disclosed which justified trial court in receiving evidence as to statements of parties as to what was said at time of execution of agreement, in order to ascertain intent of parties with respect to additions and alterations and to explain ambiguities, but not to modify terms of written agreement. Civ. Code, § 1651.

2. Factors 🔑30

In action by fruit grower to recover on alleged executed agreement in writing by which defendant shipper agreed to pay one dollar per field box for fruit picked, sold, and delivered by plaintiff, wherein it appeared that written agreement between parties was on ordinary printed form for consignment to shipper, and that handwritten statement had been appended thereto by which defendant guaranteed one dollar per box which was to be paid when fruit was picked and retained by grower, agreement and circumstances surrounding its execution disclosed that same was not mere consignment contract.

3. Factors 🔑30

In action by fruit grower to recover on alleged executed agreement in writing by which defendant shipper agreed to pay one dollar per field box for fruit picked, sold, and delivered by plaintiff, wherein it appeared that written agreement between parties was on ordinary printed form for consignment to shipper, and that handwritten statement had been appended thereto by which defendant guaranteed one dollar per box which was to be paid when fruit was picked, evidence in support of interpretation placed upon agreement by parties was sufficient to establish that there was no fatal variance between pleadings and proof. Code Civ.Proc. § 471.

G. V. Weikert, Los Angeles, S. B. Kaufman, Anaheim, for appellant.

Harold Richardson, Whittier, for respondent.

GRIFFIN, Justice.

Plaintiff owned seven acres of orange trees. He brought this action against defendant Frank Belmont, doing business as Granada Packing House, and alleged in his complaint that on June 4, 1949, defendant executed an agreement in writing with plaintiff whereby plaintiff agreed to sell and deliver to defendant all crops then grown or to be grown on his citrus trees until the date of December 31, 1949; that pursuant thereto defendant picked all crops growing in said orchard within 30 days from the execution of the agreement; that by its terms defendant agreed to pay plaintiff $1 per field box for the fruit as picked and that said sum was to be paid when the fruit was picked; that defendant picked and removed 2809 field boxes to his packing house; that $2809 is due under the agreement and that no payment thereof has been made except the sum of $1000, which defendant paid to plaintiff upon the execution of the agreement.

Defendant denied owing this amount, claimed that this agreement was but a consignment contract for the sale of the fruit and that only fruit which was "merchantable" was included in the agreement and that defendant netted only $587.68 from the sale thereof. Defendant filed a cross-complaint alleging overpayment of $412.32.

The trial court found generally that the allegations of the complaint were true and gave judgment in favor of plaintiff. It found against defendant on his cross-complaint. On this appeal the defendant claims: (1) that there was a fatal variance between the allegations of the complaint and the proof; and (2) that under the terms of the written contract between the parties, defendant was entitled to recover from plaintiff the amount prayed for in his cross-complaint.

The written agreement relied upon by the parties consists of the ordinary printed form of consignment contract between the growers and the packers and shippers of citrus fruits, as modified and amended by the parties at the time of its execution. It provides, in part: "In consideration of the mutual covenants herein assumed, the undersigned Grower agrees to and does hereby consign to Frank Belmont * * * hereinafter referred to as Shipper * * * oranges now growing and to be grown during the term of this contract of his citrus orchard consisting of 7 acres * * *. This contract covers merchantable fruit only and the shipper or his agent shall be the sole judge as to the merchantability of said fruit, and shall decide at the time of processing what shall be accepted as merchantable fruit. Since frozen fruit goes into by-products same is not accepted as merchantable * * *. Shipper agrees to pay to the grower the total amount received from the sale of said fruit, after deducting therefrom all sums of money (1) paid out or advanced hereunder", etc. "Grower hereby authorizes Shipper to pool said fruit with that of other growers each season during the life of this contract in one or more pools, or individually, * * * and the return from the sale shall be prorated to the grower * * *."

Certain paragraphs of the printed form were stricken by the parties and then there was added to this ordinary consignment contract these penciled provisions (written by the agent of the defendant) which provisions are the main subject of dispute on this appeal. They provide that the shipper: "guarantees $1.00 per field box. Same to be paid when fruit is picked. All of which is to be retained by grower. Picking is to start on or before June 7, 1949. To be continuous in force until crop is picked. This contract terminates Dec. 31—1949."

It is defendant's argument that the complaint alleges a cause of action based on a claimed sale and delivery of the oranges to defendant; that the proof shows nothing but a consignment to defendant for the purpose of sale and that if the added clause could be reasonably interpreted that defendant guaranteed to pay $1 per field box regardless of the fact that such fruit was not merchantable, the pleadings do not state a cause of action based upon a guarantee, and accordingly there is a failure of proof, citing sec. 471 of the Code of Civil Procedure; 21 Cal.Jur. p. 267, sec. 185; and Lavely v. Nonemaker, 212 Cal. 380, 385, 298 P. 976.

It is plaintiff's contention that the penciled portion of the agreement is inconsistent with the printed form; that the several provisions, when considered together, are ambiguous and that the trial court was justified in receiving in evidence the statements of the parties as to what was said at the time, as bearing upon the question as to what was intended by them in respect to the additions and alterations there made and to explain the ambiguities but not to modify the terms of the written agreement. He cites Civ.Code sec. 1651, to the effect that where there is a partly written contract and a partly printed contract, with a special view to the intention of the parties in mind, the written part controls the printed part. He also relies upon Clark v. United Fruit Distributing Co., 97 Cal.App. 784, 276 P. 374, where a material variance between the pleadings and proof was claimed to be fatal. That case was factually similar to the instant case and the court held that without the *agreement* or *guarantee* to pay a *definite sum* for the *grapes shipped,* the contract, standing alone, would be a contract of consignment, but with *such an agreement,* accompanied by the evidence produced on the subject, the court might reasonably construe it to be a contract to buy and sell, and that "one of the best methods of interpretation of a doubtful contract is the construction placed upon it by the parties themselves." The court there held the point was not well taken. Defendant criticizes the decision in that case as not laying down any broad principle of law, but as being a decision applicable only to the facts of that case. The conclusion there reached is not lacking in judicial support.

In White v. Ardzrooni, 71 Cal.App. 393, at page 400, 235 P. 461, at page 463, the question of a guaranteed price affecting a consignment contract was discussed and the court said: "The writing itself provides for a minimum guaranteed price. If deductions were to be made from the guaranteed price, then that term in the written agreement would become practically meaningless. We think the true construction of the instrument, and which carries out the intention of the parties, to be that the defendants undertook to guarantee certain returns to the growers for the grapes to be handled by them and were to be compensated out of whatever sums might be realized over and above such guaranteed prices. If this be not true, then the grower had no guaranteed price."

To the same effect is Rasmussen v. Pacific Fruit Exchange, 111 Cal.App. 346, 295 P. 538, 539, decided by this court (Hearing in the Supreme Court denied). The cause of action was predicated upon a verbal contract whereby the Exchange agreed to pack and sell grapes for plaintiff and guaranteed the grower a certain specified sum. There the defendant accepted the grapes and advanced plaintiff a specified amount on account. The action was for the balance claimed due under the oral agreement. The defendant denied the guarantee of a fixed price and alleged that the grapes were delivered to it as broker to sell for the growers upon a commission basis. The court gave judgment for plaintiff as prayed and cited Glantz v. Freedman, 100 Cal.App. 611, 280 P. 704, as authority for the statement that "plaintiff could sue the defendant for the reasonable value of his grapes instead of basing his suit upon a guaranteed price."

[1–3] With these rules in mind we will consider the evidence produced indicating the real purpose of the additions and modifications of the printed form contract. It was stipulated that defendant Ogilvie, in whose favor the court gave judgment, was the field agent of defendant and had authority to enter into the contract as modified.

Plaintiff testified that Ogilvie first contacted him a week or ten days before the contract was signed (apparently there was some previous conversation in which plaintiff told the agent he was not interested in a consignment contract but wanted to sell for cash). He testified that thereafter the agent called him and told him he had a "deal" for him and "it wasn't consignment"; that he would agree to pay plaintiff $1 per field box when the fruit was picked, and that he asked Ogilvie "If I have 3000 boxes of fruit picked and with this $1.00 a box guarantee, will I receive $3,000 for that

3000 boxes?" And that the agent said: "All right"; that at the same time the agent also told him that even if the fruit picked brought less than $1 per box, he was to retain the $1 guarantee, but if it brought more, he would be paid for the balance at the end of the season; that as soon as the fruit was picked plaintiff could go to the packing house and pick up his "guarantee check". He testified that the agent wrote in these provisions as the matters were discussed; that after the fruit was picked he called Ogilvie and asked him if he could pick up his guarantee money and that Ogilvie told him "You can get it any time". He then stated that he asked him if it would be all right for his wife to call at the packing house that afternoon and pick up the check and that he said it would be all right; that he asked who she should see there and he told her to see a Mr. Lindefeste.

Ogilvie testified that he first visited plaintiff's ranch, made an inspection of the grove, and checked a representative sample of the fruit; that he did not recall his estimate of frost damage and did not recall the substance of his conversation with plaintiff prior to the execution of the contract, although he did have several conversations with him leading up to it; and that he did not remember the substance of the conversation with plaintiff at the time certain handwritten portions of the contract were written in by him.

Plaintiff's wife testified that she was present when Ogilvie inspected the grove and that he, after cutting "a lot of oranges" stated that he estimated that the oranges were between 15 and 20 per cent "hurt" due to frost; that he took a sack full of fruit to the plant as samples; that she called at the plant after the crop had been picked and saw Mr. Lindefeste who told her that Mr. Belmont was not in at the time and did tell her: "Your check will be in the mail tonight". This testimony is uncontradicted. No check followed.

On June 22, 1949, defendant wrote plaintiff that he had no funds coming to him and set forth the claimed disposition of the fruit and its classification, as reflected in his books. Demand was made by plaintiff for the claimed $1809 due under the agreement. This action followed.

Defendant offered in evidence the canceled $1000 check. From the endorsement appears the wording: "This check is accepted as an accommodation advance." Defendant argues that this endorsement conclusively shows the nature of the transaction as being one of "consignment".

After submission of the case the trial judge, in summarizing the evidence, appropriately stated that "Nobody looking at this blank form could consider it anything other than a consignment contract, and I am inclined to think that they tried to add something to it to take it out of the category of being a plain consignment contract, and that apparently was an attempt of both parties. That is manifested first by the fact that the man who actually did the writing expressed no recollection as to it and can't remember anything about it, and we have the positive testimony that the man who doesn't remember is the man who did the writing and that he agreed and guaranteed that there was going to be a dollar a box paid for every box taken out of there, and payable when it was taken out, and not later, when they found out what part was merchantable, and whatever was paid was to be retained." He remarked: "There would have been no occasion, whatsoever, to have used the word 'retained' had there not been intended to be a modification of the consignment contract. 'Retained' and 'consignment' are as foreign to each other as black and white. This (printed form) was an agreement that Mr. Jackson was to refund some part of the thousand dollars if the fruit didn't pack out. The word 'retained' absolutely does violence to that understanding. It is as obvious as anything can be that whatever Mr. Jackson got was to be in his pocket without any agreement for return * * *. You can't possibly reconcile 'consignment' and 'retained' * *. The check isn't the contract. This contract says 'whatever Jackson got he was to retain' and what was written in the handwriting of the authorized agent of Mr. Belmont * * *. In the event the writing and the printing are inconsistent * * the writings govern. I think the two are inconsistent * * *."

The reasoning and conclusions of the trial judge have not only evidentiary support, but are legally fortified by the cases cited. When considering the contract in connection with the evidence received in support of the interpretation placed upon it by the parties it may be properly said that there was sufficient evidence to justify the court in holding that there was no fatal variance between the pleadings and proof, and that there was sufficient evidentiary support for the judgment rendered.

In view of this conclusion the court was justified in holding that defendant was not entitled to a recovery on his cross-complaint.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.